

**ICANN BOARD OF DIRECTORS
SUBMISSION NO. 2023.01.21.1b**

TITLE: **Appointment of Root Server System Advisory Committee (RSSAC) Chair**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Per Article 12, Section 2, Subsection C (ii) of the ICANN Bylaws, the Root Server System Advisory Committee (RSSAC) submits the following member for appointment as the chair of the RSSAC:

- Jeff Osborn, Internet Systems Consortium

Jeff Osborn has been elected to serve as the RSSAC chair for a two-year term beginning 1 January 2023.

RSSAC RECOMMENDATION:

The RSSAC recommends the ICANN Board of Directors appoint Jeff Osborn as the RSSAC chair for a two-year term beginning 1 January 2023.

PROPOSED RESOLUTION:

Whereas, the ICANN Bylaws call for the establishment of the Root Server System Advisory Committee (RSSAC) with the role to advise the ICANN community and ICANN Board of Directors on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Whereas, the ICANN Bylaws call for the RSSAC to be led by a chair that would be appointed by the ICANN Board of Directors.

Whereas, the RSSAC went through a 30-day nomination period for the RSSAC chair election process.

Whereas, Jeff Osborn achieved the majority of the votes in the election that concluded on 16 December 2022.

Whereas, the RSSAC has recommended to the ICANN Board of Directors the appointment of Jeff Osborn as the RSSAC chair.

Resolved (2023.01.21.XX), the ICANN Board of Directors appoints Jeff Osborn as the RSSAC chair through 31 December 2024.

PROPOSED RATIONALE:

In September 2019, the ICANN Board of Directors approved the Standard Bylaws amendment process pertaining to the RSSAC leadership. As a result, the RSSAC leadership composition transitioned from two co-chairs to a chair and a vice chair. The current term for the RSSAC chair Fred Baker expires 31 December 2022.

The appointment of the RSSAC chair is not anticipated to have any fiscal impact on the ICANN organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC.

This resolution is an organizational administrative function for which no public comment is required. The appointment of the RSSAC chair contributes to the commitment of the ICANN organization to strengthen the security, stability, and resiliency of the DNS in the public interest and in accordance with ICANN's mission.

Submitted by: Wes Hardaker
Position: RSSAC Liaison to the ICANN Board
Date Noted: 19 December 2022
Email and Phone Number hardaker@isi.edu

**ICANN BOARD OF DIRECTORS
SUBMISSION NO. 2023.01.21.1c**

TITLE: **Appointment of Root Server Operator
Organization Representative to the RSSAC**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Per Article 12, Section 12.2(c)(ii) of the ICANN Bylaws, the Chair of the Root Server System Advisory Committee (RSSAC) submits the following member for appointment to the RSSAC:

- Jeff Osborn, Internet Systems Consortium

Jeff Osborn has been selected by his root server operator organization to serve on the RSSAC.

RSSAC RECOMMENDATION:

The RSSAC Chair recommends the ICANN Board of Directors appoint Jeff Osborn as the RSSAC representative of his respective root server operator organizations.

PROPOSED RESOLUTION:

Whereas, the ICANN Bylaws call for the establishment of the Root Server System Advisory Committee (RSSAC) with the role to advise the ICANN community and ICANN Board of Directors on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Whereas, the ICANN Bylaws call for the ICANN Board of Directors to appoint one RSSAC member from each root server operator organization, based on recommendations from the RSSAC Chair.

Whereas, the RSSAC Chair has recommended to the ICANN Board of Directors the appointment of a representative from Internet Systems Consortium to the RSSAC.

Resolved (2023.01.21.XX), the ICANN Board of Directors appoints Jeff Osborn to the RSSAC through 31 December 2024.

PROPOSED RATIONALE:

In May 2013, the root server operator organizations agreed to an initial membership of representatives for the RSSAC, each nominating an individual. The ICANN Board of Directors approved the initial membership of the RSSAC in July 2013 with staggered terms. The representative from Internet Systems Consortium, Fred Baker, resigned from RSSAC on 31 December 2022.

Today, the Board is taking action pursuant to Article 12, Section 12.2 (c)(ii) of the ICANN Bylaws to appoint members to the RSSAC.

The appointment of the RSSAC members is not anticipated to have any fiscal impact on the ICANN organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC.

This resolution is an organizational administrative function for which no public comment is required. The appointment of the RSSAC members contributes to the public interest and the commitment of the ICANN organization to strengthen the security, stability, and resiliency of the DNS in the public interest and in accordance with ICANN's mission.

Submitted by: Wes Hardaker
Position: RSSAC Liaison to the ICANN Board
Date Noted: 22 December 2022
Email and Phone Number hardaker@isi.edu

ICANN BOARD PAPER NO. 2023.01.21.1d

TITLE: Proposed Revisions to the ICANN
Documentary Information Disclosure Policy

PROPOSED ACTION: For Board Consideration and Approval

EXECUTIVE SUMMARY:

The Cross Community Working Group (CCWG) on Enhancing ICANN Accountability Work Stream 2 (WS2) recommendations included several recommendations for revisions to ICANN's Documentary Information Disclosure Policy (DIDP) to enhance transparency. ICANN org reviewed those recommendations, developed a revised DIDP based on those recommendations, and sought comments through the Public Comment process on the proposed revised DIDP.

ICANN org noted that many of the public comments received had already been addressed within the proposed revised DIDP that was posted for public comment. (See Public Comment Summary Report, attached as Attachment C to the Reference Materials.) Where appropriate, ICANN org made further revisions to the DIDP in furtherance of some received public comments, as well as comments from the Board Accountability Mechanisms Committee (BAMC); the further revised DIDP is the version the BAMC is recommending for Board adoption. (See Attachment A to the Reference Materials). In some instances, comments noted areas of disagreement or divergence from the Board-approved WS2 recommendations rather than focusing on how those recommendations were implemented within the proposed revisions. Those comments were therefore not appropriate to incorporate into the revised DIDP.

In addition to the revised DIDP itself, ICANN org also [consulted the community](#) on the Board-approved recommendation from the WS2 to potentially expand the role of the ICANN Office of the Ombudsman or the Complaints Office in relation to the DIDP. The community inputs on that topic did not present clear support for such expansion. In addition, ICANN org notes that under the current DIDP a requestor already has the option of asking the Ombudsman (see ICANN Bylaws, Article 5) or the Complaints Office to review the DIDP response. As such, a revision to the DIDP is not necessary for a party to avail itself of these mechanisms, as these mechanisms are already available to all requestors.

Accordingly, the BAMC makes the below recommendation.

BOARD ACCOUNTABILITY MECHANISMS COMMITTEE RECOMMENDATION:

The BAMC recommends that the Board approve the amendments to the DIDP as set forth in the document titled “Revised ICANN Documentary Information Disclosure Policy”, attached as Attachment A to the Reference Materials, as part of the implementation of DIDP-related Board-approved WS2 recommendations.

PROPOSED RESOLUTION:

Whereas, ICANN organization maintains the ICANN Documentary Information Disclosure Policy (DIDP) through which members of the public can request that ICANN’s documentary information, that has not already been made public as a matter of course, be made publicly available.

Whereas, in June 2018, as part of the Cross Community Working Group on Enhancing ICANN Accountability’s Work Stream 2 (WS2) effort, a group of consensus-based recommendations on accountability enhancements were issued and included, among other categories, recommendations on transparency. (WS Final Report, Recommendations 8.)

Whereas, the Board approved the WS2 recommendations contained in the WS2 Final Report in 2019 and directed ICANN org to commence implementation as soon as it is feasible within the parameters of the annual budget and operating plan and the WS2 Implementation Assessment Report.

Whereas, the WS2 recommendations included 21 recommendations relating to the DIDP, as set forth in Recommendations 8.1.1 through 8.1.21. Recommendations 8.1.13, 8.1.19, and 8.1.20 also referenced potential new roles for the Office of the Ombudsman or the Complaints Office relating to the DIDP.

Whereas, to fulfill the DIDP-related Board-approved WS2 recommendations, ICANN org prepared a proposed revised DIDP and published it for public comment. ICANN org also sought community input on the Board-approved WS2 recommendation on the potential expansion of the Office of the Ombudsman or Complaints Office related to the DIDP.

Whereas, ICANN org considered the community feedback received on the proposed revised DIDP and, where appropriate, incorporated the input into the “Revised ICANN Documentary Information Disclosure Policy”.

Whereas, the Board Accountability Mechanisms Committee (BAMC) considered the proposed revisions to the DIDP in light of the WS2 Recommendations and the public comment on the proposed updates, including comments received on the potential DIDP-related role of the Office of Ombudsman or Complaints Office within the DIDP Process.

Whereas, the BAMC recommended that the Board approve the updates to the DIDP as set forth in document titled “Revised ICANN Documentary Information Disclosure Policy” as part of the org’s implementation of the DIDP-related Board-approved WS2 recommendations.

Resolved (2023.01.22.XX), the Board approves the revised DIDP as set forth in the document titled “Revised ICANN Documentary Information Disclosure Policy”.

PROPOSED RATIONALE:

The ICANN Documentary Information Disclosure Policy (DIDP) allows members of the public to request that ICANN’s documentary information, which ICANN organization has not already made public as a matter of course, be made publicly available. ICANN org, as a matter of course and as part of its commitment to transparency, already makes a large amount of information publicly available. The DIDP describes the types of information that the public can expect to be available and establishes the ability for members of the public to request ICANN to publish additional documents within its possession, custody, or control. The DIDP obligates ICANN org to respond to those requests for documentary information, and ICANN org makes all DIDP Requests and Responses publicly available.

The DIDP was initially developed after community consultation in 2009 and was updated in 2012, again after community consultation. As part of the Cross-Community Working Group on Enhancing ICANN Accountability Work Stream 2 (WS2) effort, a group of consensus-based recommendations were issued regarding, among other categories, transparency. (WS2 Final Report, Recommendation 8.) In November 2019, the ICANN Board approved the consensus recommendations contained in the WS2 Final Report and directed org to start implementing them within the parameters of the annual budget and operating plan and the WS2 Implementation Assessment Report.

The Board-approved WS2 recommendation on transparency, Recommendation 8, included 21 recommendations relating to the DIDP. (See WS2 Final Report,

Recommendations 8.1.1 – 8.1.21.) Three of the 21 recommendations on the DIDP, Recommendations 8.1.13, 8.1.19, and 8.1.20, referenced potential new roles for the Office of the Ombudsman or Complaints Office relating to the DIDP.

To fulfill the WS2 recommendations relating to the DIDP, ICANN org revised the DIDP and updated the process document for responding to DIDP requests to align with the DIDP revisions. ICANN org consulted the community through the public comment process on the proposed revised DIDP as well as the potential Office of the Ombudsman or the Complaints Office involvement in the DIDP process. ICANN org utilized the criteria set forth in WS2's Recommendation 5.11 as it relates to the potential expansion of the Office of the Ombudsman beyond the fairness-based complaints that are already within the Ombudsman's responsibilities.

ICANN org considered the community feedback on the proposed revised DIDP and agreed with the commenters on the importance of DIDP. Many of the comments received had already been addressed by the proposed revised DIDP. (See Public Comment Summary Report, Attachment C to the Reference Materials.) Some comments objected to the already Board-approved DIDP-related WS2 recommendations, rather than the proposed implementation of those recommendations. ICANN org is not in a position to incorporate suggested changes to the DIDP that diverge from or change the Board-approved WS2 recommendations, which before they were submitted for Board approval, were approved by the chartering organizations for the WS2 effort and subject to Public Comment.

With respect to the WS2 recommendation regarding the potential expansion of the Office of the Ombudsman or Complaints Office relating to the DIDP, the DIDP does not need to be further revised to include the Office of the Ombudsman and/or Complaints Office for requestors to avail themselves of these review mechanisms, as they are already available to all requestors. Community inputs received on expansion of the Office of the Ombudsman role beyond its fairness determinations did not support the WS2's potential expansion.

Notwithstanding the foregoing, the following language has been added to the revised DIDP to specifically highlight the availability of Office of the Ombudsman if a requestor is not satisfied with a DIDP response:

To the extent a requestor chooses to seek review of a response to a request pursuant to the DIDP, a requestor may seek any of the accountability mechanisms afforded under the Bylaws to the extent

applicable, such as the Reconsideration Request process in accordance with Bylaws, Article 4, Section 4.2, or the Independent Review Process in accordance with Bylaws, Article 4, Section 4.3, or Ombudsman process if a requestor believes that the response was unfair in accordance with Bylaws, Article 5.

The BAMC considered the proposed revised DIDP and recommended that the Board approve the revised DIDP is as set forth in the document titled “Revised ICANN Documentary Information Disclosure Policy”.

The Board is taking this action today as part of the implementation of the approved WS2 recommendations. Action on Board-approved WS2 recommendations is anticipated in Article 27, Section 27.1 of the ICANN Bylaws, and taking this action is consistent with ICANN’s Mission. This action also serves the public interest in reinforcing ICANN’s commitment to transparency.

There will be no direct fiscal impact or adverse ramifications on ICANN’s strategic and operating plans from the proposed changes to the charters.

There are no security, stability or resiliency issues relating to the domain name system as the result of this action.

As required by the ICANN Bylaws, the revisions to the DIDP were already the subject of public comment as discussed above.

Submitted By: Amy A. Stathos, Deputy General Counsel;
Samantha Eisner, Deputy General
Counsel
Date: 2 February 2023
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ICANN Documentary Information Disclosure Policy

(As amended [insert date])

About the DIDP

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. A principal element of ICANN's approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN makes available on its websites as a matter of course.

Specifically, ICANN has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may seek review of ICANN's DIDP Response

Publicly Available Documents

ICANN posts on websites it operates, mainly on www.icann.org, numerous categories of documents in due course. A list of those categories including, but is not limited to, the following:

- Accountability Mechanisms documents
– <https://www.icann.org/resources/pages/accountability/reconsideration-en>
and <https://www.icann.org/resources/pages/accountability/irp-en>
- Annual Reports – <https://www.icann.org/resources/pages/governance/annual-report-en>
- Articles of Incorporation – <https://www.icann.org/resources/pages/governance/articles-en>
Board Committee Information – <https://www.icann.org/resources/pages/board-committees-2018-04-13-en>
- Board Meeting Transcripts, Minutes and Resolutions – <http://www.icann.org/en/groups/board/meetings>

- Budget – <https://www.icann.org/en/about/financials>
- Bylaws (current) – <https://www.icann.org/en/about/governance/bylaws>
- Bylaws (archives) – <https://www.icann.org/en/about/governance/bylaws/archive>
- Contractual Compliance related materials - <https://www.icann.org/resources/pages/compliance-2012-02-25-en>
- Correspondence - <https://www.icann.org/resources/pages/correspondence>
- DIDP Requests and Responses - <https://www.icann.org/resources/pages/governance/transparency-en>
- Financial Information (current and historical) - <http://www.icann.org/en/about/financials>
- Litigation documents - – <https://www.icann.org/resources/pages/governance/litigation-en>
- Major agreements and Related Reports -- <https://www.icann.org/resources/pages/agreements-en>
- Monthly Registry Reports – <https://www.icann.org/resources/pages/registry-reports>
- Operating Plan – <https://www.icann.org/en/about/planning>
- Policy documents – <https://www.icann.org/policy>
- Speeches, Presentations and Publications - <https://www.icann.org/presentations>; <https://www.icann.org/resources/pages/government-engagement-publications-2020-03-02-en>; <https://www.icann.org/resources/pages/octo-publications-2019-05-24-en>
- Strategic Plan – <https://www.icann.org/en/about/planning>
- Material information relating to the Address Supporting Organization (ASO) – <https://aso.icann.org> including, but not limited to, ASO policy documents, Regional Internet Registry (RIR) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Empowered Community – <https://www.icann.org/ec>

- Material information relating to the Generic Supporting Organization (GNSO) – <https://gnso.icann.org> – including, but not limited to, correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see <https://gnso.icann.org/reference-documents.htm>), and council administration documents (see <https://gnso.icann.org/council/docs.shtml>).
- Material information relating to the country code Names Supporting Organization (ccNSO) – <https://ccnso.icann.org> – including, but not limited to, meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (ALAC) – <https://atlarge.icann.org> – including, but not limited to, correspondence, statements, and meeting minutes
- Material information relating to the Governmental Advisory Committee (GAC) – <https://gac.icann.org/web/index.shtml> – including, but not limited to, operating principles, gTLD principles, ccTLD principles, principles regarding gTLD Whois issues, communiqués, and meeting transcripts, and agendas
- Material information relating to the Root Server Advisory Committee (RSSAC) – <https://www.icann.org/en/groups/rssac> – including, but not limited to, meeting minutes and information surrounding ongoing projects.
- Material information relating to the Security and Stability Advisory Committee (SSAC) – <https://www.icann.org/en/groups/ssac> – including, but not limited to, its charter, various presentations, work plans, reports, and advisories.

Definitions

The term “ICANN” means ICANN staff (full-time or part-time), Board members, advisors, consultants, contractors, agents, and others acting on behalf of ICANN.

Submitting a DIDP Request

Any member of the public may submit a DIDP request to ICANN. To submit a DIDP request, please send an email to didp@icann.org describing the documentary information you are seeking. Please provide as much detail as possible to identify the party submitting the request and the documents requested. If you have a question or need assistance with submitting a DIDP request, please contact the DIDP team at didp@icann.org.

Responding to DIDP Requests

All DIDP requests will be responded to in accordance with the DIDP Response Process.

ICANN will provide a written response to all DIDP requests, as soon as practicable, within 30 calendar days of receipt of the request, unless it is not feasible to do so. If that time frame cannot be met, ICANN will inform the requestor in writing as to when a response will be provided, which shall not be longer than an additional 30 calendar days, and explain the reasons necessary for the extension of time to respond.

DIDP Defined Conditions for Nondisclosure

ICANN has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement, nondisclosure provision within an agreement, or separate designation of confidentiality.
- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication that, if disclosed, could be harmful to an ongoing deliberative or decision-making process, or are subject to another Condition for Non-Disclosure.
- Information that, if disclosed, could be harmful to the security and stability of the Internet, including the operation of the ICANN Managed Root Server or the Root Server System for which ICANN facilitates the coordination, or any changes, modifications, or additions to the root zone.
- Materials, including but not limited to, trade secrets, commercial and financial information, confidential business information, and internal policies and procedures, the disclosure of which could materially harm ICANN's financial or business interests or the commercial interests of its stakeholders who have those interests. Where the disclosure of documentary information depends upon prior approval from a third party, ICANN will contact the third party to determine whether they would consent to the disclosure in accordance with the DIDP Response Process.

Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN shall not be required to create or compile summaries of any documented information and shall not be required to respond to requests seeking information that is already publicly available. ICANN may choose to, however, create new documentary information to make public in response to a request under this DIDP as ICANN deems feasible and necessary if there is little to no information available on the ICANN website.

Review of DIDP Responses

To the extent a requestor chooses to seek review of a DIDP response, a requestor may invoke any of the accountability mechanisms provided for under the Bylaws to the extent applicable, such as the Reconsideration Request process in accordance with [Bylaws, Article 4, Section 4.2](#), the Independent Review Process in accordance with [Bylaws, Article 4, Section 4.3](#), or the Ombudsman if a requestor believes that the response was unfair in accordance with [Bylaws, Article 5](#).

DIDP Requests and Responses

Requests submitted under the DIDP and ICANN responses are available on [the DIDP Requests and Responses webpage](#). *NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise*

published in full on ICANN's website, unless there are exceptional circumstances requiring further redaction, in accordance with the ICANN [Privacy Policy](#).

Guidelines for the Publication of Board Briefing Materials

The publication of Board Briefing Materials on the [Board Meetings webpage](#) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at <https://www.icann.org/resources/board-material/briefing-materials-guidelines-2019-12-20-en>.

Periodic Review

ICANN will review the DIDP Policy and the DIDP Response Process every five years.

To submit a request, send an email to didp@icann.org.

PROCESS FOR RESPONDING TO ICANN'S DOCUMENTARY INFORMATION DISCLOSURE POLICY (DIDP) REQUESTS

(As amended [insert date])

The following sets forth the process guidelines for responding to a DIDP request. All DIDP requests will be processed in accordance with these guidelines.

1. Upon receipt of a DIDP request submitted to DIDP@icann.org, ICANN org will send an email notification to the requestor acknowledging receipt of the request within two business days. For requests of documentary information submitted by other means (for example, through an email to the ICANN Global Support Center, or a letter or email submitted directly to an ICANN org staff member, requests submitted as part of a reconsideration request, etc.), within two business days of receipt of the request by the DIDP team, ICANN org will send the requestor an email acknowledging receipt of the request indicating that the request will be processed under the DIDP process.
2. ICANN org will promptly evaluate the request. The evaluation process includes identifying the subject(s) of the request, whether the request is seeking disclosure of documentary information, what documentary information is being requested, the time period of the documentary information requested, the relevant subject matter experts and/or potential custodians who may be in possession of or have knowledge regarding information responsive to the request. ICANN org will also evaluate whether the responsive documents, or any portions thereof, are already published on ICANN's website or are already publicly available.
3. After the completion of step 2, ICANN org will conduct due diligence to determine what relevant documentary information exists within ICANN org's possession, custody, or control that may be responsive to the request. The due diligence might include interviews with relevant subject matter experts and custodians, as well as an electronic document search with key search terms.
4. Following the completion of step 3, ICANN org will review and evaluate documents collected for responsiveness to the request.
5. Following the completion of step 4, responsive documents will be reviewed for appropriateness of disclosure. This process includes assessing whether the document is already published on ICANN's website or is already publicly available. If the document is already publicly available, ICANN org will provide a link to the publication in its response to the request. If a document has not yet been published, ICANN org will evaluate the document to determine if it is subject to any of the Defined Conditions for Nondisclosure set forth in the DIDP. If a responsive document is deemed to be subject to one or more DIDP Defined Conditions for Nondisclosure, the document will further be evaluated to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure. In the event that a Defined Condition for Nondisclosure is asserted to protect the interest of a third party, ICANN org will contact the third party to determine whether they would consent to the disclosure.
6. Following the completion of step 6, ICANN org will prepare a written response to the requestor. The response will identify any responsive documents that are already public

published and cite to URLs for the published material. The response will also identify documentary information responsive to the request that is not already published and has been determined to be appropriate for disclosure. ICANN org will identify in the response where on icann.org these documents will be available. Where the publication of such documents is premature at the time the response is due, ICANN org will so indicate in its response to the DIDP Request and will later notify the Requestor upon publication. If any responsive documents, or portions of documents, are subject to any DIDP Defined Conditions for Nondisclosure, the response will identify the applicable Defined Conditions for Nondisclosure, the rationale underlying the decision, and information about applicable appeal processes. Where portions of documents are subject to any DIDP Defined Conditions for Nondisclosures, the portions will be redacted, and the remainder of the document will be made publicly available.

7. ICANN org will provide a response to the DIDP request within 30 calendar days from receipt of the request. In the event that ICANN org cannot complete its response within that 30-calendar-day time frame, ICANN org will inform the requestor by email as to when a response will be provided, which shall not be longer than an additional 30 calendar days, and explain the reasons necessary for the extension of time to respond.
8. The Response will be sent to the requestor by email. ICANN org will make best efforts to accommodate the Requester's reasonable preferences regarding the form in which they wish to receive the responsive documentary information (e.g., in pdf format or native format) to the extent that the document is available in the requested format or can be converted to the requested format relatively easily. The response and request will also be published on the DIDP Requests and Responses webpage at <http://www.icann.org/en/about/transparency> in accordance with the posting guidelines set forth at <http://www.icann.org/en/about/transparency/didp>.

Public Comment Summary Report

Proposed Revisions to the ICANN Documentary Information Disclosure Policy

Open for Submissions Date:

Thursday, 21 October 2021

Closed for Submissions Date:

Monday, 6 December 2021 (extended to Monday, 13 December 2021)

Summary Report Due Date:

Monday, 20 December 2021 (extended to Friday, 28 January 2022)

Category: Other

Requester: ICANN org

ICANN org Contact(s): elizabeth.le@icann.org

Open Proceeding Link:

<https://www.icann.org/en/public-comment/proceeding/proposed-revisions-to-the-icann-documentary-information-disclosure-policy-21-10-2021>

Outcome:

ICANN organization (ICANN org or the org) received eight comments, five from community groups and three from individuals on the proposed revisions to the ICANN Documentary Information Disclosure Policy (DIDP) and the proposed responsibility for the Office of the Ombuds or the Complaints Officer in relation to the DIDP. ICANN org appreciates the feedback from the community. All received comments will be taken into consideration, and where appropriate, incorporated into the revised DIDP for Board consideration and approval. With respect to the feedback received regarding the role of the Ombuds and/or Complaints Officer in relation to the DIDP, ICANN org will take these comments into consideration as part of its evaluation of the next steps on these recommendations from the Work Stream 2 of the Cross-Community Working Group on Enhancing ICANN's Accountability (WS2).

Section 1: What We Received Input On

ICANN org sought input on the proposed updates to ICANN's DIDP to incorporate recommendations made by WS2. ICANN org also sought input on the WS2's proposed responsibility for the Office of the Ombuds or Complaints Officer in relation to the DIDP.

Section 2: Submissions

Organizations and Groups:

Name	Submitted by	Initials
At-Large Advisory Committee	ALAC staff on behalf of ALAC	ALAC
Business Constituency	BC staff on behalf of BC	BC
Leap of Faith Financial Services, Inc.	George Kirikos	LEAP
Registries Stakeholder Group	RySG staff on behalf of RySG	RySG
TurnCommerce, Inc.	Jeff Reberry	TC

Individuals:

Name	Affiliation (if provided)	Initials
Samwel Kariuki		SK
Arif Ali, Jan Janssen, John Murino, Michael Palage, Flip Petillion, and Mike Rodenbaugh		Ali, <i>et al.</i> Joint Submission

Section 2a: Late Submissions

At its discretion, ICANN org accepted a late submission, which has been appended to this summary report.

Organizations and Groups:

Name	Submitted by	Initials
Article 19	Ephraim Percy Kenyanito	A19

Section 3: Summary of Submissions

There were eight submissions to the Public Comment proceeding. The comments have been grouped into two categories based on subject matter rather than by commenter, to gain a better understanding of the comments. The categories are:

- Proposed revisions to the DIDP, and
- Evaluation of proposed roles of the Ombuds and Complaints Officer in relation to the DIDP

The comments received and responses to them are discussed in Section 4 below. All comments received except for the late submission are available in full on the [Public Comment page](#).

Section 4: Analysis of Submissions

This section provides an analysis of the submissions along with rationales for any recommendations from the ICANN org.

4.1 Proposed Revisions to the DIDP

There were eight comments submitted regarding the proposed revisions to the DIDP. All comments emphasized the role of the DIDP mechanism in transparency. All comments also related to the role of the DIDP in enhancing ICANN's transparency and accountability. One comment (SK) supported the proposed revisions and noted that the revisions will further enhance ICANN org's transparency and accountability. Other comments expressed concerns and objections to the WS2 recommendations, the DIDP, or portions of the DIDP. Another commenter (LEAP) objected in full to the need for ICANN to have a DIDP, as "transparency by design" should mean that ICANN org releases all documentation.

As a preliminary matter, ICANN org agrees with the commenters on the importance of transparency and notes that the DIDP was developed from ICANN org's commitment to transparency and accountability. ICANN org appreciates the comments submitted and will take them into consideration as appropriate. However, with respect to the objections to the WS2 recommendations, ICANN org's current work in updating the DIDP is to implement the WS2 recommendations as adopted by the ICANN Board. The WS2 recommendations themselves were previously subject to Public Comment, were supported by the chartering organization, and ultimately approved by the ICANN Board. ICANN org is therefore not in a position to incorporate suggested changes to the DIDP that diverge from or change the WS2 recommendations. As the modified DIDP will require review, suggestions for future revisions can be addressed during the next DIDP review cycle.

Comments regarding DIDP Conditions for Nondisclosure

Eight comments were received regarding the DIDP Defined Conditions for Nondisclosure. One comment (Ali, *et al.* Joint Submission) stated that the proposed DIDP revisions do not reflect the WS2's recommendation 8.1.17 because the revisions do not provide for disclosure of documents in redacted or severed form. The Arif, *et al.* Joint Submission is endorsed by LEAP, which also expressed concern that the proposed revisions decrease transparency and are contrary to the WS2 recommendations and ICANN's Bylaws. (LEAP, p.2.) Recommendation 8.1.17 states:

The DIDP should include a severability clause, whereby in cases where information under request includes material subject to an exception to disclosure, rather than refusing the request outright, the information should still be disclosed with the sensitive aspects severed, or redacted, if this is possible.

([WS2 Final Report, p. 35.](#)) ICANN org notes that the proposed revisions to the DIDP incorporate Recommendation 8.1.17. Specifically, this recommendation is addressed in paragraph 6 of the [Proposed DIDP Response Process Update](#), which is incorporated into the DIDP by reference. Paragraph 6 states, in part,

If any responsive documents, or portions of documents, are subject to any DIDP Defined Conditions for Nondisclosure, the response will identify the applicable Defined Conditions for Nondisclosure, the rationale underlying the decision, and information about applicable appeal processes. *Where portions of documents are subject to any DIDP Defined Conditions for Nondisclosures,*

the portions will be redacted, and the remainder of the document will be made publicly available.

([Proposed DIDP Response Process Update, pg. 2](#) (emphasis added).)

The Ali, *et al.* Joint Submission also stated that the proposed revisions do not require ICANN org to provide a rationale for withholding responsive information as recommended in WS2 Recommendation 8.1.18. The BC also recommended that DIDP responses should either make the requested documents available or provide a clear and specific reasons for nondisclosure. ICANN org notes Recommendation 8.1.18 is also addressed in Paragraph 6 of the [Proposed DIDP Response Process Update](#). Paragraph 6 states, in part, that DIDP responses will provide the “rationale underlying the decision” to withhold any responsive documents, or portions of documents, that are subject to any DIDP Conditions for Nondisclosure.

Three comments (ALAC, RySG, TC) related to the following proposed DIDP Condition for Nondisclosure:

Materials, including but not limited to, trade secrets, commercial and financial information, confidential business information, and internal policies and procedures, the disclosure of which could materially harm ICANN’s financial or business interests or the commercial interests of its stakeholders who have those interests. Where the disclosure of documentary information depends upon prior approval from a third party, ICANN org will contact the third party to determine whether they would consent to the disclosure in accordance with the DIDP Response Process.

The commenters expressed the concern that this Condition for Nondisclosure is too broad and could be “the exception that swallows the rule”. The ALAC expressed that the first sentence of the Condition for Nondisclosure “essentially grants ICANN the right to refuse any and all requests. It is reasonable to reject requests for truly confidential information and for releasing information held by ICANN under nondisclosure agreements. But rejecting a request because it includes commercial or financial information or documents an internal policy makes a mockery of this DIDP policy.” (ALAC, p. 2.) The ALAC further stated that information related to stakeholders that was not obtained under nondisclosure conditions should not be withheld. The ALAC explained that “[i]t may be awkward for ICANN to release material that could cause harm, but the DIDP exists to ensure that ICANN is transparent. ICANN should not cover up its errors or poor judgement.” (*Id.*) The ALAC comment is endorsed by A19.¹ The RySG commented that this Condition for Nondisclosure is broader than the previous versions of the DIDP. ([RySG at No. 1.](#)) TC commented that this proposed Condition for Nondisclosure expands ICANN’s ability to withhold information that may harm ICANN org or the commercial interests of its stakeholders and thereby reduces ICANN’s accountability. ([TC, pg. 1.](#)) The TC comment is endorsed by LEAP.

ICANN org notes that the text of the foregoing Condition for Nondisclosure is exact language recommended by the WS2 within Recommendation 8.1.11, which states:

¹ A19 endorsed the comments submitted by the ALAC and the Non-Commercial Stakeholder Group (NCSG). However, NCSG did not submit a comment. As such, this Summary Report does not include an analysis A19’s endorsement of the NCSG comment.

The exceptions for “trade secrets and commercial and financial information not publicly disclosed by ICANN” and for “confidential business information and/or internal policies and procedures” should be replaced with an exception for “material whose disclosure would materially harm ICANN’s financial or business interests or the commercial interests of its stake-holders who have those interests.

([WS2 Final Report](#), p. 32.) This recommendation was deemed by the WS2 as an improvement to the DIDP by replacing to the current Conditions for Nondisclosure for “[t]rade secrets and commercial and financial information not publicly disclosed by ICANN” and “[c]onfidential business information and/or internal policies and procedures.” ([Current DIDP \(2012\)](#).) The Final Report, including Recommendation 8.1.11, was subject to Public Comment and did not receive any comment. ([Report of Public Comments re CCWG-Accountability Work Stream 2 Final Report](#), p. 2.) ICANN org is not in a position to modify the WS2’s recommendation to incorporate other standards as suggested by commenters. Further, while the DIDP currently in effect allows ICANN org to withhold third party sensitive information, the proposed revisions now require ICANN to seek third party consent “[w]here the disclosure of documentary information depends upon prior approval from a third party, which is a new and enhanced obligation that could lead to additional disclosures.” This addition implements WS2 Recommendation 8.1.12, which states, “[w]here an exception is applied to protect a third party, the DIDP should include a mechanism for ICANN staff to contact this third party to assess whether they would consent to the disclosure.” ([WS2 Final Report](#), p. 34.)

One commenter (A19) suggested that the DIDP Conditions for Nondisclosure be limited to certain principles based on international standards. (A19, p. 4.) As discussed above, the proposed revisions to the DIDP are implementation of the WS2’s recommendations on how the DIDP can be improved to enhance transparency. ([WS2 Final Report](#), Annex 8.1, p. 331-352.) In this regard, the proposed modifications to the Conditions for Nondisclosure are based upon the WS2’s recommendations, which do not include the conditions identified by A19. Therefore, incorporation of different standards or conditions may be something for consideration within a future review cycle, but ICANN org is not in a position to unilaterally impose new standards at this point in the status of implementation of WS2 recommendations.

With respect to the sentence in the DIDP that reads “[i]nformation that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure”, one commenter (A19) recommended that the DIDP include specific information as to who would determine what is in the public interest. As set forth in the Proposed DIDP Response Process Update, which is incorporated into the DIDP by reference, the determination of the appropriateness of disclosure, which include an assessment of the public interest, is conducted by relevant subject matter experts within ICANN org on the information requested. ([Proposed DIDP Response Process Update](#), p. 1-2.)

Comments regarding DIDP response process

Two comments (A19, BC) were submitted regarding the DIDP response process. The BC recommended that DIDP requests be responded to within 30 days. ICANN org notes that DIDP requests are responded to within 30 days under the current response process unless it is not feasible to do so. (<https://www.icann.org/resources/pages/didp-2012-02-25-en>.) The Proposed Revisions as well as the [Proposed DIDP Response Process Update](#) further enhances ICANN org’s commitment to transparency by specifying that ICANN org will inform a requestor when a

response will be provided if a response cannot be met within 30 days and explain the reasons necessary for the extension of time to respond. ([Proposed Revisions to DIDP](#) at pg. 3; [Proposed DIDP Response Process Update](#), p. 2.)

A19 recommended that ICANN org commit to publishing a DIDP request as soon as it is received. ICANN org will take this suggestion under consideration, however, ICANN org notes that such a commitment would not need to be reflected within the DIDP in order for it to become part of ICANN org's practice, therefore no changes are required to the DIDP on this issue.

Comments regarding periodic review of the DIDP

One commenter (A19) recommended that the review period of the DIDP be shortened to three years instead of the proposed five years. ICANN org notes that the WS2 recommended that the DIDP review cycle be every five years, and ICANN org is unable to make unilateral changes to those recommendations.

Comments about the “Publicly Available Documents” section

One commenter (A19) suggested that the “Publicly Available Documents” section of the DIDP include information that ICANN publishes as a matter of course include a dedicated page regarding ICANN's compliance its human rights obligations under Article 27, Section 27.2 of the ICANN Bylaws. (A19 attached as Appendix 1, p. 3.) ICANN org notes that the “Public Available Documents” section is not intended to be an exhaustive list of all the information that the org publishes as a matter of course, such as information regarding ICANN's compliance with Article 27, Section 27.2 of the Bylaws. A19 also recommended that the section include a commitment that the links will be updated with new information as it is published and will be crossed checked every 30 days. ICANN org notes that the “Publicly Available Section” contains the links to the main webpages for the categories of information listed. The links remain current as new information is consistently added to those pages. For example, the link provided to access financial information (<https://www.icann.org/resources/pages/governance/financials-en>) is to a page that is consistently updated with current financial data as well as historical information. No changes are needed to address this comment.

5.2 Evaluation of Proposed Expansion of Ombuds and Complaints Officer Roles

Five comments (ALAC, A19, BC, LEAP, and RySG) were submitted in support of expanding the role of the Ombudsman to be the mechanism through which requestors seek review of DIDP responses. Three comments (A19, LEAP, and RySG) were submitted regarding expanding the role of the Complaints Officer to the DIDP. LEAP objected to the WS2's recommendation to expand the role of the Ombuds and/or Complaints Officer to the DIDP.

The ALAC also recommended that the DIDP Policy and DIDP responses should reference review mechanisms available for challenges to DIDP responses. (ALAC, p. 3.) The BC suggested that there should be a 30-day window within which a requester can seek a review of ICANN org's denial of disclosure. The BC suggested that requestors may submit a request for review if they do not agree with a decision and reason for denial of disclosure and that the Ombudsman should assess such review requests within 30 days of receiving the request. The BC further suggested that the results of the Ombuds' review be published, that Ombudsman's

recommendations be advisory to ICANN org, and that ICANN org should have a 14-day period to respond to the Ombudsman’s recommendation for disclosure. ([BC at No. 1.](#))

One comment (RySG) was received for question 2 in the Guided Submission Form. Question 2 states:

In light of the WS2 request for a specific analysis of the expansion of the Ombuds’ role into the DIDP process, as it would represent a new non-complaints responsibility, please provide your inputs on some or all of the five criteria identified in WS2 Recommendation 5.11.

The RySG expressed concerns of the impact of the recommended expansion on the current accountability mechanism and noted that further clarification on the potential impact is needed. The RySG noted that any expansion on the Ombuds’ role should not remove or replace the opportunity for community members to avail themselves of other accountability mechanisms afforded under the ICANN Bylaws such as the Reconsideration process or the Independent Review Process. The RySG further stated that it is not clear whether an expansion of the Ombuds or Complaints Officer roles would create more authoritative and less advisory capacity for the roles in relation to DIDP reviews and requests. The RySG asked “how would conflicting rules on disclosure between the Ombuds and DIDP be handled? Would this provide a more streamlined/faster complaints process than the Reconsideration Request?” The RySG further stated that the Ombuds would likely have to recuse themselves from any reconsideration request challenging a DIDP response for which they reviewed.

The RySG also addressed question 3 in the Guided Submission Form. Question 3 states:

Given that the ICANN Complaints Officer does not currently have a process or mandate to initiate their own appeals or reviews of ICANN org action, please provide any inputs for ICANN to consider on the proposed expansion of the role for the Complaints Office.

The RySG noted that the Complaints Officer rather than the Ombudsman may be the more appropriate mechanism for additional review of DIDP responses if a review role could limit or conflict with the Ombudsman’s current responsibilities. (RySG at No. 3.)

ICANN org will take these comments into consideration as part of its evaluation of the next steps on these recommendations from the WS2.

Section 5: Next Steps

ICANN org will take into consideration the feedback received regarding the proposed revisions to the DIDP, and where appropriate, ICANN org will incorporate the suggestions into the revised DIDP for Board consideration and approval. With respect to the feedback received regarding the role of the Ombuds and/or Complaints Officer in relation to the DIDP, ICANN org will take these comments into consideration as part of its evaluation of the next steps on these recommendations from the WS2.

ARTICLE 19 response to the ICANN Proposed Revisions to the ICANN Documentary Information Disclosure Policy

Introduction

ARTICLE 19 welcomes the efforts of the Internet Corporation for Assigned Names and Numbers (ICANN) to engage in a multi-stakeholder process by holding this Public Comment Consultation on the ICANN Documentary Information Disclosure Policy.¹

This consultation is an important opportunity, as the rules will impact considerably the human rights of internet users. We thus appreciate the opportunity to provide ICANN with our position on the topic and we look forward to the discussions that will follow.

This statement is made on our own behalf. We also endorse comments by the Non Commercial Stakeholder Group (NCSG) and the At-Large Advisory Committee (ALAC).

About ARTICLE 19

ARTICLE 19 is an international human rights organisation that works to protect and promote free expression, which includes the right to speak, freedom of the press, and the right to access information. With regional programmes in Africa, Asia, Europe, Latin America, and the Middle East and North Africa, we champion freedom of expression at the national, regional, and international levels. The work of ARTICLE 19's Digital Programme focuses on the nexus of human rights, Internet infrastructure, and Internet governance.

At ICANN, we engage through the ICANN Empowered Community as members of the Generic Names Supporting Organization (GNSO) under the Non-Commercial Users Constituency (NCUC) and as members of the At-Large Advisory Committee (ALAC) directly as part of the European Regional At-Large Organization (EURALO). We work within the ICANN community with the main purpose of raising awareness of how the Domain Name System (DNS) affects human rights. This aim would ensure that Section 27.2 of the ICANN Bylaws (on Human Rights) and other Bylaws with an impact on human rights are

¹ Proposed Revisions to the ICANN Documentary Information Disclosure Policy <<https://www.icann.org/en/public-comment/proceeding/proposed-revisions-to-the-icann-documentary-information-disclosure-policy-21-10-2021>> accessed on 7 December 2021

implemented in full and put the user at the centre of policy development processes.

Summary

At the end of October 2021, ICANN published the ICANN Documentary Information Disclosure Policy, seeking input from the community. In November and December 2021, ARTICLE 19 reviewed the document that is subject to the public consultation.

We welcome the work of ICANN on updating the document in line with Workstream 2 Recommendations on ICANN Transparency. Our analysis shows that, primarily, the proposal contains several positive and commendable principles like the principle of maximum disclosure as well as provisions on proactive disclosure of information through various sections of the ICANN website and predictable timelines of responses to DIDP requests.

However, we generally find that this Draft Policy is significantly weaker than other international bodies like the World Bank², the United Nations Development Programme (UNDP)³, and the United Nations Educational, Scientific and Cultural Organization (UNESCO)⁴ among other international bodies. It would be useful to have ICANN compare these policies of these international bodies and revise the ICANN accordingly. This will ensure that information is "made available to the public unless there is a compelling reason for confidentiality".

Additionally, the Draft Policy provides links to various sections of the ICANN websites containing information such as Annual Reports, Budgets, Board Meeting Transcripts, Minutes and Resolutions, Board Briefing Materials on the Board Meetings among others. However, sections with these links lack clear information on how often these links are updated.

ARTICLE 19 therefore urges ICANN to consider the recommendations below, which would help align the ICANN Documentary Information Disclosure Policy more closely with international law and best practice.

² The World Bank Policy on Access to Information

<<https://documents1.worldbank.org/curated/en/391361468161959342/pdf/548730Access01y0Statement01Final1.pdf>> accessed on 7 December 2021

³ UNDP Information Disclosure Policy

<<https://www.undp.org/accountability/transparency/information-disclosure-policy>> accessed on 7 December 2021

⁴ UNESCO Access to Information Policy

<<https://en.unesco.org/this-site/access-to-information-policy>> accessed on 7 December 2021

Comments on WS2 Recommendation 5.11.

We welcome the WorkStream 2 Recommendations and support vesting this policy with the ICANN Ombudsman's Office. Additionally we welcome the proposal to expand the role of the ICANN Complaints Officer to have a process or mandate to initiate their own appeals or reviews of ICANN org action which would then be subject to review by the ICANN Ombudsman's Office.

Comments on the "Publicly Available Documents" Section

This section provides links to various sections of the ICANN websites containing information such as Annual Reports, Budgets, Board Meeting Transcripts, Minutes and Resolutions among others. However the section lacks information on ICANN's compliance with Human Rights Obligations under Section 27.2 of the ICANN Bylaws (on Human Rights) and other Bylaws with an impact on human rights. We recommend the addition of a dedicated page with this information and Human Rights Impact Assessment reports.

Additionally, the section lacks clear information on how often these links provided under the section are updated. We recommend that a paragraph is included with a clear commitment that the links will be kept up to date with new information as it is published and this will be cross checked every 30 calendar days, as is the case with the rest of the Policy.

Comments on the "DIDP Defined Conditions for Nondisclosure" Section

We welcome the addition of the following paragraph: *"Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure."*

However, this section lacks clarity regarding who would determine what information is in public interest. Additionally, the section calls the "appeal procedure" a "review" which is very weak policy language as there is not an oversight body that can decide on the appeals.

We recommend that ICANN should make this information available in one document in a simple and clear language and should require that decisions refusing disclosure of requested information should also be transparent and available to audit to enhance the public's right to appeal.

Lastly, we recommend that the exemptions be limited to these principles based on international standards:

1. Exemptions for the disclosure of information can only be based on narrow, proportionate, necessary and clearly defined limitations (UNGA 70/161⁵, UNHRC 31/32⁶) based on Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR).
2. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information (United Nations Special Rapporteur on Freedom of Expression 2013⁷).
3. The regime of exceptions should be comprehensive and other laws should not be permitted to extend it. (United Nations Special Rapporteur on Freedom of Expression 2013⁸).
4. Authorities should provide reasons for any refusal to provide access to information. (United Nations Human Rights Committee adopted General Comment 34 of 2011⁹).

Comments on the “DIDP Requests and Responses” Section

We recommend that ICANN commits to publishing an information request as soon as it is received, pending the 30-day calendar response from ICANN. Not only does this measure improve ICANN’s transparency to its stakeholders, it will improve the operation of the policy by ensuring that the DIDP process is not overwhelmed by similar or duplicate requests made by stakeholders that are unaware of active requests that are pending responses.

Comments on the “Guidelines for the Publication of Board Briefing Materials” Section

This section provides links to various sections of the ICANN websites containing information such as Board Briefing Materials on the Board Meetings. However, this section lacks clear information on how often these links are updated. We recommend that a paragraph is included with a clear commitment that the links will be kept up to date with new information as it is published and this will be cross checked every 30 calendar days, as is the case with the rest of the Policy.

⁵ United Nations General Assembly Resolution adopted by the General Assembly on 17 December 2015 <<https://undocs.org/en/A/RES/70/161>> accessed on 7 December 2021

⁶ Resolution adopted by the United Nations Human Rights Council on 24 March 2016 <<https://undocs.org/A/HRC/RES/31/32>> accessed on 7 December 2021

⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression <http://www.concernedhistorians.org/content_files/file/to/320.pdf> accessed on 7 December 2021

⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression <http://www.concernedhistorians.org/content_files/file/to/320.pdf> accessed on 7 December 2021

⁹ UN Human Rights Committee (HRC), *General Comment No.34: Article 19: Freedoms of opinion and expression*, 21 July 2011, <<https://www.refworld.org/docid/4e38efb52.html>> accessed on 7 December 2021

Comments on the “Periodic Review” Section

We recommend a shorter periodic review of this Policy, so that it takes place every 3 years. A review of this policy every 3 years allows for adjustment to the policy in the middle of the ICANN’s strategy planning period to ensure that for the remainder of the strategic planning period there is an opportunity to ensure that the DIDP serves its purpose much better. Additionally, this will ensure that the Policy evolves in tandem with evolving international best practice and updates its use of appropriate tools and technologies to facilitate proactive information disclosure.

Conclusion

ARTICLE 19 is grateful for the opportunity to engage with ICANN in this process, in light of the Workstream 2 Recommendations and the five objectives under ICANN’s Strategic Plan for Fiscal Years 2021-2025.

We look forward to continued collaboration to strengthen human rights considerations in the Domain Name System and particularly in ICANN’s policies and procedures. We welcome further engagement opportunities and avail ourselves in case of any questions or concerns.

If you would like to discuss this analysis further, please contact Ephraim Percy Kenyanito, Senior Digital Program Officer, at ephraim@article19.org. Additionally, if you have a matter you would like to bring to the attention of the ARTICLE 19 Digital Programme, you can contact us by e-mail at digital@article19.org.

ICANN Documentary Information Disclosure Policy

(As amended [insert date])

About the DIDP

ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. A principal element of ICANN's approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN makes available on its websites as a matter of course.

Specifically, ICANN has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may seek review of ICANN's DIDP Response

Publicly Available Documents

ICANN posts on websites it operates, mainly on www.icann.org, numerous categories of documents in due course. A list of those categories including, but is not limited to, the following:

- Accountability Mechanisms documents
– <https://www.icann.org/resources/pages/accountability/reconsideration-en>
and <https://www.icann.org/resources/pages/accountability/irp-en>
- Annual Reports – <https://www.icann.org/resources/pages/governance/annual-report-en>
- Articles of Incorporation – <https://www.icann.org/resources/pages/governance/articles-en> Board Committee Information – <https://www.icann.org/resources/pages/board-committees-2018-04-13-en>
- Board Meeting Transcripts, Minutes and Resolutions – <http://www.icann.org/en/groups/board/meetings>

- Budget – <https://www.icann.org/en/about/financials>
- Bylaws (current) – <https://www.icann.org/en/about/governance/bylaws>
- Bylaws (archives)
 - <https://www.icann.org/en/about/governance/bylaws/archive>
- Contractual Compliance related materials – <https://www.icann.org/resources/pages/compliance-2012-02-25-en>
- Correspondence – <https://www.icann.org/resources/pages/correspondence>
- DIDP Requests and Responses - <https://www.icann.org/resources/pages/governance/transparency-en>
- Financial Information (current and historical) - <http://www.icann.org/en/about/financials>
- Litigation documents - – <https://www.icann.org/resources/pages/governance/litigation-en>
- Major agreements and Related Reports – <https://www.icann.org/resources/pages/agreements-en>
- Monthly Registry Reports – <https://www.icann.org/resources/pages/registry-reports>
- Operating Plan – <https://www.icann.org/en/about/planning>
- Policy documents – <https://www.icann.org/policy>
- Speeches, Presentations and Publications - <https://www.icann.org/presentations>; <https://www.icann.org/resources/pages/government-engagement-publications-2020-03-02-en>; <https://www.icann.org/resources/pages/octo-publications-2019-05-24-en>
- Strategic Plan – <https://www.icann.org/en/about/planning>
- Material information relating to the Address Supporting Organization (ASO) – <https://aso.icann.org> including, but not limited to, ASO policy documents, Regional Internet Registry (RIR) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Empowered Community – <https://www.icann.org/ec>

- Material information relating to the Generic Supporting Organization (GNSO) – <https://gnso.icann.org> – including, but not limited to, correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see <https://gnso.icann.org/reference-documents.htm>), and council administration documents (see <https://gnso.icann.org/council/docs.shtml>).
- Material information relating to the country code Names Supporting Organization (ccNSO) – <https://ccnso.icann.org> – including, but not limited to, meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (ALAC) – <https://atlarge.icann.org> – including, but not limited to, correspondence, statements, and meeting minutes
- Material information relating to the Governmental Advisory Committee (GAC) – <https://gac.icann.org/web/index.shtml> – including, but not limited to, operating principles, gTLD principles, ccTLD principles, principles regarding gTLD Whois issues, communiqués, and meeting transcripts, and agendas
- Material information relating to the Root Server Advisory Committee (RSSAC) – <https://www.icann.org/en/groups/rssac> – including, but not limited to, meeting minutes and information surrounding ongoing projects.
- Material information relating to the Security and Stability Advisory Committee (SSAC) – <https://www.icann.org/en/groups/ssac> – including, but not limited to, its charter, various presentations, work plans, reports, and advisories.

Definitions

The term “ICANN” means ICANN staff (full-time or part-time), Board members, advisors, consultants, contractors, agents, and others acting on behalf of ICANN.

Submitting a DIDP Request

Any member of the public may submit a DIDP request to ICANN. To submit a DIDP request, please send an email to didp@icann.org describing the documentary information you are seeking. Please provide as much detail as possible to identify the party submitting the request and the documents requested. If you have a question or need assistance with submitting a DIDP request, please contact the DIDP team at didp@icann.org.

Responding to DIDP Requests

All DIDP requests will be responded to in accordance with the DIDP Response Process.

ICANN will provide a written response to all DIDP requests, as soon as practicable, within 30 calendar days of receipt of the request, unless it is not feasible to do so. If that time frame cannot be met, ICANN will inform the requestor in writing as to when a response will be provided, which shall not be longer than an additional 30 calendar days, and explain the reasons necessary for the extension of time to respond.

DIDP Defined Conditions for Nondisclosure

ICANN has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.
- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement, nondisclosure provision within an agreement, or separate designation of confidentiality.
- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication that, if disclosed, could be harmful to an ongoing deliberative or decision-making process, or are subject to another Condition for Non-Disclosure.
- Information that, if disclosed, could be harmful to the security and stability of the Internet, including the operation of the ICANN Managed Root Server or the Root Server System for which ICANN facilitates the coordination, or any changes, modifications, or additions to the root zone.
- Materials, including but not limited to, trade secrets, commercial and financial information, confidential business information, and internal policies and procedures, the disclosure of which could materially harm ICANN's financial or business interests or the commercial interests of its stakeholders who have those interests. Where the disclosure of documentary information depends upon prior approval from a third party, ICANN will contact the third party to determine whether they would consent to the disclosure in accordance with the DIDP Response Process.

Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN shall not be required to create or compile summaries of any documented information and shall not be required to respond to requests seeking information that is already publicly available. ICANN may choose to, however, create new documentary information to make public in response to a request under this DIDP as ICANN deems feasible and necessary if there is little to no information available on the ICANN website.

Review of DIDP Responses

To the extent a requestor chooses to seek review of a DIDP response, a requestor may invoke any of the accountability mechanisms provided for under the Bylaws to the extent applicable, such as the Reconsideration Request process in accordance with [Bylaws, Article 4, Section 4.2](#), the Independent Review Process in accordance with [Bylaws, Article 4, Section 4.3](#), or the Ombudsman if a requestor believes that the response was unfair in accordance with [Bylaws, Article 5](#).

DIDP Requests and Responses

Requests submitted under the DIDP and ICANN responses are available on [the DIDP Requests and Responses webpage](#). *NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise*

published in full on ICANN's website, unless there are exceptional circumstances requiring further redaction, in accordance with the ICANN [Privacy Policy](#).

Guidelines for the Publication of Board Briefing Materials

The publication of Board Briefing Materials on the [Board Meetings webpage](#) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at <https://www.icann.org/resources/board-material/briefing-materials-guidelines-2019-12-20-en>.

Periodic Review

ICANN will review the DIDP Policy and the DIDP Response Process every five years.

To submit a request, send an email to didp@icann.org.

REFERENCE MATERIALS - ICANN BOARD PAPER NO. 2023.01.22.1d

**TITLE: Proposed Revisions to the ICANN
Documentary Information Disclosure Policy**

The following background information and attached materials are relevant to the Board's consideration of the proposed revisions to the ICANN Documentary Information Disclosure Policy (DIDP).

Background Information

Developed in 2009 and updated in 2012, the DIDP is mechanism that allows members of the public to request ICANN's documentary information, that is not already published as a matter of course, be made publicly available. As part of the Cross Community Working Group (CCWG) on Enhancing ICANN Accountability Work Stream 2 (WS2) effort, a group of consensus-based recommendations were issued regarding, among other categories, transparency. (WS2 Final Report, Recommendation 8.) In November 2019, the ICANN Board approved the consensus recommendations contained in the WS2 Final Report and directed org to start implementation of the recommendations.

As discussed in detail in the Board paper, the WS2 recommendations on transparency included 21 recommendations on improving the DIDP. To fulfill the recommendations, ICANN org revised the DIDP to address these recommendations. ICANN org also updated the process document for responding to DIDP requests (DIDP Response Process Document) to align with the proposed revisions to the DIDP, which is attached to these Reference Materials as Attachment B. The proposed revisions to the DIDP were put out for public comment. While not required to do so as it is not in scope of the WS2 recommendations, ICANN org also published the DIDP Response Process Document for information purposes and community input.

Documents

Attachment A is the Revised ICANN Documentary Information Disclosure Policy.

Attachment B is the Revised DIDP Process.

Attachment C is the Public Report Summary Report.

Attachment D is a redline comparison of DIDP effective 2012 to the Revised DIDP.

Reference Materials

The Cross Community Working Group (CCWG) on Enhancing ICANN Accountability Work Stream 2 (WS2) Final Report is available at

<https://www.icann.org/en/system/files/files/ccwg-acct-ws2-final-24jun18-en.pdf>.

The Public Comment Proceeding on the revisions to the DIDP is available at

<https://www.icann.org/en/public-comment/proceeding/proposed-revisions-to-the-icann-documentary-information-disclosure-policy-21-10-2021>.

Submitted By: Amy A. Stathos, Deputy General Counsel;
Samantha Eisner, Deputy General
Counsel
Date: 2 February 2023
Email: amy.stathos@icann.org,
samantha.eisner@icann.org

ICANN BOARD SUBMISSION NO. 2023.01.21.1e

TITLE: **Proposed Revisions to the Board of Directors' Code of Conduct**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Pursuant to section II.D. of the Board Governance Committee's (BGC) Charter, the Committee "shall be responsible for oversight and enforcement with respect to the Board of Directors' Code of Conduct." This includes a commitment to periodically review the Code of Conduct (Code) and make any recommendations to the Board with respect to proposed for changes to the Code. Accordingly, the BGC reviewed the current Code, which was last updated in 2018, and recommended that the Code be updated to include a section on Board conduct when members are acting in their personal capacities. The Board is being asked to adopt the revised of the Code.

BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:

The BGC recommends that the Board adopt the revised Board of Directors' Code of Conduct, attached to the Reference Materials as Attachment A.

PROPOSED RESOLUTION:

Whereas, the Board Governance Committee's (BGC) scope of responsibilities includes oversight of the Board of Directors' Code of Conduct (Code), which involves periodic reviews of the Code, and making recommendation for changes to the Code to the Board as necessary.

Whereas, the BGC recently recommended and reviewed suggested changes to the Code simply to clarify the Code as it relates to Board member's conduct when acting in their own capacity while serving on the ICANN Board.

Whereas, the BGC recommended that the Board approve revisions to the Code to add clarity.

Resolved (2023.01.21.XX), the Board adopts the revised Board of Directors' Code of Conduct as is reflected in Attachment A to the Reference Materials.

PROPOSED RATIONALE:

Adopting the revised Board of Directors' Code of Conduct (Code) is consistent with ICANN's mission and commitments to ensuring legitimacy and sustainability of the ICANN multistakeholder model by ensuring that the Board members are operating at the highest ethical standards.

The Board Governance Committee has recommended that the Code be revised to simply enhance the clarity of the Code as it relates to Board members acting in their own capacity while serving on the ICANN Board.

This decision is squarely within the public interest as it is expected to positively impact the manner in which the ICANN Board operates with the public.

The adoption of the revised Code is not expected to have a fiscal impact on ICANN organization.

This decision should not have any negative impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Date: 12 January 2023
Email: amy.stathos@icann.org

Board of Directors' Code of Conduct

(As amended [])

The Board of Directors (Board) of the Internet Corporation for Assigned Names and Numbers (ICANN) has adopted the following Code of Conduct (Code) for its voting directors (Directors) and non-voting liaisons (Liaisons, collectively with the Directors, Board Members). This Code is intended to focus Board Members on areas of ethical risk, provide guidance to help them recognize and deal with ethical issues, provide mechanisms to report unethical conduct, foster a culture of honesty and accountability, deter wrongdoing and promote fair and accurate disclosure and financial reporting. The Code is not intended to override any applicable laws or any obligations pursuant to ICANN's Bylaws, Conflicts of Interest Policy, Governance Guidelines or any other applicable policies.

No code can anticipate every situation that may arise. Accordingly, this Code is intended to serve as a source of guiding principles and not absolute directives. Generally, however, the goal is to ensure that Board Members strive to foster ICANN's Mission, Core Values and Commitments in an ethical manner. ICANN's Mission, Core Values and Commitments are set forth in Article 1 of ICANN's Bylaws, which is attached as Exhibit A hereto and available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

A. General Statement of Expectation

1. Each Board Member is expected to adhere to a high standard of ethical conduct and to act in accordance with ICANN's Mission, Core Values and Commitments. The good name of ICANN depends upon the way Board Members conduct business and the way the public perceives that conduct. Unethical actions, or the appearance of unethical actions, are not acceptable. Board Members are to be guided by the following principles in carrying out their responsibilities. Note, however, that this Code summarizes such principles and nothing in this Code should be considered as limiting duties, obligations or legal requirements with which the Board Members must comply.
2. **Loyalty.** Board Members should not be, or appear to be, subject to influences, interests or relationships that conflict with the interests of ICANN organization or its ability to operate for the benefit of the Internet community as a whole. Board Members shall act so as to protect ICANN's interests and those of its staff members, assets and

legal rights, and Board Members shall serve the interests of ICANN organization and the global Internet Community over those of any other person, group or stakeholder of ICANN.

3. **Care.** Board Members shall apply themselves with seriousness and diligence to participating in the affairs of the Board and its committees and shall act prudently in exercising oversight of ICANN organization, and shall be attentive to legal ramifications of his or her and the Board's actions. Board Members are expected to be familiar with ICANN's business and the environment in which the company operates, and understand ICANN's principal business plans, policies, strategies and core values.
4. **Inquiry.** Board Members shall take such steps as are necessary to be sufficiently informed to make decisions on behalf of ICANN and to participate in an informed manner in the Board's activities. Board Members are expected to attend all meetings of the Board, except if unusual circumstances make attendance impractical.
5. **Prudent Investment.** Board Members shall avoid speculation with ICANN's assets by giving primary consideration to the probable income and probable safety of ICANN's capital assets and the relation between ICANN's assets and its present and future needs.
6. **Compliance with Laws, Rules and Regulations.** Board Members shall comply with all laws, rules and regulations applicable to ICANN.
7. **Observance of Ethical Standards.** Board Members must adhere to the highest of ethical standards in the conduct of their duties. These include honesty, fairness and integrity.

B. Integrity of Records and Public Reporting

Board Members should promote the accurate and reliable preparation and maintenance of ICANN's financial and other records. Diligence in accurately preparing and maintaining ICANN's records allows ICANN to fulfill its reporting obligations and to provide stakeholders, governmental authorities and the general public with full, fair, accurate, timely, understandable, open and transparent disclosure.

C. Conflicts of Interest

Board Members must act in accordance with the Conflicts of Interest Policy adopted by the ICANN Board, and as amended from time to time.

D. Corporate Opportunities

Board Members are prohibited from: (a) taking for themselves personally opportunities related to ICANN's business; (b) using ICANN's property, information, or position for personal gain; or (c) competing with ICANN for business opportunities. Board Members shall exercise prudent judgment to avoid the appearance of improper influence when offered opportunities, gifts or entertainment.

E. Confidentiality

Board Members should maintain the confidentiality of information entrusted to them by ICANN as confidential and any other confidential information about ICANN, its operations, customers or suppliers, which comes to them, from whatever source, except when disclosure is authorized or legally mandated. For purposes of this Code, "confidential information" includes all non-public information relating to ICANN, its business, customers or suppliers.

Process surrounding maintenance of confidential information can be found in the Board Governance Committee Code of Conduct Guidelines developed and amended from time to time, as the Board deems appropriate.

F. Board Interaction with Internet Community and Media:

1. The Board recognizes that members of the Internet community, ICANN constituency groups and the public at large have significant interests in ICANN's actions and governance and therefore the Board seeks to ensure appropriate communication, subject to concerns about confidentiality.
2. The Board notes that the President and CEO speaks for ICANN, consistent with applicable policy.
3. All comments from the Board to the Internet Community and/or Media on behalf of the Board should be reviewed and discussed by the Board in advance, and, in most circumstances, come from the Board Chair unless otherwise agreed by the Chair.

G. Acting in Personal Capacity

1. Board Members acting in their personal and not ICANN Board capacity should exercise care and discretion when engaging in an activity such as public speaking, authoring or contributing to a public article/blog/writing, or other activity similar in nature, that is about a topic that the Board has discussed or has been provided information, particularly matters that are confidential or sensitive in nature. In all such instances, the Board member must disclose, in writing or orally, as applicable, that they are speaking in their personal capacity.
2. A Board Member must inform the Board Chair, if possible, before engaging in an activity in their personal capacity, and not ICANN Board capacity, such as public speaking, authoring or contributing to a public article/blog/writing, or other activity similar in nature, that is about a topic that the Board has discussed or has been provided information, particularly matters that are confidential or sensitive in nature. If, due to the timing of the activity, the Board member is unable to inform the Board Chair beforehand, the Board member must inform the Board Chair as soon as practicable following the activity.

H. Enforcement:

Board Members will discuss with the Chair of the Board Governance Committee any questions or issues that may arise concerning compliance with this Code. Breaches of this Code, whether intentional or unintentional, shall be reviewed by the Board Governance Committee or any sub-committee established by the Board Governance Committee (excluding any Board Members whose breaches are under review), which, if necessary, shall make recommendations to the full Board for corrective action. Serious breaches of this Code may be cause for dismissal of the Board Member committing the infraction in accordance with ICANN's Bylaws and applicable law.

I. Affirmation

All Board Members shall read this Code at least annually, and shall certify in writing that they have done so and that they understand the Code.

J. Review

This Code will be reviewed periodically by the Board Governance Committee, which shall make recommendations to the full Board regarding changes to or rescinding of the Code, as deemed appropriate.

Exhibit A

Section 1.1 MISSION

The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN:

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name (Domain Name) System ("DNS") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN's scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD registrars and registries shall be deemed to be within ICANN's Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.

(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol (Protocol) numbers and Autonomous System numbers. In service of its Mission, ICANN (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force ("**IETF**") and the Regional Internet Registries ("**RIRs**") and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

(b) ICANN shall not act outside its Mission.

(c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.

(d) For the avoidance of doubt and notwithstanding the foregoing:

(i) the foregoing prohibitions are not intended to limit ICANN's authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;

(ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("**Bylaws**") or ICANN's Articles of Incorporation ("**Articles of Incorporation**"):

(A)

(1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016, including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;

(2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;

(B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and

(C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan (Five-Year Operating Plan) existing on 10 March 2016.

(iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other

basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN.

- (iv) ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.

Section 1.2 COMMITMENTS AND CORE VALUES

In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below.

(a) COMMITMENTS

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

- (i) Preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
- (ii) Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet;
- (iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;
Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;
- (iv) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory

treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and

(v) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

(b) CORE VALUES

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN:

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(ii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;

(iii) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(iv) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;

(v) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

(vi) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; and

(vii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

Board of Directors' Code of Conduct

(As amended [])

The Board of Directors (Board) of the Internet Corporation for Assigned Names and Numbers (ICANN) has adopted the following Code of Conduct (Code) for its voting directors (Directors) and non-voting liaisons (Liaisons, collectively with the Directors, Board Members). This Code is intended to focus Board Members on areas of ethical risk, provide guidance to help them recognize and deal with ethical issues, provide mechanisms to report unethical conduct, foster a culture of honesty and accountability, deter wrongdoing and promote fair and accurate disclosure and financial reporting. The Code is not intended to override any applicable laws or any obligations pursuant to ICANN's Bylaws, Conflicts of Interest Policy, Governance Guidelines or any other applicable policies.

No code can anticipate every situation that may arise. Accordingly, this Code is intended to serve as a source of guiding principles and not absolute directives. Generally, however, the goal is to ensure that Board Members strive to foster ICANN's Mission, Core Values and Commitments in an ethical manner. ICANN's Mission, Core Values and Commitments are set forth in Article 1 of ICANN's Bylaws, which is attached as Exhibit A hereto and available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

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5. **Prudent Investment.** Board Members shall avoid speculation with ICANN's assets by giving primary consideration to the probable income and probable safety of ICANN's capital assets and the relation between ICANN's assets and its present and future needs.
6. **Compliance with Laws, Rules and Regulations.** Board Members shall comply with all laws, rules and regulations applicable to ICANN.
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Board Members should promote the accurate and reliable preparation and maintenance of ICANN's financial and other records. Diligence in accurately preparing and maintaining ICANN's records allows ICANN to fulfill its reporting obligations and to provide stakeholders, governmental authorities and the general public with full, fair, accurate, timely, understandable, open and transparent disclosure.

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Board Members must act in accordance with the Conflicts of Interest Policy

adopted by the ICANN Board, and as amended from time to time.

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Board Members are prohibited from: (a) taking for themselves personally opportunities related to ICANN's business; (b) using ICANN's property, information, or position for personal gain; or (c) competing with ICANN for business opportunities. Board Members shall exercise prudent judgment to avoid the appearance of improper influence when offered opportunities, gifts or entertainment.

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Process surrounding maintenance of confidential information can be found in the Board Governance Committee Code of Conduct Guidelines developed and amended from time to time, as the Board deems appropriate.

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1. The Board recognizes that members of the Internet community, ICANN constituency groups and the public at large have significant interests in ICANN's actions and governance and therefore the Board seeks to ensure appropriate communication, subject to concerns about confidentiality.
2. The Board notes that the President and CEO speaks for ICANN, consistent with applicable policy.
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activity such as public speaking, authoring or contributing to a public article/blog/writing, or other activity similar in nature, that is about a topic that the Board has discussed or has been provided information, particularly matters that are confidential or sensitive in nature. In all such instances, the Board member must disclose, in writing or orally, as applicable, that they are speaking in their personal capacity.

2. A Board Member must inform the Board Chair, if possible, before engaging in an activity in their personal capacity, and not ICANN Board capacity, such as public speaking, authoring or contributing to a public article/blog/writing, or other activity similar in nature, that is about a topic that the Board has discussed or has been provided information, particularly matters that are confidential or sensitive in nature. If, due to the timing of the activity, the Board member is unable to inform the Board Chair beforehand, the Board member must inform the Board Chair as soon as practicable following the activity.

H. Enforcement:

Board Members will discuss with the Chair of the Board Governance Committee any questions or issues that may arise concerning compliance with this Code. Breaches of this Code, whether intentional or unintentional, shall be reviewed by the Board Governance Committee or any sub-committee established by the Board Governance Committee (excluding any Board Members whose breaches are under review), which, if necessary, shall make recommendations to the full Board for corrective action. Serious breaches of this Code may be cause for dismissal of the Board Member committing the infraction in accordance with ICANN's Bylaws and applicable law.

I. Affirmation

All Board Members shall read this Code at least annually, and shall certify in writing that they have done so and that they understand the Code.

J. Review

This Code will be reviewed periodically by the Board Governance Committee, which shall make recommendations to the full Board regarding changes to or rescinding of the Code, as deemed appropriate.

Exhibit A

Section 1.1 MISSION

The mission of the Internet Corporation for Assigned Names and Numbers ("**ICANN**") is to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the "**Mission**"). Specifically, ICANN:

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name (Domain Name) System ("DNS") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN's scope is to coordinate the development and implementation of policies:

- For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2; and
- That are developed through a bottom-up consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.

The issues, policies, procedures, and principles addressed in Annex G-1 and Annex G-2 with respect to gTLD registrars and registries shall be deemed to be within ICANN's Mission.

(ii) Facilitates the coordination of the operation and evolution of the DNS root name server system.

(iii) Coordinates the allocation and assignment at the top-most level of Internet Protocol (Protocol) numbers and Autonomous System numbers. In service of its Mission, ICANN (A) provides registration services and open access for global number registries as requested by the Internet Engineering Task Force ("**IETF**") and the Regional Internet Registries ("**RIRs**") and (B) facilitates the development of global number registry policies by the affected community and other related tasks as agreed with the RIRs.

(iv) Collaborates with other bodies as appropriate to provide registries needed for the functioning of the Internet as specified by Internet protocol standards development organizations. In service of its Mission, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

- (b) ICANN shall not act outside its Mission.
- (c) ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.
- (d) For the avoidance of doubt and notwithstanding the foregoing:
- (i) the foregoing prohibitions are not intended to limit ICANN's authority or ability to adopt or implement policies or procedures that take into account the use of domain names as natural-language identifiers;
- (ii) Notwithstanding any provision of the Bylaws to the contrary, the terms and conditions of the documents listed in subsections (A) through (C) below, and ICANN's performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN's Mission or otherwise exceed the scope of ICANN's authority or powers pursuant to these Bylaws ("**Bylaws**") or ICANN's Articles of Incorporation ("**Articles of Incorporation**"):
- (A)
- (1) all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016, including, in each case, any terms or conditions therein that are not contained in the underlying form of registry agreement and registrar accreditation agreement;
- (2) any registry agreement or registrar accreditation agreement not encompassed by (1) above to the extent its terms do not vary materially from the form of registry agreement or registrar accreditation agreement that existed on 1 October 2016;
- (B) any renewals of agreements described in subsection (A) pursuant to their terms and conditions for renewal; and
- (C) ICANN's Five-Year Strategic Plan and Five-Year Operating Plan (Five-Year Operating Plan) existing on 10 March 2016.
- (iii) Section 1.1(d)(ii) does not limit the ability of a party to any agreement described therein to challenge any provision of such agreement on any other

basis, including the other party's interpretation of the provision, in any proceeding or process involving ICANN.

- (iv) ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.

Section 1.2 COMMITMENTS AND COREVALUES

In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below.

(a) COMMITMENTS

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

- (i) Preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
- (ii) Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet;
- (iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination; Employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process;
- (iv) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and

(v) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.

(b) CORE VALUES

In performing its Mission, the following "**Core Values**" should also guide the decisions and actions of ICANN:

(i) To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of, other responsible entities that reflect the interests of affected parties and the roles of bodies internal to ICANN and relevant external expert bodies;

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

(ii) Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market;

(iii) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(iv) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;

(v) While remaining rooted in the private sector (including business stakeholders, civil society, the technical community, academia, and end users), recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities;

(vi) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture; and

(vii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting

internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.

(c) The Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

REFERENCE MATERIALS - ICANN BOARD PAPER NO. 2023.01.21.1e

TITLE: Proposed Revisions to the Board of Director's Code of Conduct

The following background information and attached materials are relevant to the Board's consideration of the proposed revisions to the Board of Director's Code of Conduct.

Documents

Attachment A is the Revised Board of Directors' Code of Conduct.

Attachment B is a redline comparison of Code of Conduct, adopted in 2018, to the Revised Code of Conduct.

Submitted By: Amy A. Stathos, Deputy General Counsel
Date: 2 February 2023
Email: amy.stathos@icann.org,

ICANN BOARD SUBMISSION NO. 2023.01.21.2a

TITLE: **Consideration of the Namecheap, Inc. v. ICANN (.BIZ, .INFO, .ORG) Independent Review Process Final Declaration**

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

Namecheap, Inc. (an ICANN accredited registrar) initiated an Independent Review Process (IRP) challenging: (i) the lack of price control provisions in the 2019 Registry Agreements for .BIZ, .INFO, and .ORG; and (ii) ICANN organization's consideration of Public Interest Registry's (PIR's) request for indirect change of control (Change of Control Request).¹ The Final Declaration was provided to the parties on 26 December 2022.

In accordance with [Article 4](#), Section 4.3(x) of the operative Bylaws,² the Board is being asked to consider the Final Declaration from the Namecheap IRP now because the Bylaws require the Board to “consider its response to IRP Panel decisions at the Board’s next meeting,” to the extent feasible. Per the resolution below, the Board would be acknowledging the Panel’s binding declarations that ICANN violated its Articles of Incorporation (Articles) and/or Bylaws in the manner set forth in the Final Declaration, and directing that ICANN organization reimburse Namecheap for certain costs in accordance with the Final Declaration. The Board would also convey to the community that further consideration is needed regarding the IRP Panel’s non-binding recommendations, which is why, per the resolution, the Board would ask the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the Final Declaration and recommendations, and provide the Board with its recommendations regarding next steps for the Board to consider.

¹ The Panel dismissed Namecheap’s claims regarding PIR’s Change of Control Request when it granted certain portions of ICANN’s motion to dismiss in February 2021.

² The operative Bylaws are the [ICANN Bylaws](#) as amended 28 November 2019.

OVERVIEW OF NAMECHEAP IRP FINAL DECLARATION:

In the Final Declaration, the IRP Panel indicated that Namecheap had “prevailed on some, but not all of its claims.” (Final Declaration at ¶ 451.) In particular, the IRP Panel agreed with ICANN that Namecheap failed to prove that the removal of the price controls amounted to discriminatory treatment under the Bylaws. Further, the IRP Panel agreed with ICANN that several of the Namecheap claims were untimely, including all claims involving .BIZ, the claim that ICANN should not have allowed registries and registrars to vertically integrate, and the claim that ICANN violated a policy from February 2006 relating to the renewal of legacy Registry Agreements.

Ultimately, however, the IRP Panel found that ICANN's approval of the 2019 Registry Agreements for .INFO and .ORG without price controls violated the Articles and/or Bylaws in a few ways, including ICANN was not sufficiently transparent in its decision-making, the Board did not make (but should have made) the decision regarding these particular Registry Agreement renewals, and ICANN did not follow procedures for ensuring promotion of the global public interest.

The Panel viewed these violations as procedural rather than substantive in nature and recommended, but did not order, that the ICANN Board analyze and discuss what steps to take to remedy the specific violations and to improve its overall decision-making process to ensure that similar violations do not occur in the future. Notably, Namecheap had urged the Panel to order ICANN to re-impose price controls in the .BIZ, .INFO, and .ORG Registry Agreements; however, the Panel did not do so, specifically stating that such an "order" is not within an IRP panel's remit and that there is a "clear distinction" between an IRP panel's "power to 'declare' and its power to 'recommend.'"

PROPOSED RESOLUTION:

Whereas, the Final Declaration in the Namecheap, Inc. v. ICANN Independent Review Process regarding .BIZ, .INFO, and .ORG (Namecheap IRP) was issued on 26 December 2022.

Whereas, among other things, the IRP Panel found that “Namecheap has prevailed on some, but not all of its claims,” declared that ICANN violated its Articles of

Incorporation and/or Bylaws in the manner set forth in the Final Declaration, and declared that ICANN shall reimburse Namecheap the sum of US\$58,750 for its share of the IRP costs in accordance with the Bylaws. (Final Declaration at ¶¶ 451, 452, 486, 505.)

Whereas, the IRP Panel made an “overall recommendation [...] that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decisionmaking process to ensure that similar violations do not occur in the future,” and made certain further recommendations as set forth in the Final Declaration. (Final Declaration at ¶¶ 493, 497-504.)

Whereas, in accordance with Article 4, Section 4.3(x) of the applicable version of the Bylaws, the Board has considered the Final Declaration.

Resolved (2023.01.21.xx), the Board acknowledges that the IRP Panel declared the following: (i) Namecheap prevailed on certain of its claims in the Namecheap, Inc. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Namecheap the sum of US\$58,750.³

Resolved (2023.01.21.xx), the Board directs the Interim President and CEO, or her designee(s), to take all steps necessary to reimburse Namecheap in the amount of US\$58,750.

Resolved (2023.01.21.xx), further consideration is needed regarding the IRP Panel’s non-binding recommendations set forth in the Final Declaration.

Resolved (2023.01.21.xx), the Board asks the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel’s Final Declaration and recommendations, and to provide the Board with its recommendation(s) regarding next steps for the Board to consider.

³ ICANN already agreed, pursuant to the Bylaws, that it would pay for the administrative costs of maintaining an IRP, including panelist fees.

PROPOSED RATIONALE:

The 2013 .BIZ, .INFO, and .ORG Registry Agreements (2013 Registry Agreements) were all due to expire in June 2019. In anticipation of the expiration of these agreements, ICANN staff entered into separate negotiations with the respective registry operators to renew the agreements. As with all legacy registry agreements, ICANN's preference was to transition the 2013 Registry Agreements to the "Base Registry Agreement," given its additional protections for registrars and registrants and increased operational efficiencies for ICANN, registry operators, registrars, and registrants. The .BIZ, .INFO, and .ORG registry operators were also interested in moving to and requested to transition to the Base Registry Agreement. The Base Registry Agreement does not contain price control provisions, whereas the 2013 Registry Agreements previously contained such provisions. After conducting its due diligence and briefing the Board regarding the rationale for transitioning .BIZ, .INFO, and .ORG to the Base Registry Agreement, ICANN staff proceeded to renew the Registry Agreements in June 2019 (2019 Registry Agreements) on the Base Registry Agreement as proposed.

Namecheap, Inc. (an ICANN accredited registrar) initiated an Independent Review Process (IRP) in February 2020, challenging the lack of price control provisions in the 2019 Registry Agreements, and ICANN organization's consideration of Public Interest Registry's (PIR's) request for indirect change of control (Change of Control Request). With respect to Namecheap's claims regarding the lack of price control provisions, Namecheap asserted that: (a) ICANN was not transparent in its decision-making process regarding not including price control provisions in the 2019 Registry Agreements; (b) the lack of price control provisions resulted in disparate treatment of .BIZ, .INFO, and .ORG, as compared to similar legacy TLDs such as .COM and .NET; and (c) the lack of price control provisions in the 2019 Registry Agreements violated the renewal clause (Section 4.2) of the 2013 Registry Agreements for .BIZ, .INFO, and .ORG. With respect to Namecheap's claims regarding PIR's Change of Control Request, the Panel dismissed those claims when it granted certain portions of ICANN's motion to dismiss in February 2021.

The final IRP hearing took place from 28 March 2022 to 1 April 2022, and the IRP Panel issued its Final Declaration on 26 December 2022.

In the Final Declaration, the IRP Panel indicated that Namecheap had “prevailed on some, but not all of its claims.” (Final Declaration at ¶ 451.) In particular, the Panel agreed with ICANN that Namecheap failed to prove its claim that the removal of the price controls amounted to discriminatory treatment under the Bylaws, because price controls continue to exist in the Registry Agreements for .COM, .NET, and .NAME. The Panel further agreed with ICANN that several of Namecheap’s claims were untimely, including all claims involving the .BIZ Registry Agreement renewal, the claim that ICANN should not have allowed registries and registrars to vertically integrate, and the claim that ICANN violated a policy from February 2006 relating to the renewal of legacy Registry Agreements.

Namecheap prevailed on its specific claims regarding the lack of price control provisions in the 2019 Registry Agreements for .INFO and .ORG, with the Panel finding three violations of the Articles of Incorporations (Articles) and/or Bylaws. Specifically, the Panel declared that:

- “ICANN’s approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Article III of the Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws because ICANN did not act in an open and transparent manner;”
- “ICANN’s approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Sections 2.1, 3.4, 3.5, and 3.6(a) of the Bylaws because it involved a policy decision to be made by the ICANN Board, and the ICANN Board did not approve this decision or comply with the procedural requirements for formal Board action;” and
- “ICANN’s approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Articles II and III of the Articles of Incorporation and Section 1.2(b)(ii) of the Bylaws because ICANN did not comply with the

procedural requirements for ensuring that ICANN promotes the global public interest and acts for the benefit of the Internet community as a whole.”

The Panel denied Namecheap’s request for cost shifting of legal fees. The Panel found that “neither party has asserted ‘frivolous or abusive’ claims or defenses.” “Accordingly, the Panel applies the general rule that ICANN shall bear all administrative costs paid to the ICDR (including arbitrator fees), and that each party should bear its own legal and expert witness fees and expenses.” (Final Declaration at ¶ 451.) The Panel ordered ICANN to reimburse Namecheap the sum of US\$58,750.00, the amount that Namecheap paid in IRP costs before ICANN had had the chance to reimburse Namecheap.⁴ (Final Declaration at ¶ 452.)

In light of its declarations and its view that the noted violations “are procedural rather than substantive in nature,” “[t]he Panel’s overall recommendation is that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decisionmaking process to ensure that similar violations do not occur in the future.” (Final Declaration at ¶ 493.) The Panel also recommended the following (Final Declaration at ¶¶ 497-504):

- “[D]ecisions as to how to implement the Panel’s rulings in this IRP should be made by the ICANN Board”;
- “[T]he ICANN Board should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest” that encourages participation of diverse stakeholders and “should be conducted in an open and transparent manner that avoids the violations found by the Panel”;
- “[W]hile the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more

⁴ ICANN had already agreed, pursuant to the Bylaws, that it would pay for the administrative costs of maintaining an IRP, including panelist fees.

- extensive than for .INFO” in light of the Panel’s finding “that the evidence that price controls should be retained is much stronger for .ORG than for .INFO”;
- “[T]he Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable” and should explain the reasons for not conducting further expert analysis if that decision is made”;
 - “[I]f the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public interest, the Panel recommends that ICANN seek to amend the 2019 Registry Agreements to include appropriate price controls”;
 - “[T]he ICANN Board may wish to consider approaching the registry operators for .ORG and .INFO about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above”; and
 - The “Board consider revisions to ICANN’s decisionmaking process to reduce the risk of similar procedural violations in the future,” such as “adopt[ing] guidelines for determining what decisions involve policy matters for the Board to decide, or what are the issues on which public comments should be obtained.”

The Panel also noted: “While providing recommendations is consistent with the purpose of the independent review process, the Panel notes that it has no expertise or experience regarding the internal operations of ICANN, or with the diverse stakeholders in the global Internet community, aside from information presented in this proceeding. Thus, the Panel’s recommendations are directed at identifying issues and measures that ICANN should consider and analyze further, in consultation with the Internet community.” (Final Declaration at ¶ 492.)

The Board appreciates that the parties participated in good faith in the IRP, and acknowledges that a neutral third-party Panel determined that Namecheap prevailed on certain of its claims, declared that ICANN violated its Articles and/or Bylaws in the manner set forth in the Final Declaration, and declared that ICANN should reimburse Namecheap for its share of the IRP costs as set forth in the Final Declaration. The Board

is therefore adopting this resolution so as to not delay the reimbursement of Namecheap for these costs, while the Board continues to consider the Panel's recommendations and/or next steps relating to this matter.

The Board recognizes the importance of this decision and wants to make clear that it takes the results of all ICANN accountability mechanisms very seriously, which is why the Panel's recommendations are being referred to the Board Accountability Mechanisms Committee (BAMC) for thorough consideration and formulating its recommendation(s) to the Board on next steps.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

Taking this decision is expected to have a direct financial impact on ICANN in the amount the Panel declared ICANN should reimburse the prevailing party, which was anticipated under the current budget. Further review and analysis of the Panel's recommendations will not have any direct impact on the security, stability, or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Date Noted: 13 January 2023
Email: amy.stathos@icann.org

REFERENCE MATERIALS – ICANN BOARD SUBMISSION NO. 2023.01.21.2a

TITLE: Consideration of the Namecheap, Inc. v. ICANN (.BIZ, .INFO, .ORG) Independent Review Process Final Declaration

Attachments:

The following attachment is relevant to the Board consideration of the IRP Panel’s Final Declaration in the Namecheap, Inc. v. ICANN Independent Review Process regarding .BIZ, .INFO, and .ORG (Namecheap IRP):

- Attachment A is the [Final Declaration](#) in the Namecheap IRP – issued on 26 December 2022.

Other Relevant Materials:

The documents, briefs, background facts, arguments, supporting declarations, and Panel rulings submitted during the course of the Namecheap IRP are available at:

<https://www.icann.org/resources/pages/irp-namecheap-v-icann-2020-03-03-en>.

BACKGROUND INFORMATION:

2019 Renewal of Registry Agreements for .BIZ, .INFO, and .ORG:

The 2013 .BIZ, .INFO, and .ORG Registry Agreements (2013 Registry Agreements) were all due to expire in June 2019. In anticipation of the expiration of these agreements, ICANN staff entered into separate negotiations with the respective registry operators to renew the agreements. As with all legacy registry agreements, ICANN’s preference was to transition the 2013 Registry Agreements to the “Base Registry Agreement,” given its additional protections for registrars and registrants and increased operational efficiencies for ICANN, registry operators, registrars, and registrants. The .BIZ, .INFO, and .ORG registry operators were also interested in moving to and requested to transition to the Base Registry Agreement. The Base Registry Agreement does not contain price control provisions, whereas the 2013 Registry Agreements previously contained such provisions. After conducting its due diligence and briefing the Board regarding the rationale for transitioning .BIZ, .INFO, and .ORG to the Base Registry Agreement, ICANN staff

proceeded to renew the Registry Agreements in June 2019 (2019 Registry Agreements) on the Base Registry Agreement as proposed.

Overview of Namecheap IRP Final Declaration:

In the Namecheap IRP, Namecheap challenged the lack of price control provisions in the 2019 Registry Agreements and ICANN organization's consideration of Public Interest Registry's (PIR's) request for indirect change of control (Change of Control Request). With respect to Namecheap's claims regarding the lack of price control provisions, Namecheap asserted that: (a) ICANN was not transparent in its decision-making process regarding not including price control provisions; (b) the lack of price control provisions resulted in disparate treatment of .BIZ, .INFO, and .ORG, as compared to similar legacy TLDs such as .COM and .NET; and (c) the lack of price control provisions in the 2019 Registry Agreements violated the renewal clause (Section 4.2) of the 2013 Registry Agreements for .BIZ, .INFO, and .ORG. With respect to Namecheap's claims regarding PIR's Change of Control Request, the Panel dismissed those claims when it granted certain portions of ICANN's motion to dismiss in February 2021.

The final IRP hearing took place from 28 March 2022 to 1 April 2022, and the IRP Panel issued its Final Declaration on 26 December 2022.

In the Final Declaration, the IRP Panel indicated that Namecheap had "prevailed on some, but not all of its claims." (Final Declaration at ¶ 451.) In particular, the Panel agreed with ICANN that Namecheap failed to prove its claim that the removal of the price controls amounted to discriminatory treatment under the Bylaws, because price controls continue to exist in the Registry Agreements for .COM, .NET, and .NAME. The Panel further agreed with ICANN that several of Namecheap's claims were untimely, including all claims involving the .BIZ Registry Agreement renewal, the claim that ICANN should not have allowed registries and registrars to vertically integrate, and the claim that ICANN violated a policy from February 2006 relating to the renewal of legacy Registry Agreements.

Namecheap prevailed on its specific claims regarding the lack of price control provisions in the 2019 Registry Agreements for .INFO and .ORG, with the Panel finding three violations of the Articles of Incorporation (Articles) and/or Bylaws. Specifically, the Panel declared that

ICANN’s approval of the 2019 Registry Agreements for .INFO and .ORG without price controls violated the Articles and/or Bylaws: (i) because ICANN did not reach its renewal decisions in an open and transparent manner; (ii) because ICANN’s renewal decisions involved a policy decision to be made by the ICANN Board, and the ICANN Board did not approve these decisions or comply with the procedural requirements for taking formal Board action; and (iii) because ICANN did not comply with the procedural requirements for ensuring that ICANN promotes the global public interest and acts for the benefit of the Internet community as a whole.

The Panel denied Namecheap’s request for cost shifting of legal fees. The Panel found that “neither party has asserted ‘frivolous or abusive’ claims or defenses.” “Accordingly, the Panel applies the general rule that ICANN shall bear all administrative costs paid to the ICDR (including arbitrator fees), and that each party should bear its own legal and expert witness fees and expenses.” (Final Declaration at ¶ 451.) The Panel ordered ICANN to reimburse Namecheap the sum of US\$58,750.00, the amount that Namecheap paid in IRP costs before ICANN had had the chance to reimburse Namecheap.¹ (Final Declaration at ¶ 452.)

In light of its declarations and its view that the noted violations “are procedural rather than substantive in nature,” “[t]he Panel’s overall recommendation is that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decisionmaking process to ensure that similar violations do not occur in the future.” (Final Declaration at ¶ 493.) The Panel also recommended the following (Final Declaration at ¶¶ 497-504):

- “[D]ecisions as to how to implement the Panel’s rulings in this IRP should be made by the ICANN Board”;
- “[T]he ICANN Board should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest” that encourages participation of diverse stakeholders and “should be conducted in an open and transparent manner that avoids the violations found by the Panel”;

¹ ICANN had already agreed, pursuant to the Bylaws, that it would pay for the administrative costs of maintaining an IRP, including panelist fees.

- “[W]hile the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more extensive than for .INFO” in light of the Panel’s finding “that the evidence that price controls should be retained is much stronger for .ORG than for .INFO”;
- “[T]he Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable” and should explain the reasons for not conducting further expert analysis if that decision is made”;
- “[I]f the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public interest, the Panel recommends that ICANN seek to amend the 2019 Registry Agreements to include appropriate price controls”;
- “[T]he ICANN Board may wish to consider approaching the registry operators for .ORG and .INFO about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above”; and
- The “Board consider revisions to ICANN’s decisionmaking process to reduce the risk of similar procedural violations in the future,” such as “adopt[ing] guidelines for determining what decisions involve policy matters for the Board to decide, or what are the issues on which public comments should be obtained.”

The Panel also noted: “While providing recommendations is consistent with the purpose of the independent review process, the Panel notes that it has no expertise or experience regarding the internal operations of ICANN, or with the diverse stakeholders in the global Internet community, aside from information presented in this proceeding. Thus, the Panel’s recommendations are directed at identifying issues and measures that ICANN should consider and analyze further, in consultation with the Internet community.” (Final Declaration at ¶ 492.)

Submitted By: Amy A. Stathos, Deputy General Counsel
 Date Noted: 13 January 2023
 Email: amy.stathos@icann.org

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Process Panel

Namecheap, Inc.

Claimant,
- and -

Case Number: 01-20-0000-6787

Internet Corporation for Assigned Names
and Numbers (ICANN)

Respondent.

FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

Independent Review Panel

Glenn P. Hendrix, Chair
Grant L. Kim
Christof Siefarth

December 23, 2022

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FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

I. INTRODUCTION

1. This case arises from an Independent Review Process (“IRP”) initiated by Claimant Namecheap, Inc. (“Namecheap” or “Claimant”) against the Internet Corporation for Assigned Names and Numbers (“ICANN” or “Respondent”).¹ At issue is whether ICANN acted contrary to the ICANN Articles of Incorporation (“Articles”) and ICANN Bylaws (“Bylaws”) by approving new registry agreements in 2019, which removed the limits on maximum increases in the prices charged by the registry operators of the .ORG, .INFO, and .BIZ generic Top-Level Domains (“gTLDs”).

2. ICANN is responsible for overseeing the technical coordination of the Internet domain name system on behalf of the Internet community. ICANN enters into contracts with registry operators that operate specific gTLDs, such as .ORG, .INFO, and .BIZ. Registrars such as Namecheap purchase the non-exclusive rights to specific domain names from registry operators and sell them to end-users.

3. Thus, if an organization called “Noname” wanted to operate a website at “www.noname.org,” it could purchase the right to use that name from a registrar such as Namecheap, which would purchase the right to use that name from the registry operator for the .ORG gTLD, which is currently the Public Interest Registry, or “PIR.”

4. Before 1 July 2019, ICANN’s registry agreements with the operators of the .ORG, .INFO and .BIZ gTLDs capped price increases by registry operators at 10% per year.

5. When the registry agreements for .ORG, .INFO, and .BIZ expired on 30 June 2019, they were replaced with new registry agreements (the “2019 Registry Agreements”) that did not include this cap on price increases. As a result, the registry operators of the .ORG, .INFO, and .BIZ gTLDs were now able to increase prices by more than 10% annually. ICANN’s decision to remove the cap on price increases from the 2019 Registry Agreements is referred to as the “Price Cap Decision.”

¹ For convenient reference, the attached Appendix A sets forth all defined terms used in this Declaration.

6. IRP proceedings allow independent review of ICANN's actions that are alleged to violate the Articles or Bylaws.

7. Namecheap's IRP Request challenges "ICANN's decision to remove the provisions according to which the operators of .ORG, .INFO and .BIZ were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another."²

8. Namecheap's IRP Request seeks, *inter alia*, the following relief:

- i. A declaration that ICANN acted contrary to its Articles and Bylaws;
- ii. A declaration that, in order to comply with its Articles and Bylaws, ICANN must annul the Price Cap Decision;
- iii. A declaration that, in order to comply with its Articles and Bylaws, ICANN must ensure that .ORG remains dedicated to the non-profit sector by adopting measures such as requiring that .ORG be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service; and
- iv. A declaration that, in order to comply with its Articles and Bylaws, ICANN must ensure that price caps for legacy gTLDs can only be removed following policy development process that takes due account of the interests of the Internet users and with the involvement of the different stakeholders.³

9. This Declaration sets forth the Panel's decision on Namecheap's IRP Request.

II. THE PARTIES AND COUNSEL

10. Claimant Namecheap is an ICANN-accredited domain registrar and technology company founded in 2000, with its registered office at 4600 East Washington

² Namecheap Request for IRP ¶ 2.

³ *Id.* ¶ 58.

Street, Suite 305 Phoenix, AZ 85034, USA. It manages over 10 million domains and is one of the top web hosting providers in the world.⁴

11. Claimant is represented in this proceeding by:

Flip Petillion, Jan Janssen, and Diego Noesen of:

PETILLION
Guido Gezellestraat 126
B-1654 Huizingen
Belgium

12. Respondent ICANN is a non-profit public corporation organized under the laws of California, with its registered office at 1205 Waterfront Drive, Suite 300, Los Angeles, CA, USA 90094-2536.

13. Respondent is represented in this proceeding by:

Jeffrey A. LeVee, Eric P. Enson, Kelly M. Watne, and Nathan Gencarella of:

JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071 USA

III. BACKGROUND FACTS

C. The Domain Name System and ICANN

14. The creation of the Domain Name System (“DNS”), as a hierarchical structure with top-level domains (TLDs) dates back to 1981.⁵ Prior to ICANN’s creation

⁴ Namecheap Pre-Hearing Brief ¶ 4.

⁵ Namecheap Pre-Hearing Brief ¶ 55-56. This summary of background facts is based primarily on the background descriptions in the Parties’ submissions, which appear to be undisputed.

in 1998, the only generic TLDs (“gTLDs,” as contrasted with ccTLDs, country code top-level domains) were .COM, .NET and .ORG.⁶

15. The DNS makes the Internet network easier to navigate and manage in at least two ways. First, domain names are easier for people to remember than the IP addresses assigned to each computer, which are a series of numbers. Second, the hierarchical structure of the DNS avoids the need for every computer on the network to maintain a current list of all IP addresses of every other computer. Instead, each computer needs only a list of the IP addresses of the computers (called root name servers) that coordinate communications for a particular TLD. For example, if a user wants to access the ICANN website at ICANN.org, the user’s computer communicates with the root name server for the .ORG TLD, which will then direct the query to the servers for the ICANN.org website.⁷

16. ICANN controls and manages the unique single root at the top of the DNA hierarchical structure, including the allocation of IP addresses and the delegation of TLDs into the root. Registry operators for a specific TLD (such as .ORG) must obtain a license from ICANN for their TLD servers to be accessible via the Internet. Thus, ICANN controls both what TLDs are recognized, and the terms and conditions under which registry operators may operate their TLDs on the Internet.⁸

C. The Original gTLDs and Three Rounds of Expansions

17. The three original gTLDs (.COM, .NET, and .ORG) were all managed by Verisign (then known as Network Solutions), and price controls were required by the National Telecommunications and Information Administration (“NTIA”).⁹

18. Following its creation on 30 September 1998, ICANN introduced additional gTLDs in three rounds. The first round, in 2000, included .BIZ, .INFO,

⁶ Namecheap Pre-Hearing Brief ¶ 61. The original gTLDs also included .EDU, .INT, .GOV, and .MIL, but Namecheap notes that they are subject to strict registration requirements and are thus not comparable to .COM, .NET, and .ORG.

⁷ Namecheap Pre-Hearing Brief ¶ 55-56.

⁸ Namecheap Pre-Hearing Brief ¶ 59-60.

⁹ ICANN Pre-Hearing Brief ¶ 23.

.NAME and .PRO.¹⁰ The Registry Agreements for the unsponsored TLDs introduced during this round all had price controls.¹¹

19. The second round of additional gTLDs took place in 2004 and was limited to sponsored TLDs without any price controls.¹²

20. The original three gTLDs and the gTLDs delegated during the first and second round expansions are collectively referred to as “legacy gTLDs.”¹³

21. The third round was by far the largest expansion, involving over a thousand new gTLDs. It became known as the “New gTLD Program.” It dates back to a policy development process to develop recommendations for the introduction of new gTLDs that ICANN’s Generic Names Support Organization (“GNSO”) began in 2005.¹⁴

22. The ICANN Board adopted the GNSO recommendations in June 2008, and the application window was officially launched in 2012. Applications were evaluated under ICANN’s New gTLD Applicant Guidebook.¹⁵

C. The Base Registry Agreement for New gTLDs

23. Successful applicants proceeded to contract with ICANN, executing a Base Registry Agreement applicable to all new gTLDs.¹⁶ The version of the Guidebook that included the draft Registry Agreement was opened for public comments in 2008 and, after several revisions, formed the basis for launching the New gTLD Program in 2012. Another public comment period occurred in February 2013.¹⁷

¹⁰ Namecheap Pre-Hearing Brief ¶ 87.

¹¹ ICANN Pre-Hearing Brief ¶ 24.

¹² Namecheap Pre-Hearing Brief ¶ 87. “Sponsored” gTLDs are specialized gTLDs with a sponsor who represented the community to which they are directed. “Unsponsored” gTLDs are intended for broader use and do not have a sponsor. ICANN Pre-Hearing Brief ¶ 24.

¹³ Namecheap Pre-Hearing Brief ¶ 61.

¹⁴ ICANN Pre-Hearing Brief ¶ 26.

¹⁵ *Id.*

¹⁶ ICANN Pre-Hearing Brief ¶ 27.

¹⁷ ICANN Pre-Hearing Brief ¶¶ 27, 29-31.

24. In June 2009, ICANN retained an economist, Professor Dennis W. Carlton, to evaluate various aspects of the New gTLD program, including assessing the need for price control provisions. Dr. Carlton concluded that price controls for new gTLDs were unlikely to generate significant consumer benefits.¹⁸

25. The new Base Registry Agreement for new gTLDs did not include price caps, but did include certain other pricing protections.¹⁹ This Base Registry Agreement has been adopted for over 1,200 gTLDs in the DNS, mostly without modifications.²⁰

C. The 2019 Renewal of the Registry Agreements for .ORG, .INFO, and .BIZ

26. In contrast to the new Base Registry Agreement for new gTLDs, the Registry Agreements for .ORG, .INFO, and .BIZ included price caps until they were removed in 2019.

27. For example, the 2013 Registry Agreements for .ORG, .INFO, and .BIZ limited the price charged to registrars for domain name registrations to US \$8.25 until the end of 2013, with a maximum price increase of 10% for each subsequent calendar year.²¹

28. The 2013 .ORG, .INFO, and .BIZ Registry Agreements expired in June 2019. According to ICANN, the renewal negotiations for .ORG, .INFO and .BIZ began in May 2018. ICANN negotiated with the following registry operators: Neustar for .BIZ, Afiliacorp for .INFO, and PIR for .ORG. The negotiations between ICANN staff and these registry operators were mostly conducted by telephone.²²

29. The agreement renewals were discussed during an ICANN staff meeting on 5 December 2018.²³ In January 2019, ICANN received a draft memo from Dr. Carlton

¹⁸ ICANN Pre-Hearing Brief ¶ 32.

¹⁹ ICANN Pre-Hearing Brief ¶ 34. The Base Registry Agreement is RM 183.

²⁰ ICANN Pre-Hearing Brief ¶ 36.

²¹ Section 7.3(a), 22 August 2013 Registry Agreements for .ORG, .INFO, and .BIZ (RM 18, RM 27, RM 28).

²² ICANN Pre-Hearing Brief ¶ 44 footnote 86.

²³ Namecheap, Pre-Hearing Brief ¶ 153.

“ Redacted - Privileged ”. On 16 January 2019, another staff meeting took place.²⁴ An ICANN Board workshop took place in Los Angeles between 25 and 28 January, 2019 during which ICANN staff briefed the ICANN Board about the 2019 Registry Agreements. There are no minutes of the meeting, but ICANN provided the following summary in July 2019:

During the course of renewal negotiations with the respective registry operators for .biz, .info and .org, the ICANN org provided a briefing and held a discussion with the ICANN Board at the Board’s workshop in Los Angeles (25-28 January 2019). The org presented the history of the price controls in various gTLD contracts, how the concepts of price control and price protection were considered by the community during the development of the Base gTLD Registry Agreement for the New gTLD Program, and rationale for why ICANN org recommended adopting the Base RA rather than maintaining the price controls.²⁵

“ICANN org” or “org” refers to the ICANN organization, meaning the staff, as distinguished from the ICANN Board. The Board did not intervene in ICANN org’s plans to adopt the Base Registry Agreement rather than maintain price controls.

30. In the spring of 2019, ICANN announced that it would renew the .ORG, .INFO and .BIZ Registry Agreements without price controls. ICANN received over four thousand public comments from non-profits, international organizations, government agencies, individuals, and private companies, although many of these were computer-generated using an online template created by the Internet Commerce Association.²⁶ Almost all commenters objected to the removal of price controls. The ICANN staff published a Report of Public Comment Proceeding for each gTLD summarizing the comments.²⁷

²⁴ Namecheap, Pre-Hearing Brief ¶ 156.

²⁵ Annex 92, Letter from Cyrus Namazi (ICANN) to Zak Muscovitch, (General Counsel Internet Commerce Association), 26 July 2019, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

²⁶ ICANN Pre-Hearing Brief ¶ 51.

²⁷ ICANN Pre-Hearing Brief ¶¶ 51-52; Namecheap Pre-Hearing Brief ¶¶ 166-67.

31. On 1 May 2019, PIR's CEO, Jonathan Nevett, sent a letter to the ICANN Board stating that PIR (which, again, is the .ORG registry operator) "will not raise prices exorbitantly both because doing so would violate our values and because we are bound by the competitive market."²⁸

32. A Board workshop took place in Marrakesh during the "ICANN65" meeting in June 2019. The workshop was closed to the public and minutes were not recorded, but ICANN indicates that ICANN staff briefed the Board on the status of negotiations and the results of the public comment process, providing an analysis of public comments and "briefing papers" that outlined the rationale for renewing the Registry Agreements without price controls.²⁹

33. On 30 June 2019, ICANN renewed the .ORG, .INFO, and .BIZ Registry Agreements without price control provisions.³⁰

C. Namecheap's Reconsideration Request 19-2

34. On 12 July 2019, Namecheap requested reconsideration of the Price Cap Decision (Reconsideration Request 19-2), asserting that it was contrary to ICANN's Articles of Incorporation and Bylaws and based on an incomplete, non-transparent record.³¹ Namecheap's Request was limited to .ORG and .INFO.³²

35. On 27 August 2019, ICANN's Ombudsman accepted reconsideration of Request 19-2, while the Board Accountability Mechanisms Committee found that the Request was "sufficiently stated." The Ombudsman proceeded to substantively reevaluate Request 19-2 on 7 September 2019.³³

36. Namecheap and ICANN participated in an unsuccessful "Cooperative Engagement Process" on 18 November 2019.³⁴ On 21 November 2019, ICANN's Board

²⁸ Namecheap Pre-Hearing Brief ¶ 185.

²⁹ Namecheap Pre-Hearing Brief ¶¶ 179-80.

³⁰ Namecheap Pre-Hearing Brief ¶ 184; RM 18, 27, 28.

³¹ Namecheap Pre-Hearing Brief ¶ 189.

³² ICANN Pre-Hearing Brief ¶ 56.

³³ Annex 123, 124.

³⁴ Namecheap Pre-Hearing Brief ¶ 190.

denied Reconsideration Request 19-2.³⁵ On 25 February 2020, Namecheap initiated this IRP proceeding

IV. PROCEDURAL HISTORY OF THIS IRP

37. On 25 February 2020, Namecheap filed its IRP Request with the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association, which administers IRP proceedings.

38. Additionally, on 25 February 2020, Claimant filed a request for the appointment of an emergency panelist and an order providing for interim measures of protection (the “Emergency Relief Request”). Claimant sought to require ICANN to: (1) stay all actions that further the change of control of the .ORG registry operator to a for-profit entity during the pendency of the IRP; and (2) take all actions that are necessary to prevent the .ORG registry operator from removing the price control provision.

39. ICANN responded to the Emergency Relief Request on 11 March 2020, rejecting Namecheap’s claims on the merits and also maintaining that Namecheap lacked standing because it had not suffered any harm as a result of ICANN’s conduct and thus was not a proper “Claimant” under the Bylaws.

40. On 20 March 2020, the Emergency Panelist, Gary L. Benton, issued a decision denying the Emergency Relief Request on the basis that “the balance of hardships with respect to the requested interim relief tips in favor of ICANN.”³⁶ The Emergency Panelist made no ruling on the merits, stating: “In determining that interim relief is not appropriate at this time with respect to elimination of the price controls or the pending change of control review, it should be made clear that this decision does not resolve the merits to be fully addressed by the IRP Panel.”³⁷

41. The Emergency Panelist denied ICANN’s request that the IPR proceeding be summarily dismissed for lack of standing, but expressly noted that his findings on

³⁵ Namecheap Pre-Hearing Brief ¶ 191.

³⁶ Decision on Request for Emergency Relief ¶ 131.

³⁷ *Id.* ¶ 130.

standing were limited to the Emergency Relief Request and were not binding on this IRP Panel.³⁸

42. ICANN responded to Claimant's IRP Request on 10 April 2020. In addition to denying that it violated its Articles or Bylaws, ICANN renewed its argument that Namecheap lacked standing

43. In its IRP Request, Namecheap requested the Panel be composed of three members pursuant to Article 6 of the ICDR Rules, with each Party appointing one panelist.³⁹ Thereafter, the two appointed panelists were to select (with the consultation of the Parties) a third panelist who would serve as the chair of the Panel.

44. On 29 April 2020, Namecheap and ICANN selected Christof Siefarth and Grant L. Kim, respectively, as their party appointed panelists. On 11 May 2020, the ICDR appointed both as the party selected panelists. Both panelists agreed upon Glenn P. Hendrix to serve as the chair. On 14 July 2020, the ICDR confirmed Mr. Hendrix as the chairperson of the Panel.

45. During the course of this proceeding, the Parties made various written submissions to the Panel. The more significant submissions are listed in Appendix B to this Declaration.

46. The Parties submitted the following witness statements and expert reports, in addition to fact exhibits and legal authorities:

- Affidavit of Mr Hillan Klein of 22 March 2022 for Claimant
- Affidavit of Mr Hillan Klein dated 8 February 2022 for Claimant;
- Affidavit of Mr Hillan Klein of 21 December 2020 for Claimant;
- Affidavit of Ms Maryna Zhuravlova of 16 December 2020 for Claimant;
- Expert Report of 20 December 2020 by Professor Frank Verboven and Dr. Gregor Langus, with appendices (Economic Expert Report I) for Claimant;

³⁸ Decision on Request for Emergency Relief ¶ 94.

³⁹ See Namecheap IRP Request ¶ 55-56.

- Expert Report of 25 November 2021 by Professor Frank Verboven and Dr. Gregor Langus, with appendices (Economic Expert Report II) for Claimant;
- Expert Report of 8 January 2022 by Dr. Gregor Langus and Professor Frank Verboven (Economic Expert Report III) together with Domains and Complementary Services Gross Profit by Year (2017-2021) for Claimant;
- Presentation of Dr. Langus and Professor Verboven of 31 March 2022, for Claimant;
- Expert Report by Jeffrey J. Neuman of 19 November 2021 (Regulatory Expert Report) for Claimant;
- Opening Statement by Jeffrey J. Neuman of 31 March 2022 for Claimant;
- Expert Report of Dennis W. Carlton dated 14 January 2022 for Respondent;
- Presentation of Dennis W. Carlton dated 31 March 2022 for Respondent;
- Witness Statement of J. Beckwith (“Becky”) Burr dated 14 January 2022 for Respondent;
- Witness Statement of Maarten Botterman dated 14 January 2022 for Respondent;
- Witness Statement of Russell Weinstein dated 14 January 2022 for Respondent;
- Declaration of Russell Weinstein dated 14 October 2021 for Respondent.

47. The Panel has issued the following Procedural Orders during the course of this proceeding:

- Procedural Order No. 1, issued on 27 August 2020, determining the place of arbitration, governing laws and procedures, outlining the status of the dispute, summarizing the Parties’ views on scheduling and various procedural matters, the Parties’ views on exchanges of information, confidentiality matters, pleadings and communications with the Panel, exhibits, and other matters;

- Procedural Order No. 2, issued on 27 August 2020 concerning a series of issues including the status conference of 25 September 2020, disclosure requests, the final merits hearing, pre-hearing and post-hearing briefs and witness statements and other matters;
- Procedural Order No. 3, issued on 3 December 2020, regarding the case management conference held on 2 December 2020;
- Procedural Order No. 4, issued on 17 December 2020, decided a series of issues raised by the Parties including but not limited to an extension of set deadlines;
- Procedural Order No. 5, issued on 24 December 2020, ruled on the Parties' Motions to Compel Disclosure;
- Procedural Order No. 6, issued on 12 February 2021, was a partial ruling on Respondent's Motion to Dismiss;
- Procedural Order No. 7, issued on 27 February 2021, ruled on Namecheap's objection to ICANN's ESI Protocol for search terms and ICANN staff interview inquiries;
- Procedural Order No. 8, issued on 10 March 2021, was a final ruling on Respondent's Motion to Dismiss which:
 - granted ICANN's motion to dismiss Namecheap's IRP request with respect to a possible change of control of PIR to a for-profit entity (a transaction that ultimately did not occur), including Namecheap's request for a declaration that "in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that .ORG remains dedicated to the non-profit sector by adopting measures such as requiring that .ORG be operated by a non-profit entity";
 - denied ICANN's motion to dismiss Namecheap's IRP Request with respect to the price control issue.
- Procedural Order No. 9, issued on 10 March 2021, which granted in part and denied in part Claimant's Motion for Reconsideration regarding Procedural Order No. 6;

- Procedural Order No. 10, issued on 19 April 2021, as a revised case schedule;
- Procedural Order No. 11, issued on 20 August 2021, as a revised case schedule;
- Procedural Order No. 12, issued on 22 October 2021, granting relief on Namecheap's Motion to Compel and Motion for Sanctions;
- Procedural Order No. 13, issued on 2 November 2021, on Other Relief Sought by Namecheap's Motion to Compel and Motion for Sanctions;
- Procedural Order No. 14, on 2 November 2021, issued a revised case schedule with the following deadlines:

Event	Prior Date	Revised Date
Claimant to identify fact and expert witnesses	20 October 2021	30 November 2021
Claimant to submit Pre-Hearing Brief, Witness statements, exhibits, legal authorities	20 October 2021	30 November 2021
Respondent to identify fact and expert witnesses	15 November 2021	20 December 2021
Respondent to submit Pre-Hearing Brief, Witness statements, exhibits, legal authorities	3 December 2021	14 January 2022
Parties to communicate to the Panel whether the Hearing should be remote or in person, and if in person, the venue		1 February 2022
Claimant may seek leave for limited rebuttal	24 December 2021	8 February 2022
	14 December 2021	

Event	Prior Date	Revised Date
Initial Pre-Hearing conference via Zoom		14 February 2022 (8:30 a.m., Pacific time)
Respondent may object to leave (if sought) for limited rebuttal by Claimant	10 January, 2022	25 February 2022
Final Pre-Hearing conference via Zoom	17 January 2022	17 March 2022 (8:30 a.m., Pacific time)
Final Merits Hearing	24 - 28 January 2022	28 March - 2 April 2022

- Procedural Order No. 15, issued on 7 January 2022, addressing Annex 67, Annex 78, Slack communications, Dennis Carlton communications, and Namecheap’s Request regarding ICANN witnesses;
- Procedural Order No. 16, issued on 4 February 2022, addressing disclosure issues in connection with Annex 78 and certain communications by Dr. Dennis Carlton;
- Procedural Order No. 17, issued on 22 February 2022, finding that:
 - Dr. Dennis Carlton’s Communications are subject to the work product doctrine and ordering ICANN to produce the report for an *in camera* review by the Panel;
 - denying Namecheap’s motion to subpoena certain ICANN witnesses to testify at the hearing; and
 - denying Namecheap’s Motion for an in-person hearing.
- Procedural Order No. 18, issued on 4 March 2022, concerning:

- the 25 February 2022 objections of Respondent to the 8 February 2022 request of Claimant for leave to submit rebuttal materials; and
- the results of the Panel's *in camera* review of the 2018 draft report of Dr. Dennis Carlton pursuant to the Panel's directions in Procedural Order No. 17.
- Procedural Order No. 19, issued on 17 March 2022, regarding the pre-hearing conference on the same date and the Panel's ruling on various issues regarding the conduct of the hearing.

48. The Parties participated in a case management conference on 15 December 2021 and a pre-hearing status conference on 14 February 2022.

49. The oral hearing was conducted via videoconference from 28 March to 1 April 2022. The hearing was transcribed by Mark McClure, Certified Shorthand Reporter in and for the State of California. After submitting post-hearing briefs, the Parties presented oral closing arguments at a videoconference hearing on 29 June 2022.

V. GOVERNING LAWS AND PROCEDURES

50. The Parties have agreed that this IRP proceeding is conducted in accordance with the ICANN Amended and Restated Articles of Incorporation filed with the California Secretary of State on 3 October 2016, and the Bylaws as amended on 28 November 2019.

51. This Independent Review is administered by the ICDR. The governing rules include the ICDR International Arbitration Rules, as amended and in effect as of 1 June 2014 ("ICDR Rules"), and the Interim Supplementary Procedures for ICANN Independent Review Process (the "IRP Procedures") adopted on 25 October 2018. Section 2 of the IRP Procedures states: "In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR Rules, these Interim Supplementary Procedures will govern."

52. The Panel views this proceeding as an "international arbitration" within the meaning of the California International Arbitration and Conciliation Act ("CIACA"), given that the subject matter is "related to commercial interests in more

than one state.”⁴⁰ Given the global nature of the Internet, this dispute about the operation of the .ORG, .INFO and .BIZ gTLDs has worldwide implications. The Panel also observes that the Bylaws provide that Independent Review is intended to “[l]ead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.”⁴¹ Further, the IRP Procedures provide that IRPs shall be conducted in accordance with the ICDR Rules. Accordingly, this proceeding falls within the CIACA, to the extent that statute is not preempted by the Federal Arbitration Act.

53. The Parties have stipulated that the place of arbitration (seat) is Los Angeles, California, United States of America.

54. Article III of the ICANN Articles of Incorporation provides that ICANN “shall ... carry[] out its activities in conformity with relevant principles of international law and international conventions.”⁴²

VI. THE RELIEF SOUGHT

55. In its 30 November 2021 Pre-Hearing Brief, Claimant requested that the Panel make the following binding declarations:⁴³

- ICANN’s decision to remove the price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparency, and without discrimination or arbitrariness;

⁴⁰ See Cal. Civ. Proc. Code § 1297.13(d).

⁴¹ ICANN Bylaws § 4.3(a)(viii).

⁴² See also ICANN Bylaws § 1.2(a) (ICANN “must ... carry [] out its activities in conformity with relevant principles of international law and international conventions”).

⁴³ Namecheap Pre-Hearing Brief ¶ 425. Namecheap requested the same declarations in its 8 February 2022 Rebuttal Brief (¶ 160) and incorporated those requests by reference into its 27 May 2022 Post-Hearing Brief (¶ 61). Those declarations include some new requests that Namecheap did not include in its 25 February 2020 IRP Request or its 12 July 2019 Reconsideration Request 19-2. ICANN has objected to those new requests, as discussed in Section IX below.

- Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Sections 1.2 (a)(i), (iv) and (vi) of ICANN's Bylaws;
 - Sections 1.2(b)(iii), (iv) and (vii) of ICANN's Bylaws;
 - Section 1.2 (c) of ICANN's Bylaws;
 - Section 2.1 juncto Section 3.6(a)-(c) of ICANN's Bylaws;
 - Section 3.1 of ICANN's Bylaws;
 - Section 3.6(c) of ICANN's Bylaws;
 - Section 7.6 of ICANN's Bylaws; and
 - Section 7.17 of ICANN's Bylaws.
- ICANN's stated objective and requirement that .ORG be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service is violated by ICANN's decision to remove price caps in .ORG and must therefore be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a) of ICANN's Bylaws;
 - Section 1.1(a)(v) of ICANN's Bylaws;
 - Section 2.3 of ICANN's Bylaws;
 - Section 1.1(a)(i) juncto Article 3(1) of ICANN's Bylaws.

- ICANN's entering into registry agreements for .ORG, .INFO and .BIZ that do not contain price caps must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a) of ICANN's Bylaws;
 - Section 1.2(a)(v) of ICANN's Bylaws;
 - Section 2.3 of ICANN's Bylaws because ICANN's actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably;
 - Section 1.1(a)(i) juncto Article 3(1) of ICANN's Bylaws.
- ICANN's entering into the 2019 registry agreements for .ORG, .INFO and .BIZ without the cross-ownership restrictions that were in place for .ORG, .INFO and .BIZ at the date of the Board's adoption of the ICANN Board Resolution 2012.10.18.01 (sic) must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a) of ICANN's Bylaws;
 - Section 1.2(a) (v) of ICANN's Bylaws;

- Section 2.3 of ICANN's Bylaws because ICANN's actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably;
- Section 1.1(a)(i) juncto Section 3.1 of ICANN's Bylaws.
- ICANN's rejection of Namecheap's Reconsideration Request No. 19-2 must be annulled as inconsistent with and violative of Section 4.2(m) of ICANN's Bylaws;⁴⁴
- ICANN's actions and inactions to maintain the removal of price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the ICANN Articles of Incorporation;
 - Article III of the ICANN Articles of Incorporation;
 - Section 1.2(a)(i), (iv) and (vi) of ICANN's Bylaws;
 - Section 1.2(b)(iii), (iv) and (vii) of ICANN's Bylaws;
 - Section 1.2(c) of ICANN's Bylaws;
 - Section 2.1 juncto Article 3(6)(a)-(c) of ICANN's Bylaws;
 - Section 3.1 of ICANN's Bylaws;
 - Section 3.6(c) of ICANN's Bylaws;
 - Section 7.6 of ICANN's Bylaws;
 - Section 7.17 of ICANN's Bylaws;

⁴⁴ As discussed below, the Panel holds that Price Cap Decision violated ICANN's Articles and Bylaws and thus deems the issue of the Board's decision not to reconsider the Price Cap Decision moot.

- Naming Namecheap as the prevailing party in this IRP proceeding;
- Awarding Namecheap its costs in this proceeding, including but not limited to its internal costs, legal advice and representation costs, costs of expert witnesses, and any other costs such as for document review and transportation, made or still to be made until the final resolution of this IRP; and
- Awarding such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follows its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

56. ICANN requests that the Panel deny each of Namecheap's claims and requests for relief.⁴⁵

VII. ISSUES TO BE DECIDED

57. Namecheap's claims and ICANN's defenses present the following issues:

- **Issue 1:** Has Namecheap been "materially affected" by the dispute such that it has standing?
- **Issue 2:** Are Namecheap's claims regarding .BIZ, vertical integration, and the Feb06 policy time-barred?
- **Issue 3:** What standard applies to the Panel's review of actions by the ICANN organization and Board?
- **Issue 4:** Was the Price Cap Decision contrary to ICANN's obligation to apply policies and practices in a non-discriminatory manner?
- **Issue 5:** Did the ICANN organization act contrary to its transparency obligations in making the Price Cap Decision?

⁴⁵ ICANN Pre-Hearing Brief ¶ 179; ICANN Post-Hearing Brief ¶ 86.

- **Issue 6:** Was it contrary to the Articles of Incorporation and Bylaws for the ICANN organization (rather than the ICANN Board) to make the Price Cap Decision?
- **Issue 7:** Was the Price Cap Decision in connection with .ORG contrary to ICANN’s commitment to apply fairly its standards, policies, and processes?
- **Issue 8:** Was the Price Cap Decision contrary to ICANN’s obligation to act for the benefit of the Internet community as a whole?
- **Issue 9:** How should fees and costs be allocated in this proceeding?
- **Issue 10:** What is the scope of the Panel’s authority to award relief?
- **Issue 11:** What relief, if any, should be awarded here?

58. The following sections expand on these issues and set forth the Panel’s findings.

VIII. ISSUE 1: HAS NAMECHEAP BEEN “MATERIALLY AFFECTED” BY THE DISPUTE?

C. The Issue, Legal Framework, and Prior Rulings

59. A threshold issue is whether Namecheap qualifies as a “Claimant” under Section 4.3(b)(i) of the Bylaws, which states:

A “**Claimant**” is any legal or natural person, group, or entity including, but not limited to the EC (Empowered Community), a Supporting Organization (Supporting Organization), or an Advisory Committee (Advisory Committee) that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

60. “Disputes” are defined as: “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws,” which is

followed by a non-exclusive list of violations.⁴⁶ “Covered Actions” are defined as “any actions or failures to act by or within ICANN (Internet Corporation for Assigned Names and Numbers) committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”⁴⁷

61. Thus, to qualify as a “Claimant” for the purpose of this proceeding, Namecheap must show that it “has been materially affected” by a dispute concerning whether ICANN’s actions or failure to act violate the Articles or Bylaws, which means that Namecheap “must suffer an injury or harm that is directly and causally connected to the alleged violation.”

62. The mandatory nature of the “materially affected” requirement is reflected in Section 4.3(o)(i) of the Bylaws, which authorizes an IRP Panel to “[s]ummarily dismiss Disputes that are brought without standing....”

63. The Parties have used the term “standing” as a shorthand reference to the “materially affected” requirement reflected in Section 4.3(o)(i) of the Bylaws. While the Panel will also use the term “standing,” it bears emphasis that the concept of “standing” in this context is not necessarily the same as under the laws of the United States or other jurisdictions.

64. As noted above, the Emergency Panelist rejected ICANN’s argument that Namecheap lacks standing, while emphasizing that his decision was limited to the Emergency Relief Request only.⁴⁸ The Emergency Panelist stated:

As alleged as to the price control provisions, as a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and casually [sic] related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm [has] not occurred to date. The evidentiary support is

⁴⁶ Bylaws § 4.3(b)(iii).

⁴⁷ Bylaws § 4.3(b)(ii). The IRP Procedures contain the same definitions of “Claimant,” “Dispute,” and “Covered Actions” in the Section 1 Definitions. Because the definitions are the same, the Panel focuses on the Bylaws rather than the IRP Procedures.

⁴⁸ Decision on Request for Emergency Relief ¶ 94.

implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap's status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.⁴⁹

65. As also noted above, this Panel denied ICANN's request to dismiss this proceeding on the ground that Namecheap is not a proper "Claimant" under the Bylaws. The Panel emphasized, however, that its ruling was limited to the preliminary issue of whether Namecheap had made a sufficient *prima facie* showing of standing for the case to proceed:

ICANN's critiques go to the weight of Namecheap's evidence, but the Panel need not (and is not in a position to) make any findings as to whether Namecheap's factual allegations are well-founded or true. The Panel simply finds that they are sufficient to make out a *prima facie* case for standing such that the case may proceed.⁵⁰

66. The Panel based its finding that Namecheap had established a *prima facie* case for standing on the following points:

- The "has been materially affected" requirement of the Bylaws must be interpreted in view of the purposes of IRPs, which include ensuring that ICANN complies with its Articles and Bylaws, empowering the global Internet community and Claimants to enforce compliance with meaningful expert review, and ensuring that ICANN is accountable to the global Internet community.⁵¹
- While "has been" materially affected could be interpreted to mean that the harm must have already occurred, "[d]enying IRP review of significant ICANN actions that create a real risk of adverse impacts in the future that are the natural and expected consequence of an ICANN action or inaction would be contrary to the ... purposes of IRPs, as stated in the Bylaws."⁵²

⁴⁹ *Id.* ¶ 92.

⁵⁰ Procedural Order No. 8 ¶ 48.

⁵¹ *Id.* ¶ 40.

⁵² *Id.*

- The Bylaws expressly permit a Claimant to request “interim relief” which “may include prospective relief” to prevent “[a] harm for which there will be no adequate remedy in the absence of such relief.” Almost by definition, such prospective relief will be directed to future harm.⁵³
- The risk of future price increases that exceed the prior caps is the natural and expected consequence of removing such caps, since such increases would not be possible if the price control provisions were still in place.⁵⁴
- Given that an IRP request must be filed within 120 days after a Claimant becomes aware of the material effect of the challenged ICANN action, and in any event within 12 months from the date of that action, interpreting “materially affected” to require a showing of actual price increases would prevent review of the Price Cap Decision if registry operators waited over a year to increase prices. That would be inconsistent with the IRP purpose of ensuring independent review of significant ICANN decisions.⁵⁵
- All stakeholders, including ICANN, share an interest in prompt review of the Price Cap Decision, to clarify whether that decision remains in effect and to decrease the risk that it will be too late to unring the bell.⁵⁶
- ICANN disputed Namecheap’s evidence that the registry operators of .ORG, .INFO, and .BIZ have significant market power that creates a risk of large price increases, but that is an argument that goes to the weight of the evidence which is not appropriate for resolution on a summary motion to dismiss.⁵⁷

67. Both sides have now had a full opportunity to present evidence and arguments on standing, including in their written pre-hearing and post-hearing submissions, during the merits hearing from 28 March to 1 April, 2022, and during the

⁵³ Procedural Order No. 8 ¶ 41.

⁵⁴ Procedural Order No. 8 ¶ 44.

⁵⁵ *Id.* ¶ 42.

⁵⁶ *Id.* ¶ 43.

⁵⁷ *Id.* ¶ 48.

oral closing arguments on 29 June 2022. The key points of the Parties' submissions are highlighted below.

C. Namecheap's Position

68. Namecheap maintains that Procedural Order No. 8 correctly states the test for standing, and that it has met that test for the reasons set forth in that order. Namecheap argues that the test must be interpreted in view of the purposes of IRPs, which include ensuring that ICANN complies with its Articles of Incorporation and Bylaws, and empowering the global Internet community to enforce such compliance through meaningful, affordable and accessible expert review.

69. Namecheap asserts that standing should be determined as of the date the IRP is filed, but maintains that a current risk of future harm is relevant. Namecheap contends that a current risk of future harm may decrease the current enterprise value of a company, and that actual harm may not immediately materialize for multiple reasons, including that registry operators may have decided to postpone price increases until after this IRP is concluded in order to avoid creating evidence that might favor Namecheap.

70. Namecheap asserts that decisions of the U.S. Supreme Court on standing have no greater relevance than decisions of other jurisdictions, and cites decisions from Switzerland and the European Court of Justice. Subject to that caveat, Namecheap cites U.S. Supreme Court decisions to argue that standing may be supported by "procedural injury," as when "agencies undertake actions without affording the statutory procedures due to the plaintiff - for example, when an agency promulgates a rule without addressing substantive comments submitted by the plaintiff on that rule."⁵⁸

71. Namecheap contends that the key evidence on standing includes:

- evidence that .ORG and other legacy gTLDs have sufficient market power to create a risk of price increases in excess of 10% (the limit in the now-removed price control provisions);

⁵⁸ Namecheap's 26 January 2021 Response to ICANN's Motion to Dismiss ¶ 5, citing *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (RM 66); *Summers v. Earth Island Inst.*, 555 U.S. 488, 495-97 (2009) (RM 63); and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (RM 64).

- Redacted - Claimant Designated Confidential Information
- evidence that vertically integrated registrars that own (or are owned by) a registry operator may decide not to pass through all of a price increase to its customers, since the registrar's lower profits will be offset by higher profits at the registry operator level, thereby placing Namecheap, which is not vertically integrated in this manner, at a competitive disadvantage;
- evidence that price increases may lower demand for domain names and/or complementary services; and
- evidence that price increases may harm Namecheap's brand image, which is based on low prices for domain names.

C. ICANN'S Position

72. ICANN contends that the analysis of standing in Procedural Order No. 8 is incorrect and asks the Panel to reconsider. ICANN maintains that standing requires a showing of past harm that has already occurred, because the Bylaws use the term, "has been affected," in the present perfect tense. ICANN contends that a current risk of future harm is insufficient.

73. ICANN argues in the alternative that if future harm is sufficient, it must be limited to an "imminent risk of material harm that is directly and causally connected to the alleged violation of the Articles of Bylaws." ICANN also argues that Namecheap must show that such harm is "likely" to occur; the mere possibility does not suffice.

74. ICANN agrees with Namecheap that standing should be decided as of the date the IRP was filed, but argues that Namecheap's inability to show actual harm here, well after the Price Cap Decision, tends to show that Namecheap was not materially affected.

75. ICANN acknowledges that IRP procedures should be interpreted in view of the purposes of IRPs, but maintains that those purposes do not authorize this Panel to override the "plain meaning" of the Bylaws.

76. ICANN agrees with Namecheap that U.S. Supreme Court decisions on standing are not controlling, but states that they may be persuasive when they interpret “concrete injury,” which is somewhat analogous to the concept of “materially affected.” ICANN contends that U.S. Supreme Court decisions support its argument that any future harm must be “imminent” and likely to occur.

77. ICANN contends that Namecheap has failed to present any evidence that it has suffered harm that is directly connected with the removal of price caps from the registry agreements for the .ORG, .INFO, and .BIZ gTLDs. ICANN further contends that Namecheap has failed to present evidence that such harm is likely to occur in the imminent future.

78. ICANN argues that Namecheap cannot demonstrate that it has been “materially affected” by the Price Cap Decision because (a) the evidence shows that .ORG, .INFO, and .BIZ prices are unlikely to increase in the future to levels above those allowed by the prior price caps; and (b) even if prices increased above the previously permitted levels, the evidence shows that Namecheap would pass through those increases to customers and thus would not be materially harmed.

79. ICANN asserts that key evidence that .ORG, .INFO, and .BIZ prices are unlikely to increase above previously allowed levels includes:

- Registry operators of .ORG, .INFO, and .BIZ have not increased prices by more than 10% per year after the new registry agreements were signed in July 2019;
- Increasing competition from other TLDs makes it unlikely that .ORG, .INFO, and .BIZ prices will increase above the previously allowed levels, especially competition from .COM, the most popular TLD, which is still subject to price controls.
- Even if prices were increased by more than allowed under the prior price control provisions, Namecheap would likely pass through 100% of the price increases to its customers and would thus suffer no harm.

80. ICANN maintains that key evidence that Namecheap will pass through price increases to its customers includes the following:

- Namecheap has publicly stated that it will pass through price increases to customers;
- Dr. Carlton’s regression analysis shows that Namecheap has on average
Redacted - Claimant Designated Confidential Information
- Economic theory predicts that in a competitive market with conditions such as those in the DNS, registrars will fully pass on price increases, given that they all face the same price increases in view of ICANN’s prohibition on differential pricing to registrars;
- Because Namecheap’s competitors will be subject to the same price increases, such increases are unlikely to cause Namecheap to lose customers
- Namecheap has presented no evidence of any actual lost profits or customers due to price increases.

81. ICANN further contends that Namecheap has not demonstrated that price increases are likely to harm Namecheap in the context of vertically integrated competitors that serve as both registrars and as registry operators, especially in view of ICANN’s prohibition against discriminatory pricing by registry operators;

82. Finally, ICANN asserts that Namecheap has not demonstrated that price increases are likely to cause harm to Namecheap’s reputation or brand equity.

C. The IRP Panel’s Analysis and Decision

83. The Panel is not persuaded to reconsider its preliminary decision in Procedural Order No. 8 that Namecheap has standing under the “materially affected” test of the Bylaws. The Panel reaffirms that decision, while refining its reasoning in view of the additional arguments, legal authorities, and evidence presented.

1. Harm to Procedural Rights “Materially Affects” a Claimant with a “Concrete Interest” in those Rights

84. When Procedural Order No. 8 was issued, the Panel understood from the Parties that no prior IRP cases involved standing, except a single case where the matter

settled before any ruling on standing.⁵⁹ During oral closing arguments, however, ICANN’s counsel advised that standing was addressed in an IRP filed by the Gulf Cooperation Council (“GCC”), which had opposed an application for the new gTLD, “.PERSIANGULF.” ICANN explained that the GCC case involved an alleged violation of due process rights.

85. The Bylaws require this Panel to take into account prior IRP decisions involving the same or equivalent prior version of the Bylaws:

[A]ll IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue*, and norms of applicable law.⁶⁰

86. The GCC decision was issued on 19 October 2016, based on a version of the Bylaws in effect at that time that included a “materially affected” requirement similar to the clause at issue here.⁶¹ Thus, the analysis in GCC is pertinent here.

87. The GCC case arose from an application by Asia Green, a company founded by Iranian nationals, for approval of a new gTLD, “.PERSIANGULF.”⁶² Claimant GCC, an alliance of six Arab states, opposed the application on the ground that the proposed name refers to a place that is the subject of a historical naming dispute, and targets nearby countries who refer to that place as the “Arabian Gulf.”⁶³

⁵⁹ See Procedural Order No. 8 ¶ 23 and footnote 28.

⁶⁰ Bylaws § 4.3(v) (emphasis added).

⁶¹ RM-176, 19 October 2016 Partial Final Declaration in *Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-002-1065, ¶ 42 (quoting the “materially affected” clause in effect at that time). As discussed below, the “materially affected” clause was revised after the GCC decision was issued, but that revision does not alter the relevance of that decision.

⁶² 19 October 2016 Partial Final Declaration in *Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-002-1065 (RM-176, “GCC Partial Final Declaration”) ¶ 42 (quoting the “materially affected” clause in effect at that time). As discussed below, the “materially affected” clause was revised after the GCC decision was issued, but that revision does not lessen the relevance of that decision.

⁶³ GCC Partial Final Declaration ¶¶ 1-3, 6, 20.

88. The GCC and its member states used several mechanisms to oppose the .PERSIANGULF gTLD, including expressing concerns to the ICANN Government Advisory Committee (“GAC”), asking the GAC to issue an “Early Warning Notice” to the ICANN Board, invoking the “Independent Objector” process, and lodging a formal “Community Objection.”⁶⁴

89. In December 2014, the GCC filed an IRP request that challenged the ICANN Board’s September 2013 decision to continue to process the “.PERSIANGULF” application.⁶⁵

90. ICANN opposed the IRP request on several grounds, including that GCC had “failed to identify any legally recognizable harm” if .PERSIANGULF was registered. ICANN asserted that the contention that a .PERSIANGULF gTLD will create the false impression that the Gulf Arab nations accept the disputed name “Persian Gulf” is not a cognizable harm.⁶⁶ ICANN relied on the findings of the Independent Objector and Expert Panelist that GCC had not shown harm reaching the level of “material detriment.”

91. GCC replied that it had suffered injury or harm connected to ICANN’s alleged violation of the Articles or Bylaws because the Board’s decision to allow processing of the .PERSIANGULF application without fully considering GCC’s objections was a “denial of its due process rights” that caused harm “materially affecting” the GCC and its members.⁶⁷

92. The GCC panel first held that whether the Claimant has been “materially affected” by an ICANN Board action is a threshold question of standing, which “cannot and does not presuppose a successful request for IRP.” Rather, “as a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.”⁶⁸

⁶⁴ *Id.* ¶¶ 16-27.

⁶⁵ *Id.* ¶¶ 34-36, 50, 65.

⁶⁶ *Id.* ¶ 100.

⁶⁷ *Id.* ¶ 101.

⁶⁸ *Id.* ¶ 102.

93. The GCC panel then held that the “materially affected” test “cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed.” Rather, “it must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action.”⁶⁹

94. The GCC panel concluded that GCC had met this test “by describing the harm caused to its Gulf members’ due process rights, by definition, if the processing of the ‘.persiangulf’ gTLD application were to continue on the basis of a Board decision made without regard to the GCC’s objections.”⁷⁰

95. Thus, the GCC panel based standing not on a finding that approving .PERSIANGULF as a new gTLD would likely cause substantive harm to GCC, but rather on a finding that the Board’s alleged failure to fully consider GCC’s objections caused injury to GCC’s procedural rights. The GCC panel also held that proof of actual harm at the time the IRP request is filed is not essential; rather, it suffices to allege “reasonably credible injury or harm connected to the contested ICANN Board action.”⁷¹

96. The reasoning in the U.S. Supreme Court decisions cited by both ICANN and Namecheap support the conclusion that harm to procedural injury may confer standing.⁷²

97. Namecheap cited *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992) (RM-64), among other cases, to support its argument that “procedural injury” may confer standing.⁷³ ICANN also cited *Lujan*, but for the proposition that standing requires a showing of “actual or imminent” harm.⁷⁴

⁶⁹ *Id.* ¶ 105.

⁷⁰ *Id.* ¶ 105.

⁷¹ *Id.* ¶ 105.

⁷² The Panel agrees with ICANN and Namecheap that U.S. court decisions on standing are not binding in this IRP, but the rationale underlying those decisions may be persuasive to the extent they interpret concepts similar to the “materially affected” test in the ICANN Bylaws.

⁷³ Namecheap’s 26 January 2021 Response to ICANN’s Motion to Dismiss ¶ 16 (at 5).

⁷⁴ ICANN Post-Hearing Brief ¶ 24 and footnote 31.

98. The U.S. Supreme Court found no standing in *Lujan*, but recognized that harm to procedural rights may support standing in other cases.

There is this much truth to the assertion that “procedural rights” are “special.” The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

* * * *

We do not hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.⁷⁵

99. Thus, the U.S. Supreme Court held that harm to procedural rights may support standing if the procedures at issue are “designed to protect some threatened concrete interest” of the plaintiff that is the “ultimate basis” of standing. For example, a person living near a dam has standing to challenge a failure to obtain an environmental impact statement since that requirement is presumably intended to protect the interests of persons living nearby. In contrast, persons who live far from the dam may lack standing due to the lack of a concrete interest in the outcome of the dispute.

100. The Panel considers the *Lujan* test to strike a reasonable balance by allowing a person with a concrete interest in a procedural right to enforce that right, while not “opening the floodgates” to claims by persons who lack such an interest.

101. This case involves an IRP under the ICANN Bylaws, not a lawsuit against the U.S. government governed by the U.S. law of standing. Nevertheless, the Panel finds that similar policy concerns are implicated. Allowing anyone to bring an IRP

⁷⁵ RLA-7, *Lujan*, 504 U.S. at 572, footnotes 7 and 8.

based on ICANN's alleged violation of procedural obligations would open the floodgates to claims by persons who have only an abstract interest in the dispute.

102. Limiting claims to persons who have a concrete interest would not open the floodgates, but would promote the purposes of an IRP, which include: (1) ensuring that ICANN "complies with its Articles of Incorporation and Bylaws"; (2) empowering the global Internet community to enforce compliance; and (3) ensuring that ICANN is "accountable to the global Internet community and Claimants."⁷⁶

103. The IRP panel in the GCC case did not explicitly require a showing that the procedures at issue were designed to protect a "concrete interest" of the claimant. However, this is implied by (1) the GCC panel's holding that the claimant must allege "reasonably credible injury or harm *connected* to the contested ICANN Board action";⁷⁷ and (2) the Bylaws requirement that the claimant "must suffer an injury or harm that is directly and *causally connected* to the alleged violation."⁷⁸

104. "Causally connected" implies that the claimant has a real interest in the procedural rights at issue. Absent such an interest, it is hard to see how a claimant could allege "reasonably credible injury" that is "causally connected" to that violation. To borrow the dam analogy in the *Lujan* case, a person who lives far from a proposed dam has no concrete interest in ensuring that an environmental impact statement is prepared, so such a person would have difficulty in alleging reasonably credible injury that is connected with the failure to prepare such a statement. A person who lives far away could allege an abstract interest in ensuring that the government complies with the law. But to base standing on such an abstract interest would open the floodgates to suit by virtually anyone.

105. In sum, the Panel holds that harm to procedural rights confers standing under the "materially affected" test if the claimant has a "concrete interest" in the procedural rights and alleges "reasonably credible injury" that is "causally connected" to the claimed procedural violation.

⁷⁶ Bylaws § 4.3(a)(i), (ii), (iii).

⁷⁷ See GCC Partial Final Declaration ¶ 105 (emphasis added).

⁷⁸ Bylaws § 4.3(b)(i) (emphasis added).

2. Standing Is Established by Namecheap's Claimed Injury to Procedural Rights that It Has a Concrete Interest in Enforcing

106. Namecheap claims that ICANN's "decision-making process" violated ICANN's procedural obligations under the Articles and Bylaws for several reasons:

- "ICANN failed to remain open and transparent in its decisions leading to the removal of price caps in .org, .info and .biz";⁷⁹
- ICANN's Price Cap Decision improperly benefited individual registry operators "without granting the Internet community and those entities most affected with a useful and meaningful opportunity to assist in the policy development process."⁸⁰
- ICANN violated its commitment to remain accountable to the Internet community by removing price caps "in spite of – and without responding to – the concerns raised," including "an unprecedented number of public comments from an entire cross-section of the Internet community."⁸¹
- "No analysis" preceded the Price Cap Decision, and the ICANN Board "rubber-stamped that decision without any analysis of its own."⁸²

107. Namecheap's claim that ICANN made its Price Cap Decision in a non-transparent manner without adequately considering the Internet community's concerns is similar to GCC's claim that ICANN failed to fully consider its objections to the .PERSIANGULF gTLD. Both claims involve alleged harm to procedural rights.

108. The Panel finds that Namecheap has a sufficient concrete interest in ICANN's alleged violation of procedural rights to confer standing. As a registrar that pays a fee to registry operators for every domain name it obtains for customers, any price increase by registry operators will have a direct and immediate impact on Namecheap. Using the dam analogy, Namecheap is similar to a person who lives near

⁷⁹ Namecheap Request for IRP ¶15, heading V.A.

⁸⁰ *Id.* ¶ 41.

⁸¹ *Id.* ¶ 42.

⁸² *Id.* ¶ 43.

the dam, rather than a person who lives far away. Namecheap has a direct interest in the Price Cap Decision that is not merely academic or speculative.

109. Namecheap seeks to protect procedural rights that are similar to those in the dam hypothetical in *Lujan*. The purpose of an environmental impact statement is to ensure that decisions as to proposed projects are made after due consideration of the impact on the surrounding environment. Enforcing the procedural right to an environmental impact statement ensures that impact will be considered, but does not necessarily mean that the project will not be approved.

110. Similarly, Namecheap seeks to enforce ICANN's procedural obligation under its Articles and Bylaws to make significant decisions in an open and transparent manner, after considering concerns expressed by the Internet community. Enforcing that obligation ensures that those concerns will be considered, but does not necessarily mean that the Price Cap Decision was substantively erroneous.

3. Standing Is Also Established by the Current Risk of Future Harm Due to Price Increases

111. ICANN contends that the "has been materially affected" test requires Namecheap to prove that it has already suffered economic harm or is likely to suffer economic harm in the imminent future. ICANN argues that Namecheap cannot show such harm because .ORG and .INFO prices have not increased since the 2019 Registry Agreements were signed by more than allowed by the prior price caps. ICANN further contends that Namecheap cannot show that such increases are likely in the imminent future, or that, if they occurred, that such increases would likely harm Namecheap.

112. ICANN's argument that standing requires proof of past or imminent economic harm is inconsistent with the *GCC* test, which provides that standing may be established by a violation of procedural rights that the claimant has a concrete interest in enforcing, even if no economic harm has occurred or is likely to occur in the imminent future. The Panel thus rejects ICANN's argument on this point.

113. Further, the Panel reaffirms its prior ruling that an ICANN action creating a significant risk of future harm may establish standing under appropriate circumstances. As the Panel explained in Procedural Order No. 8:

A narrow reading of the standing requirement – requiring that injury or harm must have already occurred – would be at odds with ensuring that

ICANN complies with its Articles of Incorporation and Bylaws, empowering the global Internet community and claimants to enforce compliance with the Articles of Incorporation and Bylaws, and ensuring that ICANN is accountable to the global Internet community and claimants. As noted by Namecheap, ICANN's actions are forward-looking, and they generate their effects prospectively. Indeed, the Bylaws expressly permit a claimant to request “interim relief” which “may include prospective relief” to prevent “[a] harm for which there will be no adequate remedy in the absence of such relief.” Almost by definition, such prospective relief will be directed to future harm.⁸³

114. ICANN has not persuaded the Panel to reconsider the foregoing view.

115. ICANN emphasizes that the Bylaws define a Claimant as an entity that “has been materially affected,” which suggests that the ICANN action must have already had an impact on the Claimant.

116. The Panel agrees that there must have been some impact, but “materially affected” is a broad term that is not limited to actual economic harm. The removal of price control provisions from the 2019 Registry Agreements created a risk that prices may increase by more than 10% in the future. This is a new risk that has existed only since the price controls were removed. The fact that the price increases have not yet materialized does not mean that the risk does not exist.

117. As noted previously, delaying review of the Price Cap Decision until after prices are actually increased by more than 10% makes little sense.⁸⁴ Delay increases the risk that it may be too late to unring the bell. It is in the interest of all stakeholders, including ICANN, to resolve disputes about the Price Cap Decision promptly.

118. An October 2016 amendment to the Bylaws reinforces the conclusion that a current risk of harm due to future action may support standing. Before October 2016, the Bylaws excluded harm caused by third party actions, as highlighted below:

Pre-October 2016 Bylaws: “In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the

⁸³ Procedural Order No. 8 ¶ 41 (footnote omitted).

⁸⁴ *Id.* ¶ 43.

Board's alleged violation of the Bylaws or the Articles of Incorporation, *and not as a result of third parties acting in line with the Board's action.*"⁸⁵

119. The October 2016 amendment deleted the highlighted text so that the Bylaws now read as follows:

October 2016 Bylaws: "To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation."⁸⁶

120. The October 2016 deletion of the exclusion of third party acts makes clear that harm resulting from "third parties acting in line with the Board's action" may constitute harm that meets the "materially affected" test. Unlike harm resulting directly from Board action, harm resulting from "third parties acting in line with the Board's action" will likely lag the actual Board decision.

121. Here, the challenged ICANN action is the removal of price control provisions from the 2019 Registry Agreements, which have a term of ten years.⁸⁷ That action creates the new risk that registry operators may increase prices by more than previously allowed levels at some point during the ten-year term. Any harm from such increases would result from third parties "acting in line" with the Price Cap Decision.

122. The Panel finds that the risk of future economic harm is meaningful. While .ORG and .INFO price increases have not exceeded the prior limits since their removal in July 2019, this does not mean there is no risk of such increases during the remaining ten-year terms of the 2019 Registry Agreements.

123. Further, while competition from .COM and other gTLDs may limit .ORG and .INFO price increases to some extent, the testimony of both Namecheap and ICANN witnesses shows that .ORG, in particular, is a special gTLD that is not entirely

⁸⁵ Bylaws, as amended 11 February 2016, § 4.3(2) (RM 74) (emphasis added).

⁸⁶ Bylaws, as amended 1 October 2016, § 4.3(b)(i) (RER-10).

⁸⁷ 2019 Registry Agreement for .ORG, RM 29; 2019 Registry Agreement for .INFO, RM 30

fungible with .COM and other gTLDs. As discussed below, this creates a risk of future increases higher than would have been allowed under the prior price controls.⁸⁸

124. The Panel also finds that if prices increase by more than would have been allowed under the prior price controls, there is substantial evidence that such increases could harm Namecheap by decreasing its profit margins or causing it to lose customers.

125. Dr. Carlton opined that Namecheap would not be harmed because it would pass through 100% of price increases to its customers, without any loss in customers or profits. He asserted that (i) economic theory predicts 100% pass through due to intense competition between registrars; (ii) Namecheap publicly stated it would pass through price increases; (iii) Redacted - Claimant Designated Confidential Information ; and (iv) analysis of Namecheap data for all gTLDs during the same time period shows that Namecheap has, on average, Redacted - Claimant Designated Confidential Information .⁸⁹

126. In contrast, Namecheap's economics expert, Dr. Langus, opined that 100% pass-through was unlikely because (i) intense competition between registrars does not necessarily result in perfect pass-through;⁹⁰ (ii) Namecheap did not state that it would immediately pass through 100% of all price increases;⁹¹ (iii) because price controls were removed recently, the available data are not sufficient to conduct a reliable empirical analysis of the impact of that removal;⁹² and (iv) Dr. Carlton's empirical analysis is unreliable for several reasons, including Redacted - Claimant Designated Confidential Information .⁹³

127. Dr. Langus further opined that even if Namecheap passed through 100% of price increases to customers, Namecheap could be harmed for several reasons.

⁸⁸ The Panel focuses here on evidence that .ORG has market power, which is stronger than evidence related to .INFO. Evidence related to .INFO is discussed below in Section XI.D.

⁸⁹ Carlton Report ¶¶ 17-26 and Tables 1, 2; Carlton Presentation Slides 5, 6; Hearing Tr. Day V 12:6 to 14:11.

⁹⁰ EER-III ¶¶ 24-29.

⁹¹ *Id.* ¶¶ 39-40.

⁹² EER-II ¶ 79.

⁹³ EER-III ¶¶ 30-38; Hearing Tr. Day IV, 132:10 to 135:5.

128. First, Dr. Langus asserted that registry price increases could reduce overall demand for domain names, which would result in lost customers and profits.⁹⁴ He noted that companies often register multiple related domain names, for “defensive purposes” (*i.e.*, to protect against cybersquatters who register similar names) and also to make it easy for customers to find their website.⁹⁵ Large price increases may cause customers to abandon some of their multiple related domain names.

129. Second, Dr. Langus noted that Namecheap generates a substantial percentage of its profits from the sale of “complementary services” related to a domain name, such as email, storage space, and webpage templates and advice. Increased domain name registration prices could reduce demand for such services.⁹⁶

130. Third, Dr. Langus noted that competing registrars that are vertically integrated (such as GoDaddy, which acquired Neustar’s registry operations) would not need to pass through 100% of registry price increases, because the lower margins of the registrar would be offset by higher margins of the related registry operator.⁹⁷ If Namecheap matched the partial pass-through, it would face lower profit margins that would not be offset by the higher margins of a related company.⁹⁸ And if Namecheap passed through 100% of the price increases, its prices would be higher than the competing vertically integrated registry, which would be contrary to Namecheap’s brand image (“name cheap”) and could result in lost customers.

131. Dr. Langus stated that the ability of vertically integrated companies to manipulate prices in a way that harms competitors who are not vertically integrated is “a dominant theory of harm of antitrust enforcement agencies in vertical mergers” that is referred to as “input foreclosure.”⁹⁹ Dr. Langus testified that he did not know if this

⁹⁴ *Id.* ¶¶ 50-52.

⁹⁵ *Id.* ¶ 51; *see* EER-II, ¶¶ 119-22.

⁹⁶ EER-III ¶¶ 54-56.

⁹⁷ *Id.* ¶¶ 13, 41.

⁹⁸ *See* Hearing Tr. Day V 169:8 to 170:1 (vertically integrated companies such as GoDaddy can put pressure on Namecheap’s margins by not passing through all of a price increase).

⁹⁹ EER-I ¶ 89.

would actually occur, but economic theory predicts an incentive to do this, and the “theoretical prediction is robust.”¹⁰⁰

132. Dr. Carlton did not dispute that vertical integration creates the potential problem that “you might favor yourself over a rival that you compete with downstream.”¹⁰¹ He called this problem “a hot topic in antitrust and vertical mergers.”¹⁰² Dr. Carlton agreed that “there are limited circumstances when vertical integration can wind up harming competition.”¹⁰³ He also agreed that as a theoretical matter, “GoDaddy or other vertically integrated companies might choose to not pass it [price increases] all through because they can make it up elsewhere.”¹⁰⁴

133. Dr. Carlton stated, however, that he had seen no evidence that GoDaddy had actually manipulated prices in this manner.¹⁰⁵ He opined that GoDaddy was unlikely to do so because raising prices for a specific gTLD (such as .BIZ) might cause customers to shift to a different gTLD, meaning that “GoDaddy gets nothing.”¹⁰⁶

134. Both Dr. Langus and Dr. Carlton are well-credentialed, credible and articulate experts, and each made good points. For the purpose of the “materially affected” test, however, the Panel need not definitively resolve their conflicting views. Namecheap is not seeking to make a case for the recovery of damages. Rather, the critical issue, as stated in the GCC case, is whether Namecheap has alleged “reasonably credible injury or harm connected to” the contested ICANN action.¹⁰⁷

135. The Panel finds that Namecheap has presented sufficient evidence to support a “reasonably credible” claim that the removal of price controls creates a significant risk that price increases exceeding the prior limits will harm Namecheap. Even if Namecheap is able to pass through most increases, the risk remains that pass-

¹⁰⁰ Hearing Tr. Day V 170:2-14.

¹⁰¹ Hearing Tr. Day V 165:20-21.

¹⁰² Hearing Tr. Day V 165:17-18.

¹⁰³ Hearing Tr. Day V 166:12-14.

¹⁰⁴ Hearing Tr. Day V 166:12-14.

¹⁰⁵ Hearing Tr. Day V 90:15-22.

¹⁰⁶ Hearing Tr. Day V 167:22 to 169:1.

¹⁰⁷ GCC Partial Final Declaration ¶ 105.

through will be delayed or incomplete. That risk is especially acute in the context of a vertically integrated competitor that has both the ability and the incentive to pass through only a portion of price increases, forcing non-vertically integrated companies such as Namecheap to either reduce their margins or charge higher prices than the vertically integrated company.

136. Dr. Carlton agreed that incomplete pass-through by a vertically integrated competitor is a theoretical risk.¹⁰⁸ While he asserted that this was unlikely to occur, the Panel is not persuaded that the risk is insignificant. Accordingly, Namecheap has met the “materially affected” test by alleging “reasonably credible injury or harm connected to” the contested ICANN action.

4. Conclusion Regarding the Materially Affected Test

137. In sum, Namecheap has met the “materially affected test,” as interpreted in the GCC case, based on its claims that ICANN violated its procedural obligation to make decisions in an open and transparent manner, and Namecheap’s concrete interest as a registrar in enforcing that obligation. Namecheap has also presented reasonably credible evidence that it faces a meaningful risk of economic harm during the ten-year term of the 2019 Registry Agreements from price increases exceeding those allowed under the prior price control provisions.

IX. ISSUE 2: ARE NAMECHEAP’S CLAIMS REGARDING .BIZ, VERTICAL INTEGRATION, AND THE FEB06 POLICY TIME-BARRED?

C. The Issue and Legal Framework

138. Section 4 of the IRP Procedures sets a 120-day deadline to file an IRP:

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

¹⁰⁸ Hearing Tr. Day V 167:22.

139. ICANN asserts that the following Namecheap claims are untimely because Namecheap did not assert them within 120 days of becoming aware of the material effect of the action, as required by Section 4 of the IRP Procedures:

- Namecheap’s claim that ICANN’s Price Cap Decision regarding the .BIZ gTLD (the “**.BIZ Claim**”) violated ICANN’s Articles and Bylaws;¹⁰⁹
- Namecheap’s claim that ICANN “failed to apply fairly its policies and processes on vertical integration” (the “**Vertical Integration Claim**”);¹¹⁰ and
- Namecheap’s claim that ICANN “failed to apply fairly its policies and processes on the Feb06 Policy” (the “**Feb06 Policy Claim**”).¹¹¹

140. The following sections summarize ICANN’s timeliness objections and Namecheap’s response as to each of these claims, and then explain the Panel’s decision.

C. Timeliness of Namecheap’s .BIZ Claim

1. ICANN’S Position

141. ICANN’s timeliness objection to Namecheap’s .BIZ Claim focuses on the content of Reconsideration Request 19-2, which Namecheap filed on 12 July 2019.

142. ICANN states that Namecheap admitted in its Reconsideration Request 19-2 that it became aware on 1 July 2019 of the “material effect” of ICANN’s Price Cap Decision, which occurred on 30 June 2019, so the 120-day deadline to challenge that decision expired on 29 October 2019.¹¹²

143. ICANN contends that Namecheap missed that deadline as to its .BIZ claim, because Reconsideration Request 19-2 sought reconsideration of ICANN’s Price Cap Decision as to .ORG and .INFO only, and not as to .BIZ.¹¹³ ICANN further contends

¹⁰⁹ ICANN Pre-Hearing Brief ¶¶ 169-74.

¹¹⁰ ICANN Pre-Hearing Brief ¶¶ 155, 157.

¹¹¹ ICANN Pre-Hearing Brief ¶¶ 156-57.

¹¹² ICANN Pre-Hearing Brief ¶ 170.

¹¹³ ICANN Pre-Hearing Brief ¶ 170.

that Namecheap’s “vague references” to “all legacy gTLDs” in Reconsideration Request 19-2 were not sufficient to put the .BIZ gTLD at issue.¹¹⁴

144. ICANN also notes that the ICANN Board’s Proposed Determination on Reconsideration Request 19-2 was limited to .ORG and .INFO only, and that Namecheap did not object to that limitation in its rebuttal.¹¹⁵

2. Namecheap’s Position

145. Namecheap does not dispute that it was required to challenge ICANN’s Price Cap Decision regarding .BIZ by 29 October 2019. Namecheap contends, however, that it met this deadline because Reconsideration Request 19-2 put .BIZ at issue for several reasons.

146. First, Namecheap emphasizes that Reconsideration Request 19-2 “requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in *all* legacy TLDs.”¹¹⁶

147. Second, Namecheap notes that Becky Burr, a member of the ICANN Board of Directors, recused herself from the Board’s decision on Reconsideration Request 19-2, on the ground that “*this addresses issues that were arised (sic) in connection with the extension of the BIZ contract* and I was at Neustar and advised Neustar.”¹¹⁷ Namecheap argues that Ms. Burr’s recusal effectively acknowledges that Reconsideration Request 19-2 put the .BIZ renewal agreement at issue.

148. Third, Namecheap contends that “ICANN’s decisions regarding .ORG, .INFO and .BIZ were jointly taken” and resulted “in a single and non-severable decision.” Namecheap argues that addressing .ORG and .INFO only would be “unworkable,” because it might result in “disparate treatment,” which could lead to a new IRP “on exactly the same issue.”¹¹⁸

¹¹⁴ ICANN Pre-Hearing Brief ¶ 171.

¹¹⁵ ICANN Pre-Hearing Brief ¶ 172-73.

¹¹⁶ Namecheap Rebuttal Brief ¶ 151, quoting Reconsideration Request 19-2, Section 9 (emphasis added by Namecheap).

¹¹⁷ Namecheap Rebuttal Brief ¶ 153 (emphasis added by Namecheap).

¹¹⁸ Namecheap Rebuttal Brief ¶ 153 (emphasis added by Namecheap).

3. The IRP Panel's Analysis and Decision

149. Namecheap filed this IRP on 25 February 2020, which is more than 120 days after 1 July 2019, which is the date that Namecheap admittedly became aware of the material effect of ICANN's decisions to renew registry agreements for .ORG and .INFO without price controls.

150. ICANN has not asserted that this IRP is untimely as to .ORG and .INFO, apparently because it considers Namecheap's 12 July 2019 Reconsideration Request 19-2 to have tolled the 120-day deadline with respect to those domains.¹¹⁹ Thus, for purposes of this IRP, the Panel is proceeding with the understanding that a timely reconsideration request tolls the 120-day deadline (but without making an independent determination on that point).¹²⁰

151. Namecheap has not disputed that 1 July 2019 is also the date that it became aware of the material effect of ICANN's decision to renew the registry agreement for .BIZ. The critical issue then is whether Reconsideration Request 19-2 tolled the 120-day deadline by seeking reconsideration of ICANN's decision to renew the registry agreement for .BIZ without price controls, thereby meeting the 120-day deadline.

152. The Panel concludes that Namecheap's claim as to .BIZ is untimely because (a) Reconsideration Request 19-2 and related documents make it clear that Namecheap sought reconsideration of ICANN's decision regarding .ORG and .INFO only; and (b) Namecheap's other arguments are not persuasive, as discussed below.

a) Reconsideration Request 19-2 did not seek reconsideration of the ICANN decision regarding .BIZ

153. Under a header with the title, "Description of specific action you are seeking to have reconsidered," Section 3 of Reconsideration Request 19-2 states in full:

¹¹⁹ ICANN notes that Section 4 of the IRP Procedures required Namecheap to institute an "Accountability Mechanism" by 29 October 2019. The accountability mechanisms in the Bylaws include reconsideration (§ 4.2), as well as IRPs (§ 4.3).

¹²⁰ The Panel also notes that Namecheap initiated this IRP on 25 February 2020, which is within 120 days of the ICANN Board's denial of reconsideration on 29 November 2019.

On 30 June 2019, ICANN org *renewed the registry agreement for the .org and .info TLD without the historic price caps*, despite universal widespread public comment supporting maintain[ing] the price caps. The decision by ICANN org to unilaterally remove the price caps when renewing legacy TLDs with little (if any) evidence to support the decision goes against ICANN's Commitments and Core Values, and will result in harm to millions of internet users throughout the world. ICANN's announcement about this decision is at <https://www.icann.org/resources/agreement/org-2019-06-30-en> and <https://www.icann.org/resources/agreement/info-2019-06-30-en>.¹²¹

154. Namecheap's description of "the specific action you are seeking to have reconsidered" is clear and unambiguous. Namecheap sought reconsideration of ICANN's 30 June 2019 decision to "renew[] the registry agreement for the .org and .info TLD without the historic price caps." Namecheap provided hyperlinks to ICANN's public announcements of the renewal agreements for .ORG and .INFO. Namecheap did not request reconsideration of ICANN's decision to renew the .BIZ registry agreement without price controls; nor did it provide a hyperlink to the .BIZ renewal agreement.

155. Had Namecheap wanted to challenge the .BIZ renewal agreement, it should have referred to the .BIZ registry agreement.

156. As Namecheap has noted, Reconsideration Request 19-2 includes some general references to "legacy TLDs." For example, the second sentence of Section 3 refers to "[t]he decision by ICANN org to unilaterally remove the price caps when renewing legacy TLDs with little (if any) evidence to support the decision." But the second sentence of Section 3 must be read together with the preceding and following sentences, which refer to ICANN's decision regarding .ORG and .INFO. Section 3, when read as a whole, leaves no doubt that the only "specific action" that Namecheap challenged is ICANN's decision to renew the .ORG and .INFO registry agreements without price controls.

157. In Section 9 of Reconsideration Request 19-2, Namecheap asked ICANN to "reverse its decision and include (or maintain) price caps in all legacy TLDs."

¹²¹ Annex 8, Section 3 (emphasis added).

“Reverse its decision,” however, can only refer to the decision identified in Section 3, which is limited to .ORG and .INFO.

158. Namecheap’s request that ICANN “include (or maintain) price caps in all legacy TLDs” appears to be precatory in nature. Namecheap expressed the wish or desire that ICANN include or maintain price controls in all legacy TLDs, including other legacy TLDs such as .COM, for which price controls were still in effect.

159. Namecheap’s wish does not mean that it sought reconsideration of ICANN decisions regarding “all legacy TLDs.” In fact, Namecheap identified the decisions regarding .ORG and .INFO as the only decisions for which it sought reconsideration.

160. Thus, while Namecheap expressed the wish that ICANN “include (or maintain) price caps in all legacy TLDs,” it sought reconsideration only as to ICANN’s decisions regarding .ORG and .INFO.

161. The limited scope of Namecheap’s Reconsideration Request 19-2 is confirmed by the Proposed Determination that the ICANN Board issued on 3 November 2019. As ICANN has noted, the first sentence of the Proposed Determination stated:

The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization’s 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afiliás Limited (Afiliás) *for the .ORG and .INFO generic top-level domains (gTLDs)*, respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, *the .ORG/INFO Renewed RAs*), insofar as the renewals eliminated “the historic price caps” on domain name registration fees *for .ORG and .INFO*.¹²²

162. The Proposed Determination is explicitly limited to the decisions regarding the “.ORG/.INFO Renewed RAs.” Indeed, it refers to the “.ORG/.INFO Renewed RAs” over 30 times and concludes:

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org’s execution of the *.ORG/INFO*

¹²² Proposed Determination R-53 ¶ 1 (emphasis added).

Renewed RAs did not contradict ICANN’s Bylaws, policies, or procedures, and that ICANN staff did not fail to consider material information in executing the Agreement.¹²³

163. In contrast, the Proposed Determination’s only reference to the .BIZ registry agreement is a footnote stating the registry agreement was similar to the Base Registry Agreement.¹²⁴ That footnote contains no analysis of whether the decision to renew the .BIZ registry agreement without price controls was proper.

164. Namecheap did not object to the Proposed Determination by arguing that it failed to address renewal of the .BIZ registry agreement without price controls. On the contrary, Namecheap acknowledged that the Proposed Determination was limited to .ORG and .INFO.¹²⁵

The Requestor, Namecheap Inc., submits this Rebuttal to the ICANN Board’s Proposed Determination on Reconsideration Request (RfR) 19-2 (the ‘Recommendation’). The Recommendation concerns Requestor’s request that the Board reverse ICANN org and the ICANN Board decision of 30 June 2019 *to renew the registry agreement for the .org and .info TLDs without the historic price caps (the ‘Decision’)*.

165. In sum, the content of Reconsideration Request 19-2, the Proposed Determination of the ICANN Board, and Namecheap’s Rebuttal to Proposed Determination all point to the same conclusion: Namecheap sought reconsideration of the Price Cap Decision as to .ORG and .INFO only, and not as to .BIZ.

b) Namecheap’s other arguments regarding its .BIZ Claim are unavailing

166. Namecheap’s other arguments regarding .BIZ are not persuasive.

167. Namecheap contends that Ms. Burr’s recusal from the Board’s decision on Reconsideration Request 19-2 is effectively an admission that Namecheap sought

¹²³ Proposed Determination R-53 ¶ 22 (emphasis added).

¹²⁴ Proposed Determination R-53 ¶ 3, footnote 3.

¹²⁵ Annex 10 ¶ 1; Namecheap’s Rebuttal to Reconsideration Request 19-2, 18 November 2019 (emphasis added).

reconsideration of the renewal of the .BIZ registry agreement without price caps. Namecheap cites the following statement by Ms. Burr: “Because this addresses issues that were arised (sic) in connection with the extension of the BIZ contract and I was at Neustar and advised Neustar, I’m going to recuse myself from 19-2.”¹²⁶

168. The Panel is not persuaded by this argument. As Ms. Burr explained, she served from 2012 to March 2019 as Deputy General Counsel and Chief Privacy Officer at Neustar, which was the registry operator for the .BIZ gTLD.¹²⁷ Ms. Burr supported Neustar’s 2013 renewal of the .BIZ registry agreement and had limited involvement with the 2019 renewal. Ms. Burr testified that even though Reconsideration Request 19-2 did not challenge the absence of price control provisions from the .BIZ Registry Agreement, she recused herself “in an abundance of caution” to avoid any “appearance of a conflict.”¹²⁸

169. The Panel finds Ms. Burr’s testimony to be credible. While Reconsideration Request 19-2 was limited to .ORG and .INFO, the renewal agreement for .BIZ presented a similar issue, which created the risk of an “appearance of a conflict,” in that Ms. Burr’s views on the .BIZ renewal agreement could be perceived as influencing her views regarding the .ORG and .INFO renewal agreements.

170. The Panel concludes that Ms. Burr’s recusal was a reasonable exercise of professional judgment and is not an “admission” that Reconsideration Request 19-2 sought reconsideration of the renewal agreement for .BIZ. That conclusion is consistent with the content of Reconsideration Request 19-2, which was directed only to .ORG and .INFO, as discussed above.

171. Namecheap also contends that “ICANN’s decisions regarding .ORG, .INFO and .BIZ were jointly taken,” and resulted “in a single and non-severable decision.” Namecheap makes the related argument that addressing .ORG and .INFO only would be “unworkable,” because ICANN “would need to ensure that its

¹²⁶ Namecheap Rebuttal Brief ¶ 153.

¹²⁷ Burr Statement ¶ 3.

¹²⁸ Burr Statement ¶ 32.

implementation of the decision does not result in disparate treatment,” which could result in a new IRP “on the same issue.”¹²⁹

172. The Panel is not persuaded that addressing the merits of Namecheap’s claims regarding .ORG and .INFO only is “unworkable.” While the .BIZ decision was made at the same time as .ORG and .INFO, it was a separate decision involving a separate registry agreement that followed negotiations with a different registry operator.

173. In sum, the Panel finds that Namecheap’s .BIZ claim is untimely because Namecheap did not file this IRP or initiate another “accountability mechanism” (such as reconsideration) within the 120-day deadline in Section 4 of the IRP Procedures. Accordingly, the Panel dismisses that claim, without addressing its merits.

C. Timeliness of Namecheap’s Claims Regarding Vertical Integration and the Feb06 Policy

1. The Panel’s Preliminary Views of 22 April 2022

174. After the merits hearing, on 22 April 2022, the Panel invited the Parties to comment on ICANN’s timeliness objection to Namecheap’s claims regarding vertical integration and the Feb06 Policy and expressed the following preliminary views:

The Panel notes that Namecheap listed the following issue: “Did ICANN respect its Board-approved processes when removing cross-ownership restrictions in .ORG, .INFO, and .BIZ?” ICANN has asserted that claims based on Vertical Integration (or cross-ownership restrictions) and the Feb06 Policy are barred. The Panel’s preliminary view is that (1) standalone claims that ICANN improperly removed cross-ownership restrictions or violated the Feb06 Policy are beyond the scope of this IRP as framed by Namecheap’s IRP Request and Reconsideration Request 19-2; but (2) cross-ownership restrictions and the Feb06 Policy may be relevant as a factual matter to standing and Namecheap’s claim that

¹²⁹ Namecheap Rebuttal Brief ¶ 153 (emphasis added by Namecheap).

ICANN improperly removed price caps The parties are invited to comment on this preliminary view.¹³⁰

2. ICANN'S Position

175. ICANN agreed that claims involving the removal of cross-ownership restrictions or Feb06 Policy violations are beyond the scope of this IRP because Namecheap did not initiate a timely Accountability Mechanism (such as a reconsideration request) regarding the underlying decisions, nor did it include any such claims in its IRP Request.¹³¹ ICANN disagreed, however, with the Panel's preliminary view that cross-ownership restrictions and the Feb06 Policy may be relevant to standing and Namecheap's claim that ICANN improperly removed price controls.

176. ICANN asserted that "arguments relating to the removal of cross-ownership restrictions and the Feb06 Policy are not properly before the Panel" because Namecheap did not challenge any alleged violations of these policies within one year of their adoption. ICANN also maintained that Namecheap's representative, Mr. Klein, "conceded that Namecheap is not challenging anything relating to vertical integration."¹³²

177. ICANN further argued that any violations related to vertical integration or the Feb06 Policy would not be relevant to standing because any resulting harm to Namecheap would be "proximately caused by the change in vertical integration policy itself or violations of ICANN's non-discrimination policy, not the removal of price control provisions."¹³³

¹³⁰ April 22 List, Issue 4. As discussed below, "vertical integration" or "cross-ownership" refers to a situation where a registry operator shares common ownership with a registrar, The Feb06 Policy refers to a policy regarding registration agreements developed by the Generic Names Supporting Organization (GNSO), which the ICANN Board approved, but which ICANN did not implement.

¹³¹ ICANN Post-Hearing Brief ¶ 37.

¹³² *Id.* ¶ 38.

¹³³ *Id.* ¶ 98.

3. Namecheap's Position

178. Namecheap replied to the Panel's preliminary views as follows:¹³⁴

Namecheap is not making a separate claim with respect to ICANN's failure to apply fairly its policies and processes on vertical integration and on the Feb06 Policy, but in connection to ICANN's opaque decision to renew the .ORG, .INFO and .BIZ RAs without price caps. These issues are relevant as a factual matter, in particular to Namecheap's claim that ICANN improperly removed the price caps. Indeed, ICANN failed to implement, apply and abide by these policies when it decided to remove the price caps.

4. The IRP Panel's Analysis and Decision

179. The Panel retains its preliminary views that vertical integration and the Feb06 Policy are beyond the scope of this IRP to the extent that Namecheap is presenting them as separate claims, but they may be considered in connection with the claims that Namecheap asserted in this IRP.

180. The Panel considers claims for relief to be distinct from arguments and allegations that support a claim. The test for asserting a new claim is more stringent than for presenting new arguments or allegations that support a claim that has already been asserted. In general, claims may be time-barred if they are not asserted by the applicable deadline. In contrast, if a claim has been timely asserted, new arguments and allegations that support that claim can be made during the course of an arbitration or other legal proceeding, absent undue tardiness or prejudice to the opposing party.

181. As discussed above, ICANN interprets Section 4 of the IRP Procedures as requiring a claimant to initiate an IRP or other Accountability Mechanism within 120 days of becoming aware of the material effect of the challenged ICANN action. Further, Article 9 of the ICDR Rules states: "Any party may amend or supplement its claim, counterclaim, setoff, or defense unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties, or any other circumstances."

¹³⁴ ICANN Post-Hearing Brief ¶ 98.

182. Under these principles, it is generally not proper to assert entirely new claims challenging distinct ICANN actions that were not part of an IRP Request or other Accountability Mechanism (such as reconsideration) filed within the 120-day deadline. In contrast, that deadline does not require a claimant to include every specific argument and allegation that supports the claims in its IRP Request or reconsideration request.¹³⁵

183. As discussed below, Namecheap has asserted both “claims” and “arguments” regarding vertical integration and the Feb06 Policy. The Panel finds that claims regarding vertical integration and the Feb06 Policy are beyond the scope of this IRP, but the Panel may consider Namecheap’s arguments to the extent that they support the claims made by Namecheap in its IRP Request and Reconsideration Request 19-2.

a) Namecheap’s vertical integration claims and arguments

184. Namecheap did not mention vertical integration or cross-ownership in its July 2019 Reconsideration Request 19-2 or its February 2020 IRP Request.

185. Namecheap first mentioned vertical integration in connection with ICANN’s motion to dismiss for lack of standing. Namecheap argued in its 26 January 2021 Response to that motion that price increases could harm Namecheap even if Namecheap passed them through to its customers. To support this point, Namecheap asserted:

If some of Namecheap’s rivals do not fully pass through the price increase, Namecheap would lose customers to those cheaper rivals. The point is all the stronger if rivals are *vertically integrated* with any of the TLD operators concerned.¹³⁶

¹³⁵ These general principles may, of course, be subject to exceptions in specific cases; the Panel expresses no view on the scope of any exceptions that do not involve the specific facts of this case.

¹³⁶ Namecheap’s 26 January 2021 Response to ICANN’s Motion to Dismiss ¶ 64 (emphasis added).

186. Namecheap cited the first Economic Expert Report of Professor Dr. Verboven and Dr. Langus, which noted that GoDaddy, the world’s largest registrar, had acquired the registry business of Neustar, the registry operator of .BIZ.¹³⁷

187. Drs. Verboven and Langus opined that the vertical integration of Neustar’s registry operations with GoDaddy’s registry business provided the merged firm with the ability to manipulate prices and other sale terms in a way that may increase Namecheap’s costs while not imposing a similar burden on the merged firm.¹³⁸ They referred to such manipulation as “input foreclosure,” which is “a dominant theory of harm of antitrust enforcement agencies in vertical mergers.”¹³⁹

188. Ten months later, in its Pre-Hearing Brief of 30 November 2021, Namecheap asserted a new claim for a declaration that “ICANN’s entering into the 2019 registry agreements for .ORG, .INFO and .BIZ without the cross-ownership restrictions that were in place for .ORG, .INFO and .BIZ at the date of the Board’s adoption of the ICANN Board Resolution 2012.10.18.01 must be annulled as inconsistent with and violative of” international law and multiple clauses of the ICANN Articles and Bylaws.¹⁴⁰

189. To support this new cross-ownership claim, Namecheap stated in its Pre-Hearing Brief that in October 2012, the ICANN Board approved a process for registry operators to remove cross-ownership restrictions from their registry agreements.¹⁴¹ Namecheap claimed that ICANN applied its vertical integration policy “unfairly” by removing cross-ownership restrictions from the 2019 Registry Agreements for .ORG, .INFO, and .BIZ, without following the approved process.¹⁴²

190. ICANN promptly objected to Namecheap’s claim that “ICANN failed to apply fairly its policies and processes on vertical integration.” ICANN argued that it

¹³⁷ EER-I ¶ 88.

¹³⁸ EER-I ¶¶ 89-93.

¹³⁹ EER-I ¶ 89.

¹⁴⁰ Namecheap Pre-Hearing Brief ¶ 425, fourth bullet point (at 133) (emphasis added).

¹⁴¹ Namecheap Pre-Hearing Brief ¶ 390.

¹⁴² Namecheap Pre-Hearing Brief, ¶¶ 390-93.

was “completely inappropriate and prejudicial” for Namecheap to introduce this new claim “just before the merits hearing and after two years of litigation.”¹⁴³

191. The Panel agrees with ICANN that Namecheap’s request for a declaration that ICANN unfairly removed cross-ownership restrictions from the 2019 Registry Agreements is an untimely new claim. Namecheap did not make any similar claim in its July 2019 Reconsideration Request 19-2 or its February 2020 IRP Request. Indeed, those requests did not even mention “cross-ownership” or “vertical integration.”

192. Namecheap asserts that it “is not making a separate claim with respect to ICANN’s failure to apply fairly its policies and processes on vertical integration,” and instead relies on vertical integration “as a factual matter” that is relevant to its “claim that ICANN improperly removed the price caps.”¹⁴⁴ Yet Namecheap requested the following declaration in its Pre-Hearing Brief:

That “ICANN’s entering into the 2019 registry agreements for .ORG, .INFO and .BIZ *without the cross-ownership restrictions* that were in place for .ORG, .INFO and .BIZ at the date of the Board’s adoption of the ICANN Board Resolution 2012.10.18.01 must be annulled as inconsistent with and violative of” international law and multiple clauses of the ICANN Articles and Bylaws.¹⁴⁵

193. This request solely concerns ICANN’s decision to enter into registry agreements that do not contain cross-ownership restrictions. Removal of cross-ownership restrictions is a significant decision that is distinct from the removal of price controls. Namecheap itself distinguished between removal of cross-ownership restrictions and removal of price controls in its separate requests for declaratory relief. Further, Namecheap bases its challenge of the removal of cross-ownership restrictions on an entirely separate policy, adopted by the ICANN Board in 2012, which focuses on cross-ownership, and not price controls.

¹⁴³ ICANN Pre-Hearing Brief ¶¶ 155, 157.

¹⁴⁴ Namecheap Post-Hearing Brief ¶ 12.

¹⁴⁵ Namecheap Pre-Hearing Brief ¶ 425, bullet points 1, 2, 4 (at 131-33) (emphasis added). Namecheap repeated these requests in its 8 February 2022 Rebuttal Brief (¶ 160) and incorporated them by references in its 27 May 2022 Post-Hearing Brief (¶ 61).

194. Thus, the Panel concludes that Namecheap’s claim that ICANN improperly removed cross-ownership restrictions from the 2019 registry agreements should be dismissed.

195. At the same time, the Panel finds that Namecheap’s arguments on vertical integration that relate to standing or support its claim that ICANN improperly removed price controls from the 2019 registry agreements may be considered. In the context of standing, Namecheap’s vertical integration argument is not an affirmative claim for relief. Rather, it is a factual response to ICANN’s standing defense. Vertical integration may also be relevant, as a factual matter, to Namecheap’s claim that price controls became more important once ICANN allowed vertical integration and that ICANN failed to consider this in entering into the 2019 Registry Agreements.

b) Namecheap’s Feb06 Policy claims and arguments

196. The Panel makes a similar ruling regarding the Feb06 Policy.

197. Namecheap did not mention the Feb06 Policy in its July 2019 Reconsideration Request 19-2, its 18 November 2019 Rebuttal to the Board’s Proposed Determination, or its 25 February 2020 IRP Request.

198. Namecheap first mentioned the Feb06 Policy in its Pre-Hearing Brief of 30 November 2021. Namecheap claimed that “ICANN failed to apply fairly its policies and processes on the Feb06 Policy.”¹⁴⁶ To support this claim, Namecheap alleged as follows:

- In December 2005, the GNSO started a policy development process that became known as the “Feb06 PDP,” which addressed (1) price control policies for registry services; and (b) objective measures for approving price increases.¹⁴⁷
- The GNSO recommended that there should be a policy guiding registry agreement renewals and that individual negotiations for fees paid to ICANN should be avoided.¹⁴⁸

¹⁴⁶ Namecheap Pre-Hearing Brief ¶124 (heading (iii)).

¹⁴⁷ *Id.* ¶ 75.

¹⁴⁸ *Id.* ¶ 78.

- In January 2008, the ICANN Board accepted the GNSO’s recommendation on “contractual conditions for existing gTLDs” and directed the ICANN staff “to implement the recommendations, as outlined in the Council Report to the Board on the PDF Feb-06.”¹⁴⁹
- The ICANN staff, however, did not implement the GNSO’s recommendations, including the 2019 renewal of the registry agreements for .ORG, .INFO, and .BIZ.¹⁵⁰
- “A fair application of the Feb 06 policy would have required that ICANN implement the GNSO recommendations and develop an open and transparent process for the renewal of existing RAs, considering the possibility for competitive rebids.” ICANN did not follow this procedure, however.¹⁵¹

199. Namecheap stated in its Post-Hearing Brief that it “is not making a separate claim with respect to ICANN’s failure to apply fairly its policies and processes on ... the Feb06 Policy,” and that Namecheap relies on the Feb06 Policy “as a factual matter” that is relevant to “Namecheap’s claim that ICANN improperly removed the price caps.”¹⁵²

200. Namecheap is correct that it has not asserted a claim for declaratory relief that refers specifically to the Feb06 Policy. Namecheap, however, seeks a declaration that ICANN’s entry into the 2019 Registry Agreements without price caps violated Article I(2)(a)(v) of the Bylaws, which requires ICANN to “make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory”¹⁵³

201. Namecheap’s argument that “fair application of the Feb 06 policy” required ICANN to “develop an open and transparent process for the renewal of

¹⁴⁹ *Id.* ¶ 79.

¹⁵⁰ *Id.* ¶¶ 80, 402.

¹⁵¹ Namecheap Pre-Hearing Brief ¶ 402.

¹⁵² ICANN Post-Hearing Brief ¶ 98.

¹⁵³ Namecheap Pre-Hearing Brief ¶¶ 222, 425 (third bullet point, at 132).

existing RAs”¹⁵⁴ suggests that it is not relying on that policy solely as factual background to ICANN’s removal of price caps from the 2019 Registry Agreements. Rather, Namecheap appears to be claiming that ICANN violated the Feb06 Policy by not developing an “open and transparent process” for renewing the 2019 Registry Agreements.

202. To the extent that Namecheap’s claim is based on alleged violation of the Feb06 Policy, the Panel dismisses that claim as untimely and beyond the scope of this IRP.

203. The Feb06 Policy was approved by the ICANN Board in 2008, so Namecheap certainly knew about that policy long before 2019, and the time to challenge the policy has long since passed.

204. At the same time, the Panel will consider Namecheap’s allegations regarding the Feb06 Policy, to the extent that they serve as factual background to Namecheap’s claim that ICANN acted improperly by not including price controls in the 2019 Registry Agreements.

X. ISSUE 3: WHAT STANDARD APPLIES TO THE PANEL’S REVIEW OF ACTIONS BY THE ICANN ORGANIZATION AND BOARD?

C. The Issue and Legal Framework

205. An important threshold issue is the standard for this Panel’s review of the ICANN actions challenged by Namecheap. The Parties agree that the issue is governed by Section 4.3(i) of the Bylaws, which is almost identical to Rule 11 of the IRP Procedures:

Each IRP PANEL shall conduct an objective, de novo examination of the Dispute.

- (i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

¹⁵⁴ *Id.* ¶ 402.

- (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- (iii) For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment. . . .¹⁵⁵

206. “Covered actions” are defined as “any actions or failure to act by or within ICANN ... committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”¹⁵⁶

207. “Disputes” are defined as including “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws,” which is followed by a non-exclusive list of specific actions.¹⁵⁷

208. Thus, “objective, de novo examination” generally applies to challenged ICANN conduct, except for claims arising from “the Board’s exercise of its fiduciary duties.” As to such claims, “the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.”¹⁵⁸ The Parties dispute the scope of this “business judgment” exception.

209. The ICANN Bylaws were significantly amended in October 2016. IRP review was previously limited to actions of the ICANN Board only.¹⁵⁹ The October 2016 Amendments expanded review to actions of “individual Directors, Officers, or Staff

¹⁵⁵ Namecheap Pre-Hearing Brief ¶¶ 245-46 (citing Bylaws § 4.3(i) and IRP Procedures, Rule 11; ICANN Pre-Hearing Brief ¶¶ 58-60 (same)).

¹⁵⁶ Bylaws § 4.3(b)(ii); IRP Procedures, Rule 1.

¹⁵⁷ Bylaws § 4.3(b)(iii)(A); IRP Procedures, Rule 1. The definition includes two other types of claims that are not relevant here.

¹⁵⁸ October 2016 Bylaws (RER-10), § 4.3(b)(i).

¹⁵⁹ *See, e.g.*, February 2016 Bylaws (RM 74), § 3(1) (providing for independent review of “Board actions” alleged to be inconsistent with the Articles or Bylaws); § 3.4 (requiring IRP Panel to decide whether the ICANN Board acted consistently with the Articles and Bylaws).

members,” in addition to actions of the Board.¹⁶⁰ The October 2016 Amendments also changed the standard of review, which was previously defined by the following three-prong test:

The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?¹⁶¹

210. The October 2016 Amendments replaced this three-prong test with “objective, de novo examination of the Dispute,” subject to the “business judgment” exception discussed above.¹⁶²

211. The October 2016 Amendments bear on the relevance of prior IRP decisions that interpreted pre-October 2016 versions of the Bylaws. In fact, this IRP appears to be one of the first to address the standard of review under the business judgment exception adopted in October 2016.¹⁶³

¹⁶⁰ October 2016 Bylaws (RER-10), § 4.3(b)(ii) (defining “Covered Actions” subject to IRP review as actions or failures to act “committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”); November 2019 Bylaws (RM 2), § 4.3(b)(ii) (same definition in the version of the Bylaws in effect when this IRP began).

¹⁶¹ February 2016 Bylaws (RM 74), § 3(4).

¹⁶² October 2016 Bylaws (RER-10), § 4.3(b)(i).

¹⁶³ The Panel in the *Afilias* case noted a “profound divergence” between the parties to that case as to the scope of the business judgment exception to de novo review. 20 May 2021 Final Decision in *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702 (“*Afilias* Final Decision,” RM 190) ¶ 287. The Panel, however, resolved the claims without ruling on the precise scope of this exception. *See id.* ¶¶ 331-32, 348-49

C. Namecheap's Position

212. Namecheap asserts that objective, de novo review applies to all ICANN conduct at issue here, including that of the ICANN Board, for multiple reasons.

213. First, Namecheap argues that IRP decisions under pre-October 2016 versions of the Bylaws applied a non-deferential, de novo standard of review to Board action. For example, the first IRP held that “the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially.”¹⁶⁴ The Panel in the GCC case applied “a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.”¹⁶⁵ Namecheap asserts that the October 2016 Amendments sought to increase ICANN's accountability, so they cannot have been intended to afford more deference to the ICANN Board.¹⁶⁶

214. Second, Namecheap contends that the business judgment exception does not apply because Namecheap's claims arise from the Board's violation of the Articles and Bylaws, and not from “the Board's exercise of its fiduciary duties.”¹⁶⁷ Namecheap argues that the business judgment rule applies only when a Board fulfills its “managerial responsibility towards the corporation,” and is intended to protect individual directors from personal liability for qualifying decisions by the Board.¹⁶⁸ Namecheaps asserts that this case does not involve personal liability of directors, and

¹⁶⁴ Namecheap Pre-Hearing Brief ¶ 256, citing 19 February 2010 Declaration in *ICM Registry LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08 (RM 3) ¶ 136. *See also* Namecheap Pre-Hearing Brief ¶ 257 and footnote 262 (citing numerous IRP decisions that applied the three-prong test in the pre-October 2016 Bylaws).

¹⁶⁵ Namecheap Pre-Hearing Brief ¶ 258, citing GCC Partial Final Declaration (RM-176) ¶ 93. The GCC Partial Final Declaration was issued on 19 October 2016, shortly after the 1 October 2016 Amendments went into effect, but applied the three-prong test in the pre-October 2016 Bylaws. *See id.* ¶ 92. ¶

¹⁶⁶ Namecheap Pre-Hearing Brief ¶ 258, citing 3 November 2014 Cross Community Working Group (CCWG) Charter (RM-84).

¹⁶⁷ Namecheap Pre-Hearing Brief ¶¶ 254, 259.

¹⁶⁸ Namecheap Post-Hearing Brief ¶ 18.

that deference to Board decisions can be limited by the corporation's governing documents, which is what the Bylaws do.¹⁶⁹

215. Third, Namecheap contends that the business judgment rule does not abrogate a corporation's duty of care to avoid causing injury to third parties.¹⁷⁰

216. Fourth, Namecheap contends that the business judgment rule does not apply when the Board breaches its fiduciary duties or fails to exercise them.¹⁷¹ Namecheap argues that the Board's interpretation of the ICANN Articles and Bylaws is not an exercise of fiduciary duties, and that deferring to ICANN's interpretation of the standard of review would improperly allow ICANN to become its own judge.¹⁷²

217. Fifth, Namecheap argues that inaction by the Board does not qualify as an exercise of fiduciary duties. Rather, the business judgment rule can only apply to formal decisions by the Board, made in accordance with all applicable requirements.¹⁷³

218. Namecheap also makes the alternative argument that even if the business judgment exception applies, the Panel may (and should here) replace the Board's judgment with its own if (and because) the Board's decision is "not within the realm of reasonable business judgment."¹⁷⁴

C. ICANN's Position

219. ICANN agrees that the Panel applies de novo review to the actions or inactions of individual ICANN directors, officers, or staff members.¹⁷⁵ ICANN contends, however, that the business judgment exception to de novo review is extremely broad. ICANN asserts that "[b]ecause the Board is obliged to exercise its fiduciary duties whenever it operates as the ICANN Board," the exception applies to

¹⁶⁹ Namecheap Post-Hearing Brief ¶¶ 19-20.

¹⁷⁰ Namecheap Post-Hearing Brief ¶ 21.

¹⁷¹ Namecheap Post-Hearing Brief ¶ 22.

¹⁷² Namecheap Post-Hearing Brief ¶ 21.

¹⁷³ Namecheap Post-Hearing Brief ¶¶ 24-15.

¹⁷⁴ Namecheap Pre-Hearing Brief ¶ 255.

¹⁷⁵ ICANN Pre-Hearing Brief ¶ 60.

both actions and inaction of the Board, “whether that be in Board meetings, workshops, or informational calls, claims related to Board conduct.”¹⁷⁶

220. ICANN maintains that the IRP decisions cited by Namecheap are irrelevant because they involved earlier versions of the Bylaws that did not include a business judgment exception.¹⁷⁷

221. ICANN also maintains that “[e]very United States jurisdiction, including California, recognizes the ‘business judgment rule,’ which provides a ‘judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.’”¹⁷⁸

222. According to ICANN: (1) the ICANN organization (not the ICANN Board) “took all relevant actions relating to the 2019 Registry Agreement,” so de novo review applies to the Price Cap Decision;¹⁷⁹ and (2) the only Board action relating to Namecheap’s claims was the Board’s denial of Namecheap’s Reconsideration Request 19-2.”¹⁸⁰

223. Since the denial of reconsideration is the only Board action that ICANN contends is subject to deferential, business judgment review,¹⁸¹ ICANN concedes that de novo review applies to the Price Cap Decision, which was made by the ICANN organization, and not by the Board.

C. The IRP Panel’s Analysis and Decision

224. Because ICANN concedes that de novo review applies to the Price Cap Decision, the Panel finds that it need not address all of the Parties’ arguments about the the business judgment exception. Rather, it is sufficient to address three issues: (1) whether the business judgment exception applies only to formal Board actions, such as Board resolutions, or also to informal conduct; (2) whether the exception applies to

¹⁷⁶ ICANN Post-Hearing Brief ¶ 41.

¹⁷⁷ ICANN Post-Hearing Brief ¶¶ 61-62.

¹⁷⁸ ICANN Pre-Hearing Brief ¶¶ 63 and footnote 126 (citing several California court decisions).

¹⁷⁹ ICANN Post-Hearing Brief ¶¶ 42, 44.

¹⁸⁰ ICANN Pre-Hearing Brief ¶ 63

¹⁸¹ ICANN Post-Hearing Brief ¶ 42-43.

the Board's interpretation of the Articles and Bylaws; and (3) whether the exception applies to the Board's denial of Reconsideration Request 19-2.

225. It is not clear whether ICANN contends that business judgment review applies to informal Board actions or inactions. On the one hand, ICANN suggests that such review applies to all actions or inactions of the Board, "whether that be in Board meetings, workshops, or informational calls."¹⁸² On the other hand, ICANN asserts that "the only Board action relating to Namecheap's claims was the Board's denial of Namecheap's Reconsideration Request 19-2."¹⁸³

226. The Panel concludes that the business judgment exception applies solely to formal Board actions such as resolutions, not informal actions or inactions. In order to "act," the Board must comply with procedural requirements for formal Board meetings and resolutions. Informal views expressed at a workshop do not qualify as Board "action." Further, while the Board may approve a formal resolution not to take action, the mere absence of Board action cannot be deemed a formal act of the Board. As noted by Namecheap, if the business judgment exception applied to a mere failure to act, it would arguably mean that every staff decision of which the Board is aware but does not object qualifies as a Board "action" subject to deferential review.

227. As to the second issue – whether the exception applies to the Board's interpretation of the Articles and Bylaws – the Panel holds that it does not. The meaning of the Articles and Bylaws is not a "business judgment" but rather a legal issue for the Panel to decide, without according deference to any interpretation of the Articles and Bylaws by the Board.

228. As to the third issue – whether the exception applies to the Board's denial of Reconsideration Request 19-2 – the Price Cap Decision violated ICANN's Articles and Bylaws for reasons discussed below. Thus, the issue of whether the Board violated the Articles or Bylaws in not reconsidering the Price Cap Decision is effectively moot and will not be addressed in this Declaration. Accordingly, there is no need to determine the appropriate standard of review in connection with that decision. Finally, the Panel notes the following in evaluating Namecheap's claims: (1) the Panel gives special weight to prior IPR decisions that interpret the same or an equivalent prior

¹⁸² ICANN Post-Hearing Brief ¶ 41.

¹⁸³ ICANN Post-Hearing Brief ¶ 42.

version of the Bylaws;¹⁸⁴ and (2) while the Bylaws and IRP Procedures do not explicitly address this issue, the Panel applies the generally recognized international arbitration principle that the claimant bears the burden of proving its claims. As the Panel stated in the *Afilias* IRP: “It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.”¹⁸⁵ It is also “generally accepted in practice in international arbitration” that the degree of proof needed to carry the burden is the “balance of probabilities,” meaning that it is “more likely than not” that the claimant is correct.¹⁸⁶

XI. ISSUE 4: WAS THE PRICE CAP DECISION CONTRARY TO ICANN’S OBLIGATION TO APPLY POLICIES AND PRACTICES IN A NON-DISCRIMINATORY AND EQUITABLE MANNER?

C. The Issue and Legal Framework

229. Namecheap claims that the Price Cap Decision was contrary to ICANN’s obligation to act in a non-discriminatory and equitable manner.¹⁸⁷ Namecheap relies on the following “Non-Discriminatory Treatment” clause of the Bylaws:

Section 2.3. NON-DISCRIMINATORY TREATMENT

ICANN ... shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.¹⁸⁸

230. Namecheap also relies on ICANN’s “Commitments” in the Bylaws, which require that ICANN:

¹⁸⁴ Bylaws § 4.3(v) (emphasis added).

¹⁸⁵ *Afilias* Final Decision (RM 190) ¶ 31. The Panel understands the *Afilias* Panel’s reference to proving defenses to be limited to affirmative defenses such as the statute of limitations. A respondent who contends that the claimant has failed to prove its claim may bear the burden of presenting evidence to support specific assertions, but the claimant bears the ultimate burden of proof, except as to affirmative defenses.

¹⁸⁶ *Afilias* Final Decision (RM 190) ¶ 32.

¹⁸⁷ Namecheap Pre-Hearing Brief ¶¶ 220, 404-416.

¹⁸⁸ Namecheap Pre-Hearing Brief ¶¶ 220, citing Bylaws, § 2.3.

Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).¹⁸⁹

231. Namecheap further asserts that international law recognizes the principle of equal treatment and non-discrimination, which “requires that comparable situations are not treated differently unless differentiation is objectively justified.”¹⁹⁰

232. The Panel notes several general points about Sections 1.2(a)(v) and 2.3 of the Bylaws. First, Section 1.2(a)(v) is limited to “documented policies.” Section 2.3 is broader as it encompasses “practices, procedures, and standards” even if they do not rise to the level of “documented policies.”

233. Second, both clauses focus on the procedural issue of *how* the policy or practice is *applied*, and not its substantive merits. Even a completely unreasonable policy would not violate these clauses, as long as it were applied in an “equitable” and “consistent” manner. Conversely, applying a policy in a discriminatory and inconsistent manner would violate these clauses, even if the policy is substantively sound.

234. Third, these clauses recognize that “disparate treatment” is permissible if “justified” by “substantial and reasonable cause,” such as “the promotion of effective competition.”

235. Finally, the non-discrimination obligations of the Bylaws are more detailed and specific than the international legal authorities cited by Namecheap. The Panel finds that those international authorities do not add anything substantive, so it focuses on the non-discriminatory treatment obligations of the Bylaws.

C. Namecheap’s Position

236. Namecheap argues that ICANN applied its policies in a discriminatory manner by treating .ORG and .INFO differently than .COM and .NET.¹⁹¹ Namecheap notes that in 2019, the .COM and .NET registry agreements had price caps that the 2019

¹⁸⁹ Namecheap Pre-Hearing Brief ¶¶ 222, citing Bylaws, § 1.2(a)(v).

¹⁹⁰ Namecheap Pre-Hearing Brief ¶ 224 (footnote omitted).

¹⁹¹ Namecheap Pre-Hearing Brief ¶¶ 404-16; Namecheap Rebuttal ¶¶ 145-47.

Registry Agreements for .ORG and .INFO lack.¹⁹² Namecheap asserts that ICANN was required to include price caps in the 2019 Registry Agreements for .ORG and .INFO that are similar to .COM and .NET because the 2013 Registry Agreements for .ORG and .INFO required renewal terms to be similar to registry agreements of “reasonably comparable gTLDs.”¹⁹³

237. Namecheap contends that .ORG and .INFO are comparable to the .COM and .NET gTLDs for two reasons. First, the 2013 Registry Agreements for .ORG and .INFO specifically state that .COM, .ORG, .INFO, .BIZ, and .NET are “hereby deemed comparable.”¹⁹⁴ Second, Namecheap maintains that all of these gTLDs “are highly successful legacy gTLDs with a high level of DUMs and significant market power.”¹⁹⁵

238. In addition to citing the renewal clauses of the 2013 Registry Agreements, Namecheap asserts that “for over 20 years ICANN has recognized the need for price caps in major legacy gTLDs.”¹⁹⁶ Namecheap argues that ICANN failed to apply its policy or practice of imposing price controls on major legacy gTLDs in a consistent and equitable manner by removing price controls from .ORG, .INFO, and .BIZ.¹⁹⁷

239. Namecheap also notes that ICANN maintained price controls for .NAME in August 2021, even though that domain has a low level of DUMs relative to .ORG and

¹⁹² See 1 December 2012 .COM Registry Agreement § 7.3(d) (EER 122 at 13) (limiting .COM price increases to 7% per year); 24 June 2017 ICANN Board Resolution, RM 124 at 79-81 (approving .NET registry agreement that limited price increases to 10% per year).

¹⁹³ Namecheap Pre-Hearing Brief ¶¶ 405-07; see 2013 Registry Agreement for .ORG, § 4.2 (RM 18) (requiring renewal terms for .ORG to be similar to terms in “reasonably comparable gTLDs,” provided that “.com, .info, .net and .biz are hereby deemed comparable”); § 4.2 of 2013 Registry Agreements for .INFO and .BIZ. (RM 27, RM 28) (similar clauses).

¹⁹⁴ § 4.2 of 2013 Registry Agreements for .ORG, .INFO, and .BIZ (RM 18, 27, RM 28).

¹⁹⁵ Namecheap Pre-Hearing Brief ¶ 408. “DUMs” refers to “Domains Under Management.” Both Namecheap and ICANN have used the number of DUMs as a metric for the popularity and market power of a gTLD.

¹⁹⁶ Namecheap Rebuttal ¶ 146 (footnotes omitted), citing 24 June 2017 ICANN Board Resolution, RM 124 at 79-81, for ICANN’s 2017 reinstatement of .NET price controls.

¹⁹⁷ The Panel focuses on .ORG and .INFO because Namecheap failed to assert a timely challenge as to .BIZ. However, .BIZ remains relevant to whether ICANN consistently applied its policies and practices regarding legacy gTLDs.

.INFO.¹⁹⁸ Namecheap asserts that “the rationale for price caps in .ORG, .INFO and .BIZ is much stronger than the rationale for price caps in .NAME,” so ICANN’s maintenance of .NAME price caps means that “*a fortiori*, ICANN should maintain price caps in .ORG, .INFO and .BIZ.”¹⁹⁹

C. ICANN’s Position

240. ICANN argues that its Price Cap Decision did not violate its obligation to act in a non-discriminatory and equitable manner for several reasons.

241. First, while Section 4.2 of the 2013 Registry Agreements for .ORG and .INFO states that renewal terms shall be “similar” to those of “comparable” gTLDs such as .COM and .NET, the next sentence states:

*The preceding sentence, however, shall not apply to the terms of this Agreement regarding the price of Registry Services; standards for the consideration of proposed Registry Services, including the definitions of Security and Stability and the standards applied by ICANN in the consideration process; the terms or conditions for the renewal or termination of this Agreement; ICANN’s obligation to Registry Operator under Section 3.2(a), (b) and (c); the limitations on Consensus Policies or Temporary Specifications or Policies; or the definition of Registry Services, all of which shall remain unchanged.*²⁰⁰

242. ICANN asserts that the exclusion of “the price of Registry Services” means the .ORG and .INFO registry agreements need not have the same pricing terms as the registry agreements for .COM and .NET.²⁰¹

243. Second, ICANN contends that Namecheap was not a party to the 2013 Registry Agreements and thus “has no standing to assert any arguments related to those agreements....”²⁰² ICANN notes that those agreements state that they “shall not

²⁰⁰ ICANN Sur-Rebuttal ¶ 65, citing 2013 Registry Agreement for .ORG (RM 018 at 8) (emphasis added by ICANN).

²⁰¹ ICANN Sur-Rebuttal ¶ 65.

²⁰² ICANN Pre-Hearing Brief ¶ 144.

be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder.”²⁰³ ICANN further contends that “Section 8.6 of the 2013 Registry Agreements confirms that parties mutually can agree to modify the agreements, and the 2019 Registry Agreements reflect the parties’ intent to do so.”²⁰⁴

244. Third, ICANN asserts that there are valid reasons for retaining price caps in the registry agreements for .COM, .NET, and .NAME, all of which are operated by Verisign. ICANN asserts that .COM is “still subject to oversight by DOC [the U.S. Department of Commerce],” which requires price controls.²⁰⁵ ICANN emphasizes that “[n]o other gTLD is subject to similar oversight by the U.S. government,” so “.COM is dissimilar to all other gTLDs in the DNS in critical respects.”²⁰⁶

245. As to .NET and .NAME, ICANN asserts that the registry agreements contain price controls because Verisign chose not to transition to the Base Registry Agreement, which lacks price controls. In contrast, the registry operators for .ORG and .INFO “requested to transition to the Base Registry Agreement.”²⁰⁷

246. Fourth, ICANN contends that the alleged market power of .ORG and .INFO does not justify retaining price controls because Namecheap has not demonstrated that they “are necessary to protect the Internet community from the abuse of market power – or even that these registries possess sufficient market power to exploit the lack of price control provisions....”²⁰⁸

247. Finally, ICANN argues that the principle of non-discrimination actually supports its decision to transition .ORG and .INFO to the Base Registry Agreement, which lacks price controls. ICANN emphasizes that all 1,200+ new gTLDs use the Base Registry Agreement.²⁰⁹ In addition, “many other legacy TLDs have already made the

²⁰³ ICANN Response to IRP Request ¶ 51, footnote 90 (citing § 8.7 of the 2013 Registry Agreements).

²⁰⁴ ICANN Pre-Hearing Brief ¶ 144.

²⁰⁵ ICANN Pre-Hearing Brief ¶ 144.

²⁰⁶ ICANN Pre-Hearing Brief ¶ 145.

²⁰⁷ ICANN Pre-Hearing Brief ¶ 146.

²⁰⁸ ICANN Sur-Rebuttal ¶ 61.

²⁰⁹ ICANN Pre-Hearing Brief ¶ 143.

transition to the Base Registry Agreement,” so “there are only a small handful of gTLDs in the entire DNS that do not use the Base Registry Agreement.”²¹⁰

248. ICANN contends that Namecheap makes the “illogical” argument that the principle of non-discrimination requires it to treat the .ORG and .INFO gTLDs differently than the over 1,200 new gTLDs and several legacy gTLDs that lack price controls. ICANN asserts that it is “the *absence* of a price control provision – not the preservation of it – that has resulted in ensuring consistency across nearly all registry operators,” which “was a clear motivation for aligning the 2019 Registry Agreements with the Base Registry Agreement.”²¹¹

249. Thus, ICANN effectively argues that it had a policy or practice of transitioning legacy gTLDs to the Base Registry Agreement, which it applied in a consistent and non-discriminatory manner.

C. The IRP Panel’s Analysis and Decision

250. The Panel holds that Namecheap has not met its burden of proving that ICANN violated its obligation to apply its policies and practices in a non-discriminatory and consistent manner by not including price caps in the 2019 Registry Agreements for .ORG and .INFO that are similar to the price caps for .COM, .NET, and .NAME.

251. As an initial matter, the Panel rejects Namecheap’s argument that the 2013 Registry Agreements for .ORG and .INFO required renewal terms to include price caps similar to those of .COM and .NET. As ICANN notes, Section 4.2 of the 2013 Registry Agreements excluded “the price of Registry Services” from the terms that should be similar.²¹²

252. As to Namecheap’s argument that .ORG and .INFO are comparable to .COM and .NET, the Panel agrees that they are similar in some respects, but finds that

²¹⁰ ICANN Pre-Hearing Brief ¶ 147.

²¹¹ ICANN Pre-Hearing Brief ¶ 143.

²¹² ICANN Sur-Rebuttal ¶ 65. § 4.2 also states that excluded terms (such as prices) “shall remain unchanged,” but Namecheap has not argued that required the renewal agreements to retain the 2013 price caps. As ICANN notes, it is questionable whether Namecheap can rely on the 2013 agreements, which state that they confer no rights on non-parties, and do not prohibit the parties from agreeing to amend their terms

the similarities are not so strong that ICANN's obligation to act in a non-discriminatory manner alone required it to retain price controls in the 2019 Registry Agreements.

253. As Namecheap notes, COM, .NET, and .ORG were the three original gTLDs. They continued to be the only gTLDs available to all users at the time ICANN was created in 1998.²¹³ Thus, .COM, .NET, and .ORG enjoyed a "first-mover" advantage and positive "network effects" that have enabled them to become the three largest, best-known and most trusted gTLDs.²¹⁴ As of December 2020, .COM had about 157 million DUMs, .NET had 13.6 million; and .ORG had 10.4 million.²¹⁵

254. As discussed below, Namecheap presented evidence that .ORG has significant market power that may be comparable to or even greater than that of .COM and .NET.²¹⁶ ICANN has disputed that point, but its own witnesses acknowledged that .ORG has some market power.²¹⁷

255. The evidence of similarity is weaker as to .INFO, which is not an original gTLD and has fewer DUMs. However, INFO still has a large number of DUMs (4.5 million in December 2020, compared to over 10 million for .ORG).²¹⁸ The .INFO gTLD was introduced in the limited, first round of expansion of gTLDs in 2001, and is considered a "legacy gTLD."²¹⁹ .INFO has a first-mover advantage compared to the new gTLDs introduced after October 2013, although that advantage is not as great as the three original gTLDs, which predated ICANN's creation in 1998.

256. Another similarity is that .ORG., .INFO, .BIZ, .COM, and .NET, were all subject to price controls until 2019. In 2002, the maximum price was \$6 per year, unless

²¹³ Namecheap Pre-Hearing Brief ¶ 61. .EDU, .INT, .GOV, and .MIL are also original gTLDs, but registration is restricted, so they are not available for general use. Namecheap Pre-Hearing Brief ¶ 61, footnote 41.

²¹⁴ EER-II ¶¶ 111, 115-18. Hearing Tr. Day V, 120: 17-23; Langus, Verboven Presentation Slide 4.

²¹⁵ EER-II ¶ 150 and footnote 119.

²¹⁶ See *infra* Section XII.D.

²¹⁷ See *id.*

²¹⁸ EER-II, ¶ 150 and footnote 119.

²¹⁹ Namecheap Pre-Hearing Brief ¶ 61.

ICANN approved an increase upon finding certain conditions were met.²²⁰ Later registry agreements limited price increases to 7% for .COM, and to 10% for .NET, .ORG, .INFO, and .BIZ.²²¹

257. As discussed in further detail below, ICANN had proposed to remove price controls from .NET, .ORG, .INFO, and .BIZ in 2005, but retained them in the face of strong public opposition.²²² Before 2019, ICANN had not removed price caps from any legacy gTLDs, with the exception of .PRO, a very small gTLD with far fewer DUMS than .ORG, .INFO, and .BIZ.²²³

258. ICANN argues that other legacy gTLDs had transitioned to the Base Registry Agreement before 2019, including .JOBS, .TEL, .TRAVEL, .MOBI, and .CAT.²²⁴ Yet those gTLDs were all “sponsored” gTLDs aimed at a specific community, rather than the general public.²²⁵ In view of that community purpose, ICANN never imposed price controls on sponsored gTLDs; instead, registration prices as well as restrictions on registration were left to the sponsoring organization.²²⁶ In contrast, all unsponsored legacy gTLDs (.COM, .NET, .ORG, .INFO, .BIZ, and .PRO) had price controls from the outset.²²⁷

259. Thus, while some sponsored legacy gTLDs transitioned to the Base Registry Agreement before 2019, price controls were not “removed” because those gTLDs never had them. Before 2019, price controls were not removed from any price-capped unsponsored legacy gTLD, except for the relatively insignificant .PRO in

²²⁰ Neumann Expert Report ¶¶ 36-38; 10 November 1999 ICANN-NSI Registry Agreement for .COM, .NET, and .ORG, § 20 and Appendix B; *see* RM 41 (1999 Registry Agreement without Appendix B).

²²¹ Neumann Expert Report ¶¶ 65, 79, 150.

²²² Neumann Expert Report ¶¶ 58-60, 73-80.

²²³ Namecheap Pre-Hearing Brief ¶¶ 103-08, 411.

²²⁴ ICANN Pre-Hearing Brief ¶ 147, citing 26 July 2019 Letter from Cyrus Namazi of ICANN to Zak Muscovitch of the Internet Commerce Association (RE-8).

²²⁵ Namecheap Pre-Hearing Brief ¶¶ 87-88; Neumann Expert Report ¶ 62.

²²⁶ Namecheap Pre-Hearing Brief ¶¶ 87-88; Neumann Expert Report ¶ 63.

²²⁷ Namecheap Pre-Hearing Brief ¶¶ 61, 87.

2015.²²⁸ Thus, the Panel agrees with Namecheap that for many years, ICANN had a policy or practice of imposing price controls on unsponsored legacy gTLDs.

260. While .ORG and .INFO are similar to .COM and .NET in the above respects, they also differ in significant respects. .COM not only has far more DUMs than other gTLDs (157 million compared to 13.6 million for .NET and 10.4 million for .ORG), it is still subject to regulation by the U.S. government, which has mandated price controls.²²⁹ There is no similar government mandate for .ORG and .INFO. The Panel finds that the government mandate provides “substantial and reasonable cause” for ICANN to treat .COM differently than .ORG and .INFO.

261. .NET presents a closer case, especially relative to .ORG. Both .NET and .ORG are original gTLDs with a large number of DUMs (13.6 million for .NET and 10.4 million for .ORG in December 2020). Further, as discussed below, the evidence suggests that .ORG may have more market power in its niche market than .NET because it is strongly associated with non-profit organizations that the public can trust.²³⁰

262. ICANN argues that removing price caps from .ORG and .INFO did not violate the non-discrimination principle because transitioning legacy gTLDs to the same Base Registry Agreement used by over 1,000 new gTLDs, which lacks price caps, ensures “consistency across nearly all registry operators.”²³¹

263. ICANN also argues that transitioning legacy gTLDs to the Base Registry Agreement is reasonable for the following reasons:

- The Base Registry Agreement was adopted after extensive public comments and after an expert economist, Dr. Dennis Carlton, concluded that the new gTLDs did not need price controls.²³²

²²⁸ In 2015, .PRO had 124,000 DUMs, or about 1% of the 10.6 million DUMs of .ORG. (Namecheap Pre-Hearing Brief ¶ 104.) ICANN received only a few public comments about the 2015 .PRO registry agreement, none of which opposed the removal of price controls. (Namecheap Pre-Hearing Brief ¶ 107.)

²²⁹ ICANN Pre-Hearing Brief ¶ 145.

²³⁰ EER-II ¶ 150.

²³¹ ICANN Pre-Hearing Brief ¶143.

²³² ICANN Pre-Hearing Brief ¶¶ 29-34.

- The Base Registry Agreement includes procedural safeguards regarding price increases (such as advance notice of increases and the ability to lock-in old prices for ten years), and adds other safeguards and enhancements not related to prices;²³³
- The “maturation of the domain name market” and introduction of consumer choice and competition through the New gTLD Program have removed any need for price controls.
- Transitioning to the same Base Registry Agreements increases “operational efficiencies for ICANN, registry operators, registrars, and registrants,” since the same standard terms apply.²³⁴

264. ICANN asserts that .NET and .NAME are still subject to price controls because Verisign – which is the registry operator of .COM, .NET, and .NAME – declined to transition to the Base Registry Agreement. In contrast, the registry operators of .ORG and .INFO were willing to transition to the Base Registry Agreement.²³⁵

265. Having considered the foregoing arguments and evidence, the Panel concludes that Namecheap has not met its burden of proving that ICANN applied its policies and practices in a discriminatory manner for the following reasons.

266. First, while the record shows that ICANN had a practice of imposing price controls on unsponsored legacy gTLDs for many years, it also shows that ICANN has sought to transition legacy gTLDs to the Base Registry Agreement without price caps, following the introduction of the first new gTLDs in October 2013. Russell Weinstein, ICANN’s Vice President, Global Domand Division Accounts and Services, explained ICANN’s preference for transitioning to the Base Registry Agreement as follows:

[A]fter the Base Registry Agreement was finalized, my team and I discussed transitioning to the Base Registry Agreement with the legacy gTLD registry operators when their registry agreements were up for renewal. Transitioning these agreements to the Base Registry Agreement was ICANN’s preference because it ensured consistency across all registry

²³³ ICANN Pre-Hearing Brief ¶¶ 34-35, 45.

²³⁴ ICANN Pre-Hearing Brief ¶¶ 44-45, 109.

²³⁵ ICANN Pre-Hearing Brief ¶ 146.

operators so that legacy gTLDs operated under the same agreement as all of the new gTLDs. Similarly, many of the legacy registry operators also preferred to transition to the Base Registry Agreement when their agreements were up for renewal.²³⁶

267. Consistent with this practice, the .JOBS, .CAT, and .PRO legacy gTLDs transitioned to the Base Registry Agreement in 2015; and the .TEL and .MOBI legacy gTLDs transitioned in 2016 and 2017.²³⁷ While .PRO is a small gTLD and the others are sponsored gTLDs that never had price controls, the fact remains that all these legacy gTLDs transitioned to the Base Registry Agreement before 2019. Further, the sponsored gTLD .ASIA transitioned to the Base Registry Agreement on 30 June 2019, which is the same date that .ORG, .INFO, and .BIZ adopted the Base Registry Agreement.²³⁸

268. .NET and .NAME appear to be the only legacy gTLDs that were up for renewal between 2014 and 2019 that did not adopt the Base Registry Agreement.²³⁹ Mr. Weinstein testified that ICANN preferred to transition all legacy gTLDs to the Base Registry Agreement, but was unable to do so for .NET and .NAME because “Verisign, the registry operator for .COM, .NET, and .NAME, ... chose not to transition to the Base Registry Agreement during the latest negotiations of its .NET and .NAME registry agreements.”²⁴⁰ Mr. Weinstein explained:

Renewal of the registry agreements, however, involve bilateral negotiations between ICANN and the respective registry operators. Certain registry operators have chosen not to transition to the Base Registry Agreement for various business reasons, despite ICANN’s

²³⁶ Weinstein Statement ¶ 11.

²³⁷ ICANN Pre-Hearing Brief ¶ 147, citing 26 July 2019 Letter from Cyrus Namazi of ICANN to Zak Muscovitch of the Internet Commerce Association (RE-8). Mr. Namazi’s letter notes that these legacy gTLDs transitioned to the Base Registry Agreement since 2014, but does not identify specific dates. The years noted above are based on the registry agreements on ICANN’s website.

²³⁸ .ASIA Registry Agreement of 30 June 2019, RM 116.

²³⁹ Some legacy gTLDs were not up for renewal during this period, such as .COM, which was renewed in 2012 for a ten-year term. .COM is also a special case, in view of the government-mandated price controls.

²⁴⁰ Weinstein Statement ¶ 12.

preference. As a result, there is a small handful of legacy gTLD operators that have not adopted the Base Registry Agreement.²⁴¹

269. In view of the above evidence, the Panel finds that after the new gTLDs were introduced, ICANN implemented a practice of transitioning legacy gTLDs to the Base Registry Agreement whenever possible.

270. Second, the Panel finds that ICANN applied its new practice in a non-discriminatory, consistent and equitable manner. The evidence shows that ICANN has encouraged all legacy gTLDs that were up for renewal since 2014 to transition to the Base Registry Agreement. Verisign's decision not to transition .NET and .NAME to the Base Registry Agreement does not change this ICANN practice.²⁴²

271. Third, the Panel finds that ICANN's obligation to apply policies and practices in a non-discriminatory manner does not prohibit ICANN from adopting a new policy, even if it conflicts with a prior policy, as long as the new policy is applied in a consistent and non-discriminatory manner. As noted above, the non-discrimination clauses of the Bylaws focus on how the policies are applied, not the substantive merits of the policy. The DNS is a continually evolving field that did not exist a few decades ago. The non-discrimination clauses do not, and should not, prevent ICANN from updating old policies or creating new policies in response to new developments, such as the New gTLD Program, as long as the new policy is consistently applied prospectively.

272. Here, Namecheap has not demonstrated that ICANN violated its obligation to apply policies and practices in a consistent and non-discriminatory manner by not including price controls in the 2019 Registry Agreements for .ORG and .INFO, since this was consistent with its practice of seeking to transition legacy gTLDs to the Base Registry Agreement.

273. Nevertheless, changing old policies and adopting new policies implicates other Bylaw obligations. As explained below, the Panel holds that ICANN acted

²⁴¹ Weinstein Statement ¶ 12.

²⁴² The record does not show the reasons for Verisign's decision, but the proposed removal of price controls for .COM and .NET in 2005 provoked a strong negative reaction, including a federal antitrust lawsuit. See Neumann Expert Report ¶ 73; see 28 November 2005 Complaint, *Coalition for ICANN Transparency Inc. v. Verisign, Inc. and ICANN*, N.D. Cal. Case No. 5:05-CV-04826 (RER-70). Verisign may have been wary of provoking a similar negative reaction.

contrary to its transparency obligations in making the Price Cap Decision. The Panel also holds that the Price Cap Decision should have been made by the Board, not by the ICANN org (ICANN staff).

XII. ISSUE 5: DID THE ICANN ORGANIZATION ACT CONTRARY TO ITS TRANSPARENCY OBLIGATIONS IN MAKING THE PRICE CAP DECISION?

C. The Issue and Legal Framework

274. Namecheap contends that ICANN violated its transparency obligations, as set forth in the ICANN Articles and Bylaws.²⁴³

275. Namecheap relies on Article III of the Articles of Incorporation, which states:

[ICANN shall] operate ... for the benefit of the Internet community as a whole, carrying out its activities ... through **open and transparent processes** that enable competition and open entry in Internet-related markets....²⁴⁴

276. Namecheap also relies on Section 1.2(a) of the Bylaws, which describes ICANN's "Commitments" as follows:

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, **through open and transparent processes** that enable competition and open entry in Internet-related markets. Specifically, ICANN commits to do the following ...:

(iv) Employ **open, transparent and bottom-up, multistakeholder policy development processes** that are led by the private sector

²⁴³ Namecheap Pre-Hearing Brief ¶¶ 225-32.

²⁴⁴ Namecheap Pre-Hearing Brief ¶ 226 (citing Article IV of a draft version of the Articles of Incorporation, which is Article III in the current final version).

(including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. **These processes shall (A) seek input from the public, for whose benefit ICANN in all events shall act, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process ...**²⁴⁵

277. Namecheap further cites Bylaws Section 3.1, titled “Open and Transparent,” which provides:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) **maintain responsive consultation procedures that provide detailed explanations of the basis for decisions** (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. **ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).**²⁴⁶

278. Notably, these transparency obligations apply regardless of whether a decision is made by the ICANN Board or ICANN org. In that regard, Section 3.1 of the Bylaws states that “ICANN *and its constituent bodies* shall operate to the maximum extent feasible in an open and transparent manner.”²⁴⁷ In the event of Board action, ICANN has additional transparency obligations beyond those set forth above that are discussed in Section XIII of this Declaration. The *Dot Registry* IRP panel observed that

²⁴⁵ Bylaws §1.2(a) (emphasis added).

²⁴⁶ Bylaws §3.1 (emphasis added).

²⁴⁷ *Id.* (emphasis added).

“[t]ransparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.”²⁴⁸ That panel also held that:

- “By their very terms, these obligations govern conduct not only by the Board, but by ‘ICANN’, which necessarily includes its staff.”²⁴⁹
- “It seems fair to say that transparency is one of the most important of ICANN’s core values binding on both the ICANN Board and the ICANN staff ...”²⁵⁰

279. This Panel agrees that transparency is one of ICANN’s critical core values. Section 1.2(b) of the Bylaws defines ICANN’s “Core Values” as including:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decisionmaking to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that **those processes are accountable and transparent;**²⁵¹

280. In addition to citing the Articles and Bylaws, Namecheap asserts that transparency has “obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting role that ICANN occupies.”²⁵² The Panel finds that there is no need to consider international law because it does not add anything to the ICANN Articles and Bylaws, which provide greater specificity in this context than general concepts of international law. Thus, the Panel focuses on ICANN’s transparency obligations under its Articles and Bylaws.

²⁴⁸ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-00015004, Declaration of the Independent Review Panel (29 July 2016), RM 175, ¶ 117.

²⁴⁹ *Id.* ¶ 121.

²⁵⁰ *Id.* ¶ 122.

²⁵¹ Bylaws § 1.2(b)(ii).

²⁵² Namecheap Pre-Hearing Brief ¶ 228 (footnote omitted).

C. Namecheap's Position

281. Namecheap maintains that ICANN's obligation to operate in an open and transparent manner includes:

- (i) seeking comments from stakeholders on the decision to renew the 2019 Registry Agreements without price controls and providing a detailed explanation to stakeholders of the basis for ICANN's decision, in light of such comments, and
- (ii) creating records in a manner that ensures that the attorney-client privilege and attorney work product doctrine do not prevent disclosure of significant information about the negotiation and decision-making process and reasons for the decision that is needed to evaluate whether ICANN complied with its obligations under its Articles of Incorporation and Bylaws.²⁵³

282. Namecheap argues that ICANN's obligation to operate "to the maximum extent feasible in an open and transparent manner" requires that ICANN "not organize itself to shield any policy or business decisions behind attorney-client privilege."²⁵⁴ In contending that "legal privilege may only be invoked scarcely," Namecheap cites Section 3.5(d) of ICANN's Bylaws for the proposition that "legal matters shall not be included in the minutes made publicly available, but only 'to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN.'"²⁵⁵ And for any such matters that the Board determines not to disclose, "the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure."²⁵⁶ Hence, argues Namecheap, "legal matters must be disclosed, unless disclosure would jeopardize the interests of ICANN," and "[h]ow disclosure would put the interests of ICANN at risk must be explained publicly."²⁵⁷

²⁵³ Namecheap's Post-Hearing Brief ¶ 42.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

C. ICANN's Position

283. ICANN agrees that transparency required it to obtain public comments on its proposed Price Cap Decision and to provide a detailed explanation of the reasons for its decision. ICANN explains this obligation as follows:

Public comment is a mechanism that gives the ICANN community and other stakeholders an opportunity to provide input and feedback on ICANN's work. Public comment contributes to both ICANN's transparency and accountability.²⁵⁸

284. ICANN makes several points that are discussed in the Analysis section below, but the primary thrust of its argument is that "[i]t is difficult to conceive of a more transparent process than the one ICANN engaged in here."²⁵⁹ In that regard, ICANN notes that "ICANN staff opened a public comment period through which anyone, including members of the Internet community, could provide comments on the proposed renewals; analyzed those comments internally, then published its analysis; and explained to the Internet community the next steps in the process. ICANN's public analysis even addressed specifically the absence of the price control provisions and why they would not be included in the .BIZ, .INFO and .ORG Registry Agreements."²⁶⁰

285. With regard to attorney-client privilege, ICANN argues that its "transparency obligations do not prohibit ICANN from obtaining privileged advice from its attorneys.... Given the complex legal issues that routinely arise in the ordinary course of ICANN's day-to-day operations, ICANN's ability to obtain privileged and confidential advice from counsel is critical to ICANN's ability to fulfill its mission."²⁶¹ ICANN also cites IRP precedent, the *Afiliat* case, for the proposition that ICANN's

²⁵⁸ ICANN Post-Hearing Brief ¶ 66. *See also* 29 June 2022 ICANN Closing Presentation, Slide 19 ("Public Comment is a mechanism to obtain unput and feedback from the Internet community and enhance transparency," which is "consistent with [ICANN's] ethos and general transparency obligations").

²⁵⁹ ICANN Pre-Hearing Brief ¶ 7.

²⁶⁰ *Id.*; *see also* 29 June 2022 ICANN Closing Presentation, Slide 20 ("ICANN is required to consider public comments and to explain its core rationale, which it did here").

²⁶¹ ICANN Post-Hearing Brief ¶ 68.

accountability and transparency commitments do not “somehow imply a waiver of its right to invoke privilege.”²⁶²

C. The IRP Panel’s Analysis and Decision

286. This Panel does not question ICANN’s good faith in this process. But notwithstanding ICANN’s arguments to the contrary, it is not difficult to “conceive of a more transparent process than the one ICANN engaged in here.”²⁶³ That process would have involved:

- (i) A more robust “responsive consultation procedure[] that provide[d] detailed explanations of the basis for” rejecting the comments noting the distinct differences between legacy TLDs (especially .ORG) and the new gTLDs that launched since 2012.
- (ii) Open discussion at the ICANN Board level regarding whether further analysis is needed of whether price caps are needed for .ORG and .INFO, especially in view of the following statement in a 2009 economic analysis by Dr. Dennis Carlton: “The fact that the existing major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices ... [T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.”²⁶⁴
- (iii) As further discussed in the following Sections of this Declaration, a decision by the Board, rather than ICANN staff (or “ICANN org,” as the ICANN staff refer to themselves), regarding whether to renew the Registry Agreements at issue without price controls, thereby triggering the additional transparency obligations in the Bylaws for Board action.

287. Starting with the first point, ICANN did not adequately engage in a responsive consultation procedure that provided sufficiently detailed explanations of

²⁶² ICANN Post-Hearing Brief ¶ 68, citing *Afilias v. ICANN IRP*, Procedural Order No. 4 ¶ 42, Ex. R-18A.

²⁶³ ICANN Pre-Hearing Brief ¶ 7.

²⁶⁴ Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, RM 183, ¶ 20 (“Carlton 2009 Preliminary Analysis”).

the basis for rejecting public comments noting the distinct differences between legacy gTLDs (especially .ORG) and the newer gTLDs.

288. According to the Staff Reports of Public Comments that ICANN published for .ORG, .INFO, and .BIZ, ICANN received over four thousand comments in 2019 regarding the proposed removal of price controls.²⁶⁵ There were over three thousand comments regarding .ORG alone.²⁶⁶ In contrast, the prior renewal of the .ORG, .INFO and .BIZ RAs in 2013 (which did not implicate the price control provisions) elicited only one comment on the .ORG renewal and three comments on .INFO and .BIZ.²⁶⁷ While it appears that most of the 2019 comments were generated from a template created by a trade group (the Internet Commerce Association), many were not.

289. Virtually all the comments opposed the removal of price controls, especially for .ORG.²⁶⁸ As ICANN noted in its summary of public comments:

A primary concern voiced in the comments was with respect to the proposed removal of the price cap provisions.... Commenters provided a variety of reasons for concern about the price cap provision removal.²⁶⁹

290. As discussed below, ICANN provided a fairly detailed summary of the key concerns about removing price caps, but then failed to explain why ICANN

²⁶⁵ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annexes 5-7. The Panel has ruled that Namecheap's claim regarding .BIZ is untimely, but includes some references to .BIZ because similar comments were submitted as to all three legacy gTLDs.

²⁶⁶ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 at 1.

²⁶⁷ Annex 108 (ICANN, Minutes – Special Meeting of the Board, 22 August 2013, <https://www.icann.org/resources/board-material/minutes-2013-08-22-en#2.b>: (“Akram clarified that ICANN only received three public comments on the .BIZ and .INFO proposed renewals and one comment on the .ORG renewal. Therefore, it is hard to support the suggestion that there is an overwhelming community issue about the proposed renewals that needs attention prior to voting.”)

²⁶⁸ Namecheap Pre-Hearing Brief ¶¶ 166-67.

²⁶⁹ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annex 5 at 3; Annex 6 at 3; Annex 7 at 3.

decided to remove price caps despite those concerns. Instead, ICANN essentially repeated the explanation it gave *before* receiving the public comments.

1. Failure to Address Comments Regarding the Legacy gTLDs First Mover Advantage

291. When ICANN requested public comments in March 2019 about its proposed adoption of the Base Registry Agreement for .ORG, .INFO, and .BIZ without price controls, ICANN explained that “[t]his change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.”²⁷⁰

292. Many of the public comments replied to ICANN’s explanation by asserting that legacy gTLDs are different and should not be treated the same as new gTLDs. As ICANN noted in its summary:

Many commenters indicated the existing pricing protections should remain in part because they believed legacy TLDs, and the .org TLD in particular, are unique and should be treated differently than new gTLDs. They expressed that the .org TLD, and legacy TLDs in general, are viewed as public trusts and should be protected and managed as such.²⁷¹

293. ICANN quoted specific comments that expressed this concern, such as:

The logic to run older top-level domains should be the same as those running new top level domain names is flawed. There is a long history of the legacy top level domains and how the contracts to the registries were awarded. With the new top level domains, companies risked their own money to introduce the new domains. The registries running .info & .org are merely stewards for what should be considered a resource to the web. As an early adopter of the .info domain and holder of some .info domain

²⁷⁰ 18 March 2019 Proposed Renewal of .ORG Registry Agreement, Annex 2 ¶ 4; see Annex 3 ¶ 4, Annex 4 at 4 (similar comments for .INFO and .BIZ).

²⁷¹ Staff Report of Public Comment Proceedings for .ORG, .3 June 2019, Annex 5 ¶ 3; see Annex 6 at 3 (same comment for .INFO, but refers to .INFO instead of .ORG in the last sentence); Annex 7 ¶ 3 (same comment for .BIZ, but refers to .BIZ instead of .ORG in the last sentence).

names dating backing to 2002, ICANN must come to the realization that price cap provisions in the current .info agreement must not change going forward.²⁷²

294. Similarly, the American Society of Association Executives (“ASAE”), representing over 7,400 trade and professional association executives, specifically addressed how the new gTLDs were different from .ORG and the other legacy domains, making transition to the Base Registry Agreement without price controls potentially problematic:

It’s true that registry operators that won the right to sponsor new gTLDs can charge whatever price they see fit, but they also paid millions of dollars in some cases to acquire all of the value in their sponsored domain names, whereas the service contractors managing legacy domain names most assuredly did not. This is a crucial difference that ICANN should take great care to enforce.²⁷³

295. As already discussed, .ORG was one of the three original TLDs—along with .COM and .NET—that existed even before ICANN was created.²⁷⁴ Thus, these three enjoyed a “first-mover” advantage, attracting many registrants before other gTLDs were introduced.²⁷⁵ The .INFO and .BIZ gTLDs were not established quite so early but were still launched during the first round of new gTLDs created by ICANN (in 2001).²⁷⁶

296. Prior efforts by ICANN to remove price controls for .NET, .ORG, .INFO, and .BIZ were met with considerable backlashes. In 2005, ICANN entered into a registry Agreement for .NET that required the registrar (VeriSign) to commit to a maximum price of \$4.25 for the first 18 months of the agreement, followed by the removal of all

²⁷² Staff Report of Public Comment Proceedings for .BIZ, 3 June 2019, Annex 6 ¶ 3.

²⁷³ 25 April 2019 Comments of ASAE re Proposed Renewal of .org Registry Agreement, Annex 111 ¶ 4.

²⁷⁴ Regulatory Expert Report ¶¶ 40-41.

²⁷⁵ EER-II ¶¶ 111, 115-18.

²⁷⁶ Namecheap Pre-Hearing Brief ¶ 61.

price controls for the remainder of the agreement.²⁷⁷ But ICANN reversed course in the face of opposition, reopened the Registry Agreement, and imposed a fixed price during the first 18 months of the agreement and an annual 10% cap on price increases thereafter.²⁷⁸

297. A backlash also occurred in 2006 when the Board sought to remove price controls for .ORG, .INFO, and .BIZ.²⁷⁹ The decision of the ICANN Board in Reconsideration Request 19-2 describes what happened:

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG. However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org renegotiated the .ORG and .INFO RAs to include price caps. Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).²⁸⁰

298. .COM is unique because price controls are mandated by the U.S. Department of Commerce ("USDOC"). Yet the Registry Agreement for .NET, which is not regulated by the USDOC, also continues to include price controls. The ICANN Board approved the 2011 and 2017 renewals of the .NET Registry Agreement, which retained the 10% annual cap on price increases.²⁸¹

299. ICANN argues that price control provisions remain in the .NET Registry Agreement due to the choice of its registry operator, Verisign, which happens to also

²⁷⁷ See ICANN, *Original 2005 .NET Registry Agreement of 1 July 2005*, § 7.3(a), archived at <http://www.icann.org/tlds/agreements/net/net-registry-agreement-01jul05.pdf> (RM 119).

²⁷⁸ Regulatory Expert Report ¶ 60.

²⁷⁹ Regulatory Expert Report ¶¶ 73-80.

²⁸⁰ Annex 11 ¶ 6.

²⁸¹ ICANN Board Resolutions 2011.06.24.21, 2017.06.24.22 (RER 129, RM 124).

operate .COM, which, as noted, is subject to USDOC price controls.²⁸² ICANN maintains that “[t]his distinction ... is fatal to Namecheap’s position.”²⁸³

300. Yet the fact remains that the ICANN Board affirmatively approved price controls for the .NET Registry Agreement and has never reconsidered that position. While Verisign has never triggered the issue of removing price controls, nor has ICANN. The ICANN Board also approved all renewals of the .ORG, .BIZ, and .INFO Registry Agreements with price controls, until the ones at issue here.²⁸⁴

301. ICANN’s stated rationale for removing price controls was to “conform with the base registry agreement” for new gTLDs with the “goal of treating the Registry Operator equitably with registry operators of new gTLDs.” But ICANN never addressed the comment that the registry operators of the legacy gTLDs are in a different position from the registry operators of new gTLDs. As asserted by ASAE, whereas the “registry operators that won the right to sponsor new gTLDs ... paid millions of dollars in some cases to acquire all of the value in their sponsored domain names, ... the service contractors managing legacy domain names most assuredly did not.”²⁸⁵ The removal of price controls with respect to .ORG is especially notable, as it now stands unique among the three original TLDs as not being subject to price controls.

302. ICANN observed in its summary of public comments that “many commenters ... believed legacy TLDs ... are unique and should be treated differently than new gTLDs.”²⁸⁶ While ICANN highlighted that concern, it did not address it. Instead, ICANN repeated its prior explanation that that it sought to treat Registry Operators of legacy gTLDs and new gTLDs “equitably,” without explaining why it had rejected the concern that legacy TLDs are “unique and should be treated differently

²⁸² ICANN’s Surrebuttal Brief ¶ 63.

²⁸³ *Id.*

²⁸⁴ Namecheap Pre-Hearing Brief ¶ 72

²⁸⁵ 25 April 2019 Comments of ASAE re Proposed Renewal of .org Registry Agreement, Annex 111 ¶ 4.

²⁸⁶ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annex 5 ¶ 3, Annex 6 ¶ 3, Annex 7 ¶ 3.

than new gTLDs.” Indeed, ICANN’s post-comment “Analysis” was almost identical to its pre-comment explanation:²⁸⁷

18 March 2019 Proposed Renewal of .org RA (Annex 2)	3 June 2019 Staff Report of Public Comments Proceeding (Annex 5)
This change [removing price controls] will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.	Enacting this change [removing price controls] will not only allow the .org renewal agreement to conform to the Base gTLD Registry Agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base gTLD Registry Agreement.

2. Failure to Address Comments Regarding .ORG’s Market Power and the Negative Impact of Removing Price Controls

303. ICANN’s summary of public comments also noted the concern that .ORG is “unique in that .org was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations,” and “organizations and individuals who have historically registered legacy domain names did so under the assumption that prices would not suddenly increase.”²⁸⁸ ICANN quoted the following letter from National Public Radio, the YMCA, C-SPAN, National Geographic Society, Oceana, the American Association of Retired Persons, the Conservation Fund, and the National Trust for Historic Preservation:

[T]he .org gTLD has assumed the reputation as the domain of choice for organisations dedicated to serving the public interest... We have come to rely on this reputation to help distinguish the online presence of our organizations from the online presence of organizations that are not

²⁸⁷ ICANN added some points to its post-comment analysis, but did not explain why it considered unsponsored, legacy gTLDs to be essentially the same as sponsored new gTLDs.

²⁸⁸ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 3-4.

intended to serve the public interest. As nonprofit organizations, we also have come to rely on the certainty and predictability of reasonable domain name registration expenses when allocating our limited resources.²⁸⁹

304. The same letter observed:

ICANN has articulated no compelling policy basis for this proposed change [i.e. the removal of the price controls]. Instead, ICANN has represented that the intent is just to bring the .org Agreement into conformity with the base registry agreement used by ICANN with respect to other gTLDs not set aside for organizations that serve the public interest. This strikes us as conformity for its own sake. ICANN should not disregard the public interest in favor of administrative convenience.²⁹⁰

305. A related concern noted in ICANN's summary of public comments is that "without price controls, prices to renew domain names could become prohibitively expensive and the barrier to entry for small non-profits and organizations could be significantly raised, leading to a significant negative impact on the non-profit, charitable and small organizations who are registrants of the .org TLD."²⁹¹ Another concern is that .ORG "is inherently positioned as a monopoly, and because of the environment, consumers require regulatory pricing protections."²⁹² ICANN quoted the following comments to illustrate these concerns:

The org TLD is overwhelmingly used by non-profits and by removing the caps on the prices of org domains, ICANN will make it significantly more difficult for non-profits to do business on the internet or raise barriers to entry for new non-profits.²⁹³

Having one company able to control pricing for an entire TLD, and to have no restrictions, controls or guidelines on their ability to increase the

²⁸⁹ *Id.* Annex 5 ¶ 4 (quoting 29 April 2019 Letter to ICANN from NPR and other non-profit organizations).

²⁹⁰ 29 April 2019 Letter to ICANN from NPR and other non-profit organizations, Annex 111 ¶ 2.

²⁹¹ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 4.

²⁹² *Id.*

²⁹³ *Id.*

pricing: is in my opinion creating a monopoly, with all that implies – definitely counter to the idea of a free market. Especially in the area of .org, which is traditionally – and branded – to be the domain for not-for-profits.²⁹⁴

306. Despite noting these concerns about the special market power of .ORG and the negative impact on non-profits of removing price controls, ICANN failed to provide a detailed explanation of why it nevertheless decided to remove price controls. Instead, ICANN merely stated that the .ORG price controls “were initially included years ago by the US government when the domain name market consisted only of a handful of top-level domains,” and that “[t]here are now over 1200 gTLDs, almost all of which do not include price controls.”²⁹⁵ ICANN did not address the special non-profit market served by .ORG.

307. There is, in fact, substantial evidence that .ORG has considerable market power among non-profit registrants.²⁹⁶ Namecheap’s economic expert, Dr. Langus, opined that .ORG has as much or more market power than .COM for several reasons: (i) .ORG enjoys a “first-mover advantage” as one of the original gTLDs; (ii) .ORG is associated with non-profit entities that the public can trust, which distinguishes it from other gTLDs, which are not good substitutes; and (iii) users are “locked-in” to .ORG due to the lack of good substitutes, and also because changing to a different gTLD involves high “switching costs.”²⁹⁷

308. As further evidence of the special role of the .ORG domain, Dr. Langus cited the largest registrar, GoDaddy:

A .org domain name helps you become a well-established brand of trust and integrity. One of the original top-level domains (TLDs), it became the choice for organizations dedicated to serving the public interest. Today,

²⁹⁴ *Id.* Annex 5 ¶ 4.

²⁹⁵ *Id.* Annex 5 ¶ 8. As discussed below, ICANN noted that the Base Registry Agreement includes other protections, such as the option to lock in prices for ten years, but did not address comments that questioned whether such protections were adequate.

²⁹⁶ The Panel focuses here on evidence that .ORG has market power, which is stronger than evidence related to .INFO. Evidence related to .INFO is discussed below in Section XI.D.

²⁹⁷ Hearing Tr. Day IV, 125:21 to 129:1, Day V, 100:24 to 101:23, 104:26-28; Langus Presentation, Slide 4; EER-II ¶¶ 111-29, 150-57.

.org domains are considered some of the most trusted on the internet and tailor-made for non-commercial entities like:

- Non-profits
- Foundations
- Cultural institutions
- Religious organizations

If you're operating one of these, people expect to find you in the .org community. However, commercial organizations can also benefit with a .org domain linked to the business' charitable arm while other domain names protect the brand.²⁹⁸

309. Dr. Langus testified that PIR advertises .ORG as "a powerful signal that your site serves a greater good – rather than just a bottom line." He added that "[o]ne would be hard-pressed to find a similar and credible characterization for another TLD, among more than a thousand that are available for registration."²⁹⁹ He also noted that ".NGO" (non-governmental organization) and .ONG (having the same meaning in various romance languages) are "[p]otentially semantically close," but are not viewed as good substitutes, given that they have attracted only about 4,000 registrants since PIR introduced them in 2014.³⁰⁰ .ORG, in contrast, is the third largest gTLD, with over 10 million registrants.³⁰¹

310. ICANN witnesses agreed that .ORG has a special advantage over other gTLDs. ICANN's expert, Dr. Carlton, stated that ".org had a first-move advantage."³⁰² He testified that he had not done a detailed study, but his "general understanding of .org is that because it was one of the early TLDs, a lot of not-for-profits use .org and they like using .org because it has the connotation of a not-for-profit."³⁰³

²⁹⁸ EER-II ¶ 151.

²⁹⁹ EER-II ¶ 152.

³⁰⁰ EER-II ¶ 153; *see also* Hearing Tr. Day V, 100:24 to 101:23.

³⁰¹ EER-II ¶ 150.

³⁰² Hearing Tr. Day V, 96:5.

³⁰³ Hearing Tr. Day V, 67:14-19.

311. ICANN's Board Chair, Maarten Botterman, acknowledged during the hearing that .ORG occupies a unique position within the DNS, stating:

One of the things with .org, as you rightly – and I know you know that – it's not a domain like .com, .net. It's just that the reputation that PIR has given it over the years that gives it added value for many nonprofits. [...] I do remember, my kids always had a hard time explaining at school what your father is doing. [...] But one of the things that they came back with is – they were at school in Belgium. If they would go to a .org site, then, at least, they could trust the information. And this was the perception that comes with it [...].³⁰⁴

312. Mr. Botterman also testified that PIR's attempt to launch a new closed domain for NGOs showed that "it's very difficult to launch new TLDs."³⁰⁵ This is consistent with Dr. Langus' comment that .NGO is not viewed as a good substitute for .ORG, as illustrated by its much lower number of registrants.

313. Namecheap also presented evidence that PIR has in fact exercised market power by increasing .ORG prices and profit margins substantially. For example, Dr. Langus presented a chart showing that .ORG prices increased from six dollars in 2008 to nearly ten dollars in 2016.³⁰⁶ Those increases were within the 10% annual cap that applied at that time, but "hit 9.7 percent a number of times, and a number of times it hit 7 percent, 6 and a half."³⁰⁷ The same chart showed that from 2008-16, .ORG prices rose more than .COM prices: both started at six dollars, but .ORG ended at nearly ten dollars, while .COM ended at less than eight dollars.³⁰⁸ Dr. Langus also presented a chart showing that .ORG prices increased from 2009 to 2016 even though PIR's related costs did not increase.³⁰⁹ The chart further showed that PIR's costs decreased from 2016 to 2021, but .ORG prices remained the same.³¹⁰ As a result, PIR's profit margins on

³⁰⁴ Hearing Tr. Day II, 176:5-9.

³⁰⁵ Hearing Tr. Day II, 176:12-18.

³⁰⁶ Langus Presentation Slide 5; EER-II, ¶ 158 and Figure 3.

³⁰⁷ Hearing Tr. Day V, 118:11-13.

³⁰⁸ Langus Presentation Slide 5; Hearing Tr. Day IV 129:4-19.

³⁰⁹ Langus Presentation Slide 6; EER-II ¶ 159 and Figure 4.

³¹⁰ Langus Presentation Slide 6; EER-II ¶ 159 and Figure 4; Hearing Tr. Day IV, 129:22 to 130:6.

.ORG increased continuously from 2009 to 2021, which Dr. Langus called a “reliable indicator of market power.”³¹¹

314. Dr. Carlton opined there was no need for price caps because .ORG prices had not increased since 2016; PIR had “committed to not raise [prices] unreasonably;” and PIR’s not-for-profit structure and conduct makes it “reasonable to believe ... that they are not going to raise price unreasonably.”³¹²

315. Nevertheless, Dr. Carlton agreed that Dr. Langus’ chart shows that .ORG margins have “increased over time,” and that “the price of .org is higher than the price of .com.”³¹³ He also agreed that “the fact that [PIR’s] costs have gone down and they’ve not passed them along ... means their margins have gone up.”³¹⁴ He further acknowledged that if .ORG were changed to a for-profit structure, it would be a “perfectly reasonable concern for people to investigate as to whether that’s going to affect price.”³¹⁵ Dr. Carlton stated that because .ORG’s costs had decreased, he “would have lowered prices” if he “were a cost regulator.”³¹⁶

316. Thus, Dr. Carlton did not dispute that .ORG has meaningful market power in view of its first-mover advantage and unique role in the non-profit community, or that price controls might be worth investigating in some circumstances. He maintained, however, that this was not necessary as to .ORG, especially in view of PIR’s not-for-profit status and its representation that it would not increase prices unreasonably.³¹⁷

³¹¹ Langus Presentation Slide 6; Hearing Tr. Day IV, 130:7-11; *see* Day V, 105:3-15.

³¹² Hearing Tr. Day V, 106:23 to 110:20.

³¹³ Hearing Tr. Day V, 115:21-24.

³¹⁴ Hearing Tr. Day V, 106:23 to 107:15.

³¹⁵ Hearing Tr. Day V, 106:23 to 107:15; *see* 111:12-15 (“if there were a proposal for .org to change its structure into a for-profit, I do think that would be grounds to investigate, and exactly how it would come out depends on what you think about it”).

³¹⁶ Hearing Tr. Day V, 108:21-24; *see* 111:12-15 (“if there were a proposal for .org to change its structure into a for-profit, I do think that would be grounds to investigate, and exactly how it would come out depends on what you think about it”).

³¹⁷ Hearing Tr. Day V, 106:23-108:20; 111:12-15; 112:1-6.

317. Dr. Langus replied that PIR's representation raised the following questions: "What is unreasonable?" and "How could registrants complain to PIR that it is violating its commitment?"³¹⁸ He also noted that the continuing .ORG price increases until 2016 shows that price caps "were effective in the past in constraining the exercise of market power" and that PIR's subsequent failure to reduce prices despite "significant cost reductions" shows that PIR is actually exercising market power.³¹⁹

318. In citing the foregoing evidence, this Panel is not making a factual finding that .ORG in fact possesses sufficient market power to warrant price controls. Rather, the Panel is focused on ICANN's failure to consider this issue or, if it was considered, to provide a "detailed explanation" as to why such market power—however strong (or not) it might be—did not warrant price controls. While ICANN noted the public comments about .ORG's unique reputation as the domain of choice for non-profit organizations, it did not address them.³²⁰ ICANN's stated rationale for the Price Cap Decision seems to simply assume that .ORG is fungible with other gTLDs.

3. Failure to Address Concerns Regarding Switching Costs

319. ICANN noted in its summary that "[c]ommenters also raised concerns about the burden and costs associated with moving their web presence to another TLD, which could potentially be capitalized on by the registry operator with higher renewal prices without a price cap."³²¹ ICANN quoted the following comment as an example:

While individual domains are typically inexpensive, the costs of switching between them for an organization can be exceptionally high. Moving from one TLD to another might require notifying clients, reprinting materials, updating databases, and reconfiguring services. Consequently as consumers are locked in, there either needs to be competition at the registry level, or some form of price constraint. Given the nature of the contracts, specifically presumptive renewal for the incumbent registry operators, registry prices are not subject to competition and do not face

³¹⁸ Hearing Tr. Day V, 102:9-10.

³¹⁹ Hearing Tr. Day V, 112:21 to 113:6, 114:12-17.

³²⁰ Annex 5 ¶ 4.

³²¹ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 4.

the downward pricing pressure that every other provider of Internet infrastructure faces.³²²

320. The ASAE (American Society of Association Executives) expressed a similar concern in the comments cited above:

Stating that nonprofit organizations can easily switch from one domain name to another if they don't like the pricing structure ignores the reality that established nonprofits have a longstanding Internet presence built on a .org domain name - a name and online reputation that the organization (not the registry operator) has spent decades cultivating."³²³

321. Again, ICANN noted these comments, but did not address them. In deciding to renew the 2019 Registry Agreements without price controls, ICANN simply stated:

In alignment with the base registry agreement, the price cap provisions in the current .org agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .org renewal agreement. Protections for existing registrants will remain in place, in line with the base registry agreement. This change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.³²⁴

322. Yet this rationale assumes a market in which registrants can easily switch from legacy gTLDs to new gTLDs. While this may in fact be the case, ICANN never addressed comments maintaining that the opposite was true.

³²² *Id.*

³²³ 25 April 2019 Comments from ASAE, Annex 111 ¶ PDF page 4.

³²⁴ Staff Reports of Public Comment Proceedings for .ORG, .INFO, and .BIZ, 3 June 2019, Annex 5 ¶ 3, Annex 6 ¶ 3, Annex 7 ¶ 3.

4. Failure to Address Concerns that the Base Registry Agreement's Price Protections are Not an Adequate Substitute for Price Controls

323. Another concern noted in ICANN's summary was that "the protections afforded to registrants in the Base gTLD Registry Agreement fall short of what they believe should be in place for the .org TLD and believed they should not be viewed as a viable replacement to the existing price cap provision." ICANN quoted the following comment of the Internet Commerce Association ("ICA") :

It can also be argued that existing .org registrants are somehow 'protected' because they can renew their .org domain name for ten years before being subjected to uncapped price hikes under the Proposed Renewal Agreement. The fact is however, that there is no requirement that registrants be expressly notified that they had better register for ten years in advance or be subject to unknown, indeterminate, and potentially game-changing renewal costs. As such, it is likely that millions of charities and non-profits will not take advantage of the ability to renew for ten years... [O]nce caps are removed, once the initial ten-year period has elapsed, every single registrant is subject to untold, indeterminate, and potentially substantial price hikes, meaning that this is nothing but a temporary reprieve. Lastly, the numerous prospective .org registrants who want to establish themselves in the most appropriate registry for a charity or non-profit at some point in the next ten years, could find themselves subject to capricious and expensive registration fees for .org domain names and as such receive no benefit whatsoever from the temporary reprieve.³²⁵

324. While ICANN noted this concern, it did not address it. Instead, ICANN stated that the Base Registry Agreement would "afford protections to existing registrants," such as the option to lock in prices for ten years.³²⁶ ICANN did not address the ICA's comment that these protections were inadequate.

³²⁵ Annex 5 ¶ 5.

³²⁶ Annex 5 ¶ 5.

325. ICANN maintains that the Bylaws merely require that it “explain its core rationale, which it did here.”³²⁷ Yet the term “core rationale” does not appear in the Bylaws. Rather, the Bylaws require that ICANN “maintain responsive consultation procedures that provide *detailed explanations* of the basis for decisions.”³²⁸ While this does not mean that ICANN must individually address each and every comment, the public comments discussed here raise significant issues and were properly singled out by ICANN in its summary of public comments. To borrow ICANN’s phrase, these comments go to the heart of the “core rationale” expressed by ICANN for removing price controls. They should have been addressed.

326. The Panel emphasizes that the various public comments regarding the need to retain price controls may or may not have been correct. Any finding as to the merit of these comments would exceed the scope, authority, and competence of this Panel. But the accuracy – or not – of the comments is not the issue. ICANN’s failure to consider the points made in the comments – or, if these points were considered, to articulate a basis for disregarding them – constitutes a failure to “engage in a responsive consultation procedure that provided detailed explanations of the basis for rejecting public comments.”³²⁹

5. Failure to Address Concerns about Need for Market Analysis and Misapplication of Dr. Carlton’s 2009 Economic Analysis

327. ICANN observed that commenters “questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections,” quoting the following comment of the Registrar Stakeholder Group (the “RrSG”):

The RrSG is concerned that ICANN has arbitrarily chosen to remove pricing restrictions that could negatively impact current and future registrants of .ORG, .BIZ, and/or .INFO domain names where there is no reasonable competition to influence reasonable pricing and **without engaging in appropriate market analysis.**³³⁰

³²⁷ ICANN’s Closing Presentation, Slide 26.

³²⁸ Bylaws, §3.1 (emphasis added).

³²⁹ Bylaws §3.1.

³³⁰ Staff Report of Public Comment Proceedings for .ORG, 3 June 2019, Annex 5 ¶ 5.

328. Despite noting this concern, ICANN's 3 June 2019 "Analysis of Comments" did not address whether it had conducted "an appropriate market analysis," or explain why such an analysis was unnecessary.³³¹

329. ICANN Board members also expressed concern about the need for an economic analysis at a 21 November 2019 meeting concerning Namecheap's request for reconsideration of the Price Cap Decision:

Board members also asked questions about matters related to pricing, including how public comments concerning the pricing provisions were considered. Matthew Shears commented on the suggestion made during the comment period that a study be undertaken about the effects of removing the existing price caps. He inquired whether there should be an economic study of how the market has evolved since 2009 prior to the Board taking action to understand better how removing the pricing restrictions would encourage competition or not. Members of ICANN org engaged the Board in a discussion about the history of the price cap provisions and the discussions and economic studies about pricing provisions that took place during the development of the New gTLD Program.³³²

330. The Board meeting minutes do not disclose the result of this discussion, but there is no evidence of any further economic analysis. The meeting minutes imply that the Board concluded that no further analysis was needed in view of a prior study that "took place during the development of the New gTLD Program." That implication is confirmed by the Board's 21 November 2019 decision denying Namecheap's request for reconsideration, which relied on a preliminary report that Dr. Dennis Carlton prepared in 2009 for the New gTLD Program. The ICANN Board stated:

There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence." [...] Among other things, ICANN org considered Dr. Carlton's

³³¹ See *id.* ¶ 8 (emphasis added).

³³² Minutes – Special Meeting of the ICANN Board on 21 November 2019, Annex 115, PDF pages 4-5.

2009 expert analysis of the Base RA, including his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.³³³

331. The referenced 2009 expert analysis was commissioned by ICANN in connection with the introduction of the new gTLDs that were ultimately approved by the ICANN Board on 20 June 2011. A footnote to the Board's decision specifies that ICANN org relied on Dr. Carlton's "Preliminary Analysis Regarding Price Caps for New gTLD Internet Registries" in deciding that price controls were no longer needed for .ORG, .BIZ, and .INFO.³³⁴

332. This Panel takes at face value the ICANN Board's statement that ICANN relied on Dr. Carlton's 2009 preliminary analysis. There is nothing in the record to contradict that statement.

333. Yet ICANN's reliance on Dr. Carlton's 2009 preliminary analysis raises the following issues:

- First, Dr. Carlton focused on price controls in the new gTLDs, *not* legacy TLDs, such as .ORG, .BIZ, and .INFO.³³⁵

³³³ Annex 11 (Final Determination of the ICANN Board of Directors Reconsideration Request 19-2 (21 Nov. 2019)); *see also* Hearing Tr. Day II, 143-145.

³³⁴ *Id.* at n. 94.

³³⁵ Professor Carlton's 2009 preliminary report states: "I have been asked by counsel for ICANN to address whether price caps that limit future increases in prices charged to registrars of these new gTLDs would be necessary to insure the potential competitive benefits of the new gTLDs." (RM 183, Dennis Carlton, Preliminary analysis of Dennis Carlton regarding price caps for New gTLD Internet registries, 4 March 2009, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.) (emphasis added). His 2009 final report provides: "I have been asked by ICANN to analyze from an economic perspective ICANN's anticipated introduction of new generic top level domain names (gTLDs), and to identify and address the benefits and costs associated with ICANN's proposal. [...] In conjunction with this analysis, I also address whether price caps that limit prices and future increases in prices charged by registries of these new gTLDs would be necessary to achieve the potential competitive benefits of the new gTLDs." (RM 23, <http://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>.) (emphasis added).

- Second, the report cited by the Board in its decision on Reconsideration Request 19-2 was merely preliminary. In his final report, Dr. Carlton bolstered his conclusion that price controls were not necessary for the registration, renewal and transfer of domain names in the new gTLDs with the following observation:

The fact that **the existing major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices.** [... T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.³³⁶

- Finally, Dr. Carlton replied as follows to the concern that lack of price controls for new gTLDs could result in the elimination of price controls for legacy gTLDs:

THERE IS NO BASIS FOR DR. KENDE'S CONCERNS THAT ICANN'S PROPOSAL WILL LEAD TO THE REPEAL OF EXISTING PRICE CAPS

As noted above, Dr. Kende suggests that the absence of price caps for new TLDs could result in the elimination of price caps for .com, .net, .org, .info, .biz and others as a result of the "equitable treatment" clause in ICANN agreements. We understand from ICANN that there is no basis for this concern.

The language in this clause does not require identical treatment among all registries and recognizes that differences across ICANN contracts with different registries can be "justified by substantial and reasonable cause." ICANN's contracts with existing TLDs recognize that different practices may be appropriate for different registries and allow ICANN latitude to implement different procedures. **I am aware of no statement either by ICANN or the Commerce Department**

³³⁶ RM 23 ¶ 73 (emphasis added).

favoring the elimination of price caps specified in existing registry contracts.³³⁷

334. In short, Dr. Carlton’s final 2009 report cannot be read to justify removing price controls in legacy gTLDs, such as .ORG, .BIZ, and .INFO. If anything, he viewed the *continued* existence of price controls in major legacy gTLDs as helping justify the introduction of new gTLDs without price controls. Further, Dr. Carlton asserted that there was no basis for concern that the lack of price caps for new gTLDs would result in removal of price caps for .ORG, .INFO, and .BIZ, given that “equitable” treatment does not require “identical” treatment, and ICANN had not stated that it sought to eliminate price caps from legacy gTLDs.

335. In addressing Namecheap’s arguments regarding the 2009 Carlton report, ICANN states that “Dr. Carlton was not asked to opine on the appropriateness of price control provisions in legacy gTLD registry agreements, including the .ORG, .BIZ, and .INFO Registry Agreements, and even acknowledged that such provisions might not be appropriate.”³³⁸ But the point is not that Dr. Carlton’s 2009 report affirmatively calls for retaining price controls in legacy gTLDs, but rather that it cannot serve as a basis for removing such price controls. He specifically disclaimed any such purpose in his report. And yet 10 years later his report was used for precisely that purpose.³³⁹

336. In sum, the ICANN organization noted the public comment that an economic study should be conducted, but provided no responsive explanation. The ICANN Board apparently concluded that an economic study was not needed in view of

³³⁷ RM 24 ¶ 22 (emphasis added).

³³⁸ ICANN Pre-Hearing Brief ¶ 72 n. 259, citing RM 23, ¶ 73 (stating that “the appropriateness of these price caps may be debatable”).).

³³⁹ ICANN org also obtained a newer report prepared by Professor Carlton in 2019. (Annex 131 - Draft expert report of Dennis W. Carlton of 6 June 2019.) This report was a draft and never finalized. Nor was it provided to the ICANN Board. The 2019 report was provided only to members of ICANN’s legal department and Cyrus Namazi, who at the time was the Vice President of ICANN’s Global Domains Division. (Declaration of Amy Stathos, ¶ 3.)

Redacted - Privileged

the 2019 report was only a draft and was not subject to public scrutiny. To the contrary, it was shielded based on privilege, with even the ICANN Board unaware of its existence. (Hearing Tr. Day II, 171.) Following *in camera* review, the Panel ordered in Procedural Order No. 18 that ICANN produce the report.

Dr. Calton's 2009 report about the new gTLD program, but that study does not support removal of price controls from legacy gTLDs and actually leans in the other direction.

337. ICANN's failure to provide a "detailed explanation" of why it concluded that no economic study was needed highlights the underlying rationale for ICANN's obligation to make decision in an "open and transparent" manner. If ICANN had relied on Dr. Carlton's 2009 report at an earlier time, Namecheap and other members of the public could have explained why that reliance was misplaced.

338. For this and other reasons stated above, this Panel concludes that, contrary to its Bylaws, ICANN did not operate to the maximum extent feasible in an open and transparent manner.

6. Failure to Maintain a Non-Privileged Record of ICANN's Internal Decision-Making Process

339. ICANN's failure to provide an open and transparent explanation of its reasons for rejecting public comments opposing the removal of price controls was exacerbated by ICANN's assertion of attorney-client privilege with respect to most of the documents evidencing ICANN's deliberations.

340. Mr. Weinstein, the ICANN staff member who was most involved in the Price Cap decision, testified that:

- There were internal discussions about the need for a formal Board resolution on the renewal of a registry agreement, but those discussions included counsel and were therefore privileged;³⁴⁰
- When ICANN "dug in the price cap issue and some other issues further in the process, we did make a formal recommendation in writing. I think they were in the form of the papers and materials we provided to the board," but "it was done in the context of preparing a board information paper, which are privileged documents" because "[w]e do that in conjunction with the legal team";³⁴¹

³⁴⁰ Hearing Tr. Day III, 100.

³⁴¹ Hearing Tr. Day III, 106-107.

- ICANN staff consulted with counsel to get competition advice and
Redacted - Privileged ;³⁴²
- The email Mr. Weinstein received from his supervisor and non-legal staff member Cyrus Namazi confirming that ICANN could proceed as planned with the renewal of the Base RA without price caps was not produced as he believed that this document was “under privilege because it was consulting with counsel”;³⁴³
- Mr. Weinstein assured himself that the “all clear” to proceed without price caps was made after exercising sufficient due diligence and care, but “all these conversations were in the presence and with guidance from counsel so I believe those are privileged”;³⁴⁴
- When Mr. Weinstein sent summary emails confirming the content of negotiations between ICANN and the registry operators via telephone or in person, he made sure to include “the lawyers on it,” making the documents allegedly privileged.³⁴⁵

341. Namecheap claims that ICANN violated its transparency obligations by asserting privilege so broadly that there is virtually no non-privileged record of the process by which ICANN made its Price Cap Decision.

342. ICANN contends that it did not violate its transparency obligations for the following reasons:

- Transparency did not require ICANN to maintain a non-privileged record of its decision-making process;³⁴⁶

³⁴² Hearing Tr. Day III, 116 & 134

³⁴³ Hearing Tr. Day III, 44.

³⁴⁴ Hearing Tr. Day III, 46.

³⁴⁵ Hearing Tr. Day III, 143-144.

³⁴⁶ 29 June 2022 ICANN Closing Presentation, Slide 24.

- Requiring ICANN to maintain a non-privileged record of the reasons for its Price Cap Decision would make “no sense,” given that ICANN negotiates thousands of Registry Agreements;³⁴⁷
- ICANN “maintained a non-privileged record of the core reasons underlying its decision,” which was sufficient to meet its transparency obligations;³⁴⁸ and
- It “was not feasible to maintain a more extensive non-privileged record” because “legal issues were integrally tied to ICANN organization’s considerations.”³⁴⁹

343. ICANN asserts that its “transparency obligations do not require maintaining a non-privileged record of ICANN organization decisions.”³⁵⁰ ICANN adds that its “transparency obligations do not prohibit ICANN from obtaining privileged advice from its attorneys,” which is “critical to ICANN’s ability to fulfill its mission.”³⁵¹

344. At issue is whether transparency requires ICANN to provide not only a detailed *external* explanation to the public of the reasons for its decision on important policy matters, but also to create and maintain a non-privileged *internal* record of its deliberations that is sufficiently detailed to assess the reasons for the decision and to evaluate whether ICANN gave sufficient consideration to concerns expressed by the public.

345. The Panel declines to rule on this issue for the following reasons: (a) a ruling on this issue is not essential to the Panel’s decision on transparency, given that the Panel has already found that ICANN violated its obligation to provide a detailed public explanation of the reasons for the Price Cap Decision; (b) this question is more appropriately resolved in an IRP proceeding in which the issue is critical to the

³⁴⁷ 29 June 2022 ICANN Closing Presentation, Slide 24.

³⁴⁸ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁴⁹ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁵⁰ 29 June 2022 ICANN Closing Presentation, Slide 24.

³⁵¹ ICANN Post-Hearing Brief ¶ 68.

outcome;³⁵² and (c) the Parties' briefs do not address whether a detailed *external* explanation obviates any need for ICANN to maintain a non-privileged *internal* record of its decision-making process.

346. The case for requiring an internal non-privileged record of ICANN's deliberations might be found in the following Articles and Bylaws:

- First, as discussed above, the Articles and Bylaws require ICANN to operate, "to the maximum extent feasible," for the benefit of the Internet community as a whole through "open and transparent processes."³⁵³ Maintaining a non-privileged record of the reasons for decisions on important matters facilitates operating in an "open and transparent manner." Without such a record, it is difficult to determine whether ICANN sufficiently considered concerns from the Internet community and had a reasoned basis for rejecting those concerns.
- Second, the Bylaws require ICANN to "maintain responsive consultative procedures that provide *detailed explanations of the basis for decisions* (including how comments have influenced the development of policy considerations)," and to "implement procedures for the *documentation and public disclosure of the rationale for decisions* made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above)." ³⁵⁴ Thus, in addition to providing detailed explanations of the basis for decisions, ICANN has the obligation to document and disclose the reasons for its Price Cap Decision, "including how comments have influenced the development" of that decision.
- Third, the purpose of IRPs, as defined in the Bylaws, include ensuring that ICANN "complies with its Articles of Incorporation and Bylaws," providing "meaningful" independent review, ensuring that ICANN is "accountable" to the global Internet community, and securing the "transparent, efficient,

³⁵² For example, this might arise in a case in which ICANN provided a detailed *public* explanation of the reasons for its decision, but there was no non-privileged *internal* record (or "paper trail") of ICANN's deliberations.

³⁵³ Articles of Incorporation Article III; Bylaws § 1.2(a).

³⁵⁴ Bylaws § 1.2(a)(iv), § 3.1.

consistent, coherent, and just resolution of Disputes.³⁵⁵ “Meaningful” independent review would be facilitated by a contemporaneous record of the decision-making process (a “paper trail,” so to speak), so that an IRP panel can independently review the reasons for ICANN’s decision.

- Fourth, as Namecheap has noted, the Bylaws allow ICANN to exclude “legal matters” from the publicly available minutes of Board meetings, but only if the Board determines that exclusion is “necessary or appropriate to protect the interests of ICANN,” and the Board “describe[s] in general terms in the relevant minutes the reason for such nondisclosure.”³⁵⁶ In other words, ICANN may carve out privileged legal matters from public Board minutes, but must publish minutes of non-privileged matters and explains the carve-out. While that obligation refers to Board minutes, a similar obligation arguably applies to a written recommendation from the ICANN staff to the Board on an important matter such as the Price Cap Decision. Privileged legal matters may be put in a separate section so the rest of the memorandum can be produced after carving out the privileged section.

347. As noted above, this Panel need not render a decision on whether these provisions obligate ICANN to create a non-privileged record of its *internal* deliberations, as opposed to merely providing detailed *external* explanations for its decision, given that ICANN did not provide a sufficient external explanation here. The Panel unanimously agrees, however, that: (a) creating such an internal record would at least be *advisable* (even if not required); and (b) that ICANN appears to be overusing the attorney-client privilege to shield its internal communications and deliberations. The following paragraphs elaborate on these points.

348. This is not the first IRP Panel to express concerns regarding ICANN’s use of the attorney-client privilege to shield ICANN deliberations from disclosure. The IRP panel in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14- 0001-5004, RM 175 (“*Dot Registry*”) considered whether the ICANN Board, acting through the Board Governance Committee (“BGC”), had violated transparency by failing to publish information about

³⁵⁵ Bylaws § 4.3(i), (ii), (iii), (vii).

³⁵⁶ Bylaws § 3.5(d).

a staff recommendation that the Board deny reconsideration of the staff's denial of Dot Registry's applications for new gTLDs.³⁵⁷

349. The *Dot Registry* panel observed that ICANN is "free to assert attorney-client and litigation workproduct privileges in this proceeding, just as it is free to waive those privileges," but "is not free ... to disregard mandatory obligations under the Bylaws."³⁵⁸ The panel noted that the Bylaws entitled the Board Governance Committee to ask the ICANN staff for its views, but required staff comments to "be made publicly available on the Website." The panel further noted that "[n]one of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus subject to the shield of privilege) in reaching its conclusions."³⁵⁹

350. The *Dot Registry* panel concluded that by using the privilege to "shield[] from public disclosure all real evidence of an independent deliberative process at the BGC (other than the pro forma meeting minutes), the BGC put itself in contravention of Bylaws 1V.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public."³⁶⁰ Further, the BGC's invocation of privilege left the panel "highly uncertain" as to whether the BGC had "exercised due diligence and care in having a reasonable amount of facts in front of them," and had "exercised independent judgment in taking the decision."³⁶¹

351. This Panel cited *Dot Registry* in Procedural Order No. 13, holding that Namecheap had not overcome ICANN's prima facie showing that documents were "shielded from disclosure by the attorney-client privilege," but warned that not disclosing these documents "potentially narrows the scope of the evidence for ICANN to rebut claims that it violated its Articles of Incorporation and Bylaws."³⁶² The Panel explained:

³⁵⁷ *Dot Registry* RM 175, ¶¶ 9-11, 19-25, 149.

³⁵⁸ *Dot Registry* RM 175, ¶ 149.

³⁵⁹ *Dot Registry* RM 175, ¶ 149.

³⁶⁰ *Dot Registry* RM 175, ¶ 150.

³⁶¹ *Dot Registry* RM 175, ¶ 150.

³⁶² Procedural Order No. 13 ¶ 37.

The possible implications of using the privilege to shield information considered by the ICANN Board Governance Committee were discussed in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14- 0001-5004, Declaration of the Independent Review Panel, ¶¶ 149-50 (29 July 2016). ICANN expressed confidence during the 19 October hearing that the non-privileged evidence of ICANN’s deliberations will be sufficient to show that ICANN did not violate its Articles of Incorporation or Bylaws, and the Panel expresses no view on whether the concerns noted in the *Dot Registry* Declaration apply here. The Panel simply highlights the issue so that both Parties may address it in their submissions.³⁶³

352. ICANN argues that *Dot Registry* is inapposite because it involved a Bylaws provision that explicitly required staff comments to the BGC to “be made publicly available.” This Panel agrees that *Dot Registry* is not directly on point. Nevertheless, as in *Dot Registry*, ICANN’s invocation of privilege leaves the Panel “highly uncertain” whether the decisionmakers at ICANN had “exercised due diligence and care in having a reasonable amount of facts in front of them” in making the decision at issue.

353. ICANN argues that the panel in the *Afilias* IRP “found that ICANN’s accountability and transparency commitments *do not* ‘somehow imply a waiver of its right to invoke privilege.’”³⁶⁴ ICANN relies, however, on a preliminary procedural order that was limited to whether ICANN should be required to produce documents that ICANN argued were privileged, as well as the adequacy of ICANN’s privilege log.³⁶⁵ That preliminary issue is separate and independent from the merits issue of whether ICANN complied with the Articles and Bylaws. Indeed, the IRP panel later declared that ICANN had violated its Articles and Bylaws in several respects.³⁶⁶ This Panel similarly ruled in Procedural Order No. 13 that ICANN need not produce

³⁶³ Procedural Order No. 13 n. 3.

³⁶⁴ ICANN Post-Hearing Brief ¶ 68, citing *Afilias v. ICANN* IRP, Procedural Order No. 4 ¶ 42, Ex. R-18A (emphasis in original). ICANN also cites IRP Procedures, Rule 8, RE-1, which allows ICANN to withhold from production in IRPs documents “subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law.”

³⁶⁵ *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4 ¶¶ 38-80, R-18A.

³⁶⁶ *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision (Corrected Version of 15 July 2021) ¶ 413, RM 190.

documents for which Namecheap had not rebutted ICANN's prima facie showing of privilege.³⁶⁷ That preliminary issue is separate and independent from whether ICANN should maintain a non-privileged record of its internal deliberations.

354. ICANN argues that requiring a non-privileged record of its decision-making process would "make no sense," given that ICANN has negotiated over 2,000 Registry Agreements.³⁶⁸ Yet the issue is not whether ICANN must create a non-privileged record of decisions on every matter, no matter how routine or insignificant. Rather, the issue is whether ICANN must (or at least should) maintain such a record for decisions on "policy" for which the Articles and Bylaws require ICANN to provide "detailed explanations of the basis for decisions" (including how comments have influenced the development of policy considerations)," and to document and publicly disclose "the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above)."³⁶⁹

355. ICANN recognized that the Price Cap Decision was of sufficient import to require "responsive consultative procedures" by requesting public comments and then publishing its analysis of those comments.³⁷⁰ Internal ICANN documents confirm that ICANN understood that this was a controversial subject that would likely engender strong public opposition. For example, on 1 March 2019, Russell Weinstein, the ICANN employee responsible for negotiating the 2019 Registry Agreements, referred to the "potential hot topic of the removal of price caps," as a reason to delay the request for public comments on the proposed .INFO Registry Agreement until after a March 2019 Board meeting.³⁷¹ Similarly, an ICANN employee provided the following internal

³⁶⁷ Procedural Order No. 13 ¶ 37.

³⁶⁸ 29 June 2022 ICANN Closing Presentation, Slide 24.

³⁶⁹ Bylaws § 1.2(a)(iv), § 3.1; *see also* Articles of Incorporation, Article III. As discussed in Issue 6 below, the Price Cap Decision involved policy matters that should have been decided by the ICANN Board rather than the ICANN staff. Moreover, the obligation to document and provide detailed explanations of the rationale for policy decisions applies not only to decisions by the Board, but also to decisions by ICANN's "constituent bodies." Bylaws § 3.1.

³⁷⁰ Annexes 2-4 and Annexes 5-7.

³⁷¹ 1 March 2019 Email from Russell Weinstein to David Payne, Annex 72 at ICANN-NC-015268. ICANN had designated that email as "Highly Confidential - Outside Attorneys' Eyes Only." The Panel finds that email does not warrant a "Confidential" designation, let alone a "Highly Confidential" designation. The same comment applies to the ICANN documents cited in the next two footnotes, Annexes 106 and 107.

comment on an initial draft of ICANN's request for public comments on the proposed removal of price caps: "I took a stab at drafting this, but due to the sensitive nature of the subject, I would like to review this together to further fine tune."³⁷² Another ICANN employee suggested a "simpler statement," noting that the draft description "gets a lot of attention to being carefully explained, which makes it stand out."³⁷³ Thus, ICANN not only knew that removal of price caps was a "hot" and "sensitive" topic, it sought to downplay its significance with a "simpler" explanation.

356. Moreover, ICANN created numerous documents regarding its Price Cap Decision, including a memorandum from ICANN staff to the Board that explained the reasons for that decision.³⁷⁴ Yet ICANN produced almost none of those documents, asserting that they are privileged. Thus, the issue is not whether ICANN should have created more documents, but rather whether the documents that it created should have prepared in a manner that left a non-privileged record that is sufficient to allow meaningful independent review.

357. ICANN contends that it created "a non-privileged record of the core reasons underlying its decision."³⁷⁵ ICANN relies on the Staff Reports of Public Comment Proceedings that it published in June 2019, which ICANN describes as providing "a summary and analysis of the public comments, as well as a detailed explanation to the Internet community as to why ICANN organization nevertheless saw value in transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement in response to public comments...."³⁷⁶

358. Yet the June 2019 Staff Reports merely summarized concerns about the Price Cap Decision without explaining why it rejected them. Thus, ICANN's reports do not contain the "detailed explanation" required by its transparency obligations.

³⁷² Draft of Proposed Renewal of .INFO Registry Agreement, Annex 106 at ICANN-NC-016379; *see* Namecheap Pre-Hearing Brief ¶ 51 (explaining the related metadata).

³⁷³ Draft of Proposed Renewal of .INFO Registry Agreement, Annex 107 at ICANN-NC-013288; *see* Namecheap Pre-Hearing Brief ¶ 51 (explaining the related metadata).

³⁷⁴ Hearing Tr. Day III, 106-107 (Weinstein testimony).

³⁷⁵ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁷⁶ ICANN Post-Hearing Brief ¶¶ 63, 66, citing 26 July 2019 Letter from Cyrus Namazi Zak Muscovitch of the Internet Commerce Association, RE-8.

359. ICANN also relies on a letter that ICANN posted on its website after it implemented the Price Cap Decision.³⁷⁷ That letter includes some further information, but still does not explain why ICANN rejected many of the public concerns, such as the special nature of legacy gTLDs in general and of .ORG in particular.

360. The internal ICANN documents submitted in this IRP do not shed further light on why ICANN rejected the concerns that ICANN ignored in its public reports. Indeed, ICANN produced virtually no internal documents regarding the reasons for the Price Cap decision, claiming that such documents were privileged. Neither ICANN's public disclosures nor its internal documents provide a non-privileged record of ICANN's decision-making process that is sufficient to document and disclose the rationale for the Price Cap Decision, including a "detailed explanation" of why ICANN rejected the concerns expressed in the public comments.

361. ICANN asserts that it "was not feasible to maintain a more extensive non-privileged record" because "legal issues were integrally tied to ICANN organization's considerations."³⁷⁸ ICANN argues that "[p]rotecting privilege is critical to ICANN's ability to fulfill its mission."³⁷⁹

362. The Panel agrees that ICANN is entitled to obtain privileged and confidential advice from counsel, and it takes ICANN's concerns about privilege seriously. It appears unlikely, however, that maintaining a non-privileged record of important policy decisions with detailed explanations would impair ICANN's "ability to fulfill its mission" for several reasons.

363. First, there does not appear to be any irreconcilable conflict between transparency and privilege, given that the Price Cap Decision is a policy matter that is driven primarily by business and economic consideration, rather than legal issues. Thus, the expert reports of both sides focused on business and economic issues regarding whether the .ORG and .INFO legacy gTLDs have sufficient market power to warrant continued imposition of price controls. Public comments also focused on non-legal issues, such as whether .ORG serves a special non-profit market, and whether

³⁷⁷ ICANN Post-Hearing Brief ¶ 65, citing Annexes 5-7.

³⁷⁸ 29 June 2022 ICANN Closing Presentation, Slide 25.

³⁷⁹ ICANN Post-Hearing Brief ¶ 68.

unsponsored legacy gTLDs such as .ORG and .INFO are fungible with sponsored new gTLDs, as reflected in the public comments.

364. Second, while the Price Cap Decision may raise some privileged legal issues, it appears unlikely that such issues are so “integrally tied” to non-privileged business and economic issues that the two cannot be separated. Legal issues mentioned at the hearing include whether the Price Cap Decision required a decision by the Board, and whether the decision was consistent with competition law.³⁸⁰ The Panel agrees that these issues potentially implicate privilege concerns.³⁸¹ However, these are discrete legal issues that could have been separated from ICANN’s consideration of non-privileged matters, such as the special nature of legacy gTLDs in general, and of .ORG in particular. Indeed, Mr. Weinstein agreed that renewal of the 2019 Registry Agreements was “primarily a business decision” with some legal aspects, and that it is “theoretically possible” to separate legal issues from business issues.³⁸² In fact, ICANN prepared and published a non-privileged analysis of public comments that briefly explained the Price Cap Decision. While that explanation was too cursory to meet ICANN’s obligation to provide “detailed explanations,” ICANN could and should have published a more detailed explanation. ICANN could also have created a non-privileged internal record of the reasons for its decisions that was similar to its published explanation.

365. The record also suggests that ICANN’s reliance on privilege was overly aggressive. For example, Mr. Weinstein’s testimony suggests that ICANN considers summaries of negotiations with registry operators to be privileged if they are sent to

³⁸⁰ See Hearing Tr. Day III, 106-07, 112 (Weinstein testimony).

³⁸¹ The Panel says “potentially” because whether a communication is privileged depends on the specific facts. The Panel expresses no view on whether specific communications are or are not privileged.

³⁸² Hearing Tr. Day III, 107, 111. Mr. Weinstein testified that ICANN generally combined the two for the sake of “efficiency.” Thus, his general practice is to provide the Board with a single privileged memorandum regarding renewal of Registry Agreements, without separating non-privileged analysis of business considerations from privileged legal matters. (Hearing Tr. Day III, 109-10.) It does not seem that the burden of separating privileged from non-privileged matters in this memorandum would have been significant. Mr. Weinstein also prepares an email summary of renewal negotiations with registry operators that he (questionably, in the view of the Panel) considers to be privileged because it is copied to ICANN’s legal team. (Hearing Tr. Day III, 143-44.)

counsel, even though the content of such third party discussions would ordinarily not be privileged.³⁸³

366. Furthermore, after conducting an *in camera* review of Dr. Carlton's 2019 report, which ICANN had refused to produce based on privilege, the Panel concluded that "there is nothing from the face of the report to indicate that it was prepared in response to a request from ICANN's legal counsel, and nothing in the content of the report to suggest that it was prepared for the purpose of assisting ICANN's counsel to provide legal advice to ICANN."³⁸⁴ The Panel further held that "the report does not reveal any legal strategy or privileged mental impressions of counsel."³⁸⁵

367. In fact, Dr. Carlton's 2019 report is limited to economic analysis similar to the analysis in the expert reports that Dr. Carlton submitted in this arbitration. Dr. Carlton did not analyze any legal issues, nor did he refer to any mental impressions of ICANN's counsel. That is not surprising, given that Dr. Carlton is an economist and not a lawyer.

368. Notwithstanding the Panel's conclusions regarding the 2019 Carlton report, the Panel is not going so far as to find that ICANN generally abused the privilege, as requested by Namecheap. California's privilege laws, which apply here,³⁸⁶ did not allow the Panel to conduct *in camera* review of documents that ICANN asserted were shielded by the attorney-client privilege.³⁸⁷ The *in camera* review of the 2019 Carlton report was based on a finding that ICANN waived the attorney-client privilege as to that document by designating Dr. Carlton as an expert witness, coupled with a

³⁸³ Hearing Tr. Day III, 143-44. The Panel says "suggests" because Mr. Weinstein is not a lawyer, and the decision to withhold documents as privileged is ordinarily made by counsel. The Panel is not aware of specific evidence that ICANN withheld any email summaries of renewal negotiations based on Mr. Weinstein's expansive interpretation of privilege. Nevertheless, Mr. Weinstein's testimony raises concerns.

³⁸⁴ Procedural Order No. 1, ¶ 23.

³⁸⁵ *Id.* ¶ 28.

³⁸⁶ Procedural Order No. 16 ¶¶ 6, 10; see also *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4 ¶ 33 (12 June 2020).

³⁸⁷ See discussion at Procedural Order No. 15 ¶ 26.

narrow exception under California law allowing *in camera* review in certain situations involving work product privilege designations.³⁸⁸

369. ICANN has not waived privilege as to other documents, such as its memorandum that explained ICANN's recommendation to the ICANN Board that .ORG and .INFO transition to the Base Registry Agreement without price controls. Thus, the Panel has not reviewed other documents and is not in a position to make an overall assessment as to the privilege assertions by ICANN.

370. Nevertheless, ICANN's assertion of privilege as to the 2019 Carlton report raises doubt as to ICANN's argument that legal issues were so "integrally tied" to ICANN's Price Cap Decision that it would not have been feasible for ICANN to create a non-privileged record of its detailed rationale. That doubt is confirmed by the nature of the legal issues that ICANN has identified, such as competition law and whether ICANN needed to obtain Board approval of the Price Cap Decision. Those issues are discrete and should not be difficult to separate from non-privileged business and economic considerations.

371. ICANN's broad assertion of privilege means that ICANN has little to fall back on to show that it "maintain[ed] responsive consultation procedures that provide detailed explanations of the basis for decisions."³⁸⁹ As already discussed, both ICANN's public reports and its internal documents are insufficient. Thus, this Panel finds itself in the same position as the *Dot Registry* IRP Panel, holding that "ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges."³⁹⁰ ICANN "is not free, however, to disregard mandatory obligations under the Bylaws."³⁹¹ While ICANN's assertion of attorney-client privilege does not in itself constitute a violation of the Articles of Incorporation and Bylaws, it does factor into the Panel's finding that ICANN's failed to show that it engaged in a responsive consultation procedure that provided detailed explanations of the basis for rejecting public comments.

³⁸⁸ See Procedural Order No. 16 ¶ 10; Procedural Order No. 17 ¶¶ 15-21.

³⁸⁹ Bylaws, §3.1 (emphasis added).

³⁹⁰ *Dot Registry* ¶ 149.

³⁹¹ *Id.*

372. In sum, this Panel finds that ICANN breached its transparency obligation to provide a detailed external explanation to the public of its Price Cap Decision, including the reasons that ICANN rejected the concerns that it highlighted in its summary of public comments. That finding makes it unnecessary to decide whether transparency also required ICANN to maintain a detailed non-privileged record (in effect, a “paper trail”) of its internal deliberations. The Parties have not addressed whether a detailed external explanation removes any need for a non-privileged record of internal deliberations. Having already found that ICANN breached its transparency obligations with regard to the lack of a detailed public explanation, the Panel does not need to address whether an internal record is also required. In that regard, even if ICANN’s broad assertion of privilege does not rise to a violation of its transparency obligations, the Panel is concerned by the absence of an internal record of its deliberative process for the Price Cap Decision and believes that it would *at least* be advisable (and perhaps required) for ICANN to create such a record for future decisions on policy matters.

XIII. ISSUE 6: WAS IT CONTRARY TO THE ARTICLES AND BYLAWS FOR THE ICANN ORGANIZATION (RATHER THAN THE ICANN BOARD) TO MAKE THE PRICE CAP DECISION?

C. The Issue and Legal Framework

373. Namecheap claims that the ICANN Board improperly held “secret” meetings regarding removing price controls for .ORG, .INFO, and .BIZ, which is a decision that should have been made by the ICANN Board in a duly noticed meeting, rather than by ICANN org.

374. Namecheap points to Section 2.1 of ICANN’s Bylaws, which provides that “[e]xcept as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.”³⁹²

375. Namecheap also relies on the following Section 3.6(a) of the Bylaws:³⁹³

³⁹² Namecheap Pre-Hearing Brief ¶ 31, citing Bylaws § 2.1.

³⁹³ Namecheap Pre-Hearing Brief ¶¶ 32, 301, 304, citing Bylaws § 3.6(a).

With respect to any **policies** that are being considered by the Board for adoption **that substantially affect the operation of the Internet or third parties**, including the imposition of any fees or charges, ICANN shall:

- (i) provide public notice** on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
- (ii) provide a reasonable opportunity for parties to comment** on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), **prior to any action by the Board**; and
- (iii) in those cases where the policy action affects public policy concerns**, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.³⁹⁴

376. ICANN maintains that the Price Cap Decision was properly made by the ICANN staff, rather than by the ICANN Board, so the Bylaws requirements for formal Board action do not apply. ICANN does not dispute that it did not meet the requirements for formal Board action if they apply.

377. Thus, the key issue is whether the Price Cap Decision should have been made by the ICANN Board. If so, ICANN did not comply with the requirements for Board action, such as a formal Board meeting with advance notice and minutes. If not, those requirements do not apply.

³⁹⁴ Bylaws § 3.6(a).

C. Namecheap's Position

378. Namecheap argues that “[i]t is only after the Board approves a policy that the policy will be implemented and must be implemented.”³⁹⁵ In addition to citing Section 2.1 of ICANN’s Bylaws, Namecheap states that:

By carrying a resolution, the ICANN Board can delegate authorities and give specific instructions to ICANN’s staff, e.g., to execute renewal agreements for legacy gTLDs on ICANN’s behalf. Until the execution of the 2019 RAs for .ORG, .INFO and .BIZ, ICANN has always proceeded that way. *E.g.*, On 22 August 2013, the ICANN Board passed the following resolutions for the renewal of the .ORG, .INFO and .BIZ RAs in 2013:

Resolved (2013.08.22.10), the proposed renewal .INFO Registry Agreement is approved, and the President, Generic Domains Division and the General Counsel are authorized to take such actions as appropriate to implement the agreement;

Resolved (2013.08.22.11), the proposed renewal .ORG Registry Agreement is approved, and the President, Generic Domains Division and the General Counsel are authorized to take such actions as appropriate to implement the .ORG Registry Agreement;

Resolved (2013.08.22.12), the proposed renewal .BIZ Registry Agreement is approved, and the President, Generic Domains Division and the General Counsel are authorized to take such actions as appropriate to implement the .BIZ Registry Agreement.

The Board passed similar resolutions for .PRO, .CAT, and .TRAVEL in 2015, for .TEL in 2016, and for .MOBI and .NET in 2017.

In contrast with these resolutions, there is no record showing the approval and delegation of authority for the execution of the 2019 RAs for .ORG, .INFO and .BIZ. Consequently, these RAs have been executed without the necessary direction of the ICANN Board.

³⁹⁵ Namecheap Closing Presentation Slide 17.

As a result, ICANN has committed an *ultra vires* act under Californian law, thereby violating Article III of its Articles of Incorporation. In addition, ICANN violated Article 2(1) of its Bylaws.³⁹⁶

C. ICANN's Position

379. ICANN agrees that the Board did not make the Price Cap Decision, stating that “although the Board received briefings during workshops regarding the background relating to the draft 2019 .BIZ, .INFO, and .ORG Registry Agreements, the results of the public comments, and ICANN’s intended course of action pursuant to the Board’s oversight role, the receipt of those briefings did not result in the Board passing any resolutions regarding the 2019 Registry Agreements.”³⁹⁷

380. But ICANN further argues that “the Board did not, and did not need to, delegate some type of special authority to ICANN organization relating to ICANN’s decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement. Such particularized authority was not needed because the Bylaws expressly provide that “[t]he President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business.”³⁹⁸

381. ICANN also relies on “Delegation of Authority Guidelines” approved by the Board on 8 November 2016, which provide that ICANN’s President and CEO have the responsibility of “[l]ead[ing] and oversee[ing] ICANN’s day-to-day operations,” and that the President and CEO and senior management have the role of “[p]erform[ing] operational work in accordance with the strategic direction of the Board.”³⁹⁹

382. ICANN argues that “day-to-day operations” include entering into “contract negotiations, not just with registry operators but with registrars and numerous other third parties.”⁴⁰⁰

³⁹⁶ Namecheap Pre-Hearing Brief ¶¶ 321-25 (footnotes omitted).

³⁹⁷ ICANN Post-Hearing Brief ¶ 50.

³⁹⁸ *Id.* ¶ 51 (quoting ICANN Bylaws, Art. 15, § 15.4).

³⁹⁹ *Id.* ¶ 52 (quoting ICANN’s Delegation of Authority Guidelines (8 Nov. 2016), Ex. R-37).

⁴⁰⁰ ICANN Pre-Hearing Brief ¶ 89 (footnote omitted).

383. ICANN also maintains that the “policy development process is a defined process in which one, or multiple, ICANN supporting organizations or constituencies from the ICANN community ask the ICANN Board to approve new policies developed by the community through ICANN’s bottom-up, multistakeholder processes.”⁴⁰¹ ICANN’s Board chair, Maarten Botterman, testified that transitioning .BIZ, .INFO and .ORG to the Base Registry Agreement was not part of ICANN’s policy development process work.⁴⁰² Another ICANN Board member testified as follows:

Q. And particularly, you mentioned policy issue by the board. So where would you put the line?

A. Well, the ICANN bylaws are very specific about the role of the board with respect to policy. And the board cannot delegate under the bylaws, it cannot delegate policy -- its policy responsibility, which is not policy development, but it is the looking at receiving policy recommendations from the community, evaluating those recommendations to ensure that they are consistent with ICANN’s mission and within ICANN’s remit, and rejecting those policies only if a super-majority concludes that the community development -- developed policies are not in the global public interest. Once the board has approved the policy, the board will then direct the organization to implement those policies, and the organization is responsible for implementation, subject to oversight of the board.”⁴⁰³

Thus, ICANN defines the “policy development process” as a term of art, with its own acronym, “PDP.” According to ICANN, only those “policies” that are developed by the Internet community with a request from “ICANN supporting organizations or constituencies” require Board action.

C. The IRP’s Panel’s Analysis and Decision

384. The Panel agrees that “policy development process” and “PDP” do in fact seem to be terms of art but finds nothing in the Bylaws that *limits* Board consideration to policies that were developed through the formal policy development process that is

⁴⁰¹ *Id.* ¶ 55.

⁴⁰² Hearing Tr. Day II, 150:23–151:1.

⁴⁰³ Hearing Tr. Day II, 62:6–63:2.

initiated by a request from “one, or multiple, ICANN supporting organizations or constituencies.” To the contrary, ICANN’s Bylaws broadly provide that “[e]xcept as otherwise provided in the Articles of Incorporation or these Bylaws, **the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.**”⁴⁰⁴

385. ICANN org can *implement* policies set by the Board without further Board action. However, ICANN org’s responsibility under the 2016 Delegation of Authority Guidelines for “[l]ead[ing] and oversee[ing] ICANN’s day-to-day operations” and “[p]erform[ing] operational work in accordance with the strategic direction of the Board”⁴⁰⁵ does not extend to *establishing* new policy that substantially affects the operation of the Internet.

386. In fact, the Delegation of Authority Guidelines define the role of the CEO and Senior Management as “[i]mplement[ing] the decisions of the Board, *including implementation of policies approved by the Board and review [of] recommendations approved by the Board.*”⁴⁰⁶ The Guidelines thus make clear that ICANN org’s role is to implement policies *approved by the Board*. They do not authorize ICANN org to create or implement new policies that the Board has not approved.

387. The Panel finds that of the removal of price controls for .ORG, .INFO, and .BIZ was not a routine matter of “day-to-day operations,” as ICANN has asserted. The Price Cap Decision was a policy matter that required Board action. As noted above, Section 3.6(a) of the Bylaws requires the Board to provide advance notice and an opportunity to comment on “any **policies** that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including *the imposition of any fees or charges.*”⁴⁰⁷ The Price Cap Decision “substantially affects the operation of the Internet or third parties” and involves the “imposition of ... fees or charges” by allowing registry operators to increase domain name registration fees by more than the historic price cap of 10% per year.

⁴⁰⁴ Bylaws §2.1 (emphasis added).

⁴⁰⁵ *Id.* ¶ 52 (quoting ICANN’s Delegation of Authority Guidelines (8 Nov. 2016), Ex. R-37).

⁴⁰⁶ Delegation of Authority Guidelines at 2-3, Ex. R-37 (emphasis added).

⁴⁰⁷ Bylaws § 3.6(a) (emphasis added).

388. An argument could be made that Section 3.6(a) does not apply here because it refers to policies that “are being considered for adoption by the Board,” and the Board did not formally approve the Price Cap Decision. Yet this interpretation would allow ICANN org to make *any* policy decision, including with respect to policies that substantially affect the operation of the Internet, without any consideration by the Board. Indeed, the Board could abdicate policymaking responsibilities in favor of ICANN org through the simple expedient of doing nothing (or, as here, considering such policies developed by ICANN org only in non-public workshops, thereby circumventing the transparency and process provisions in the Bylaws). This would be inconsistent with the provision in the Bylaws that “[e]xcept as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.”⁴⁰⁸

389. Furthermore, Namecheap has presented unrebutted evidence that until ICANN adopted the Registry Agreements for .ORG, .INFO, and .BIZ in 2019, the Board had formally approved all renewals of Registry Agreements for legacy gTLDs, such as .ORG, .INFO, and .BIZ.⁴⁰⁹ Examples include:⁴¹⁰

Year	Legacy gTLD	Board Resolutions and Minutes
2013	.INFO, .ORG, .BIZ	Resolutions 2013.08.22.10, 2013.08.22.11, 2013.08.22.12 (RM 178, 179)
2015	.CAT, .TRAVEL, .PRO	Resolutions 2015.09.28.04, 2015.09.28.05, 2015.09.28.06, (RM 180, 181)
2016	.TEL	Resolution 2016.11.08.07 (RM 115)
2017	.MOBI, .NET	Resolutions 2017.03.16.04, 2017.06.24.22 (RM 112, 124)

⁴⁰⁸ Bylaws § 2.1 (emphasis added).

⁴⁰⁹ Namecheap Pre-Hearing Brief ¶¶ 321-25.

⁴¹⁰ Namecheap has focused on renewal of Registry Agreements for legacy gTLDs from 2013, apparently because that corresponds to the launch of the New gTLD Program. The record suggests, however, that before 2013, ICANN’s practice was to request and obtain Board approval of Registry Agreements for legacy gTLDs.

390. ICANN asserts that the Board has approved Registry Agreements for “very few of the over 1,200 gTLDs in the DNS and does not engage in this practice as a matter of course....”⁴¹¹ But ICANN has not cited a single Registry Agreement for a *legacy* gTLD that was executed before 2019 and that was not approved by the Board. ICANN appears to be relying exclusively on Registry Agreements for *new* gTLDs, which do not establish a precedent for *legacy* gTLDs.

391. An ICANN Board member suggested at the hearing that ICANN org was acting in accordance with established policy in renewing the Registry without price controls. Specifically, she stated that ICANN had an existing “no price caps” policy that was developed at the time it created the new gTLDs in 2011:

Q. I understand that for the purpose of whether the board acts, you have to draw a bright line, but the world is not all black and white. There are things in between.

A. Sure. I think that’s a really good question.

In this case, the board had acted in the context of the new gTLD program and it had made a determination that the community-developed policy that said “no price caps” was the correct -- that was -- that served the global public interest, and that was a -- that policy was adopted. So, in many ways, the consideration about sort of the public policy issues with respect to price caps in registries other than .com had been resolved. The other issue, of course, is that in between 2001, when the Legacy contracts were negotiated, and 2006, when they were repeated, 1,200 new, additional, competing top-level domains -- generic top-level domains had been added by the time this came up.

...

The new gTLD program addressed it and 1,200 new competing top-level domains had been introduced. And to be clear, I mean, I think this point may have been a little obscure. In fact, the board had been briefed all along on the value of moving contracts into -- onto the new gTLD Base contract and, in fact, in 2013 -- I know this from being on the other side of this -- org and the board, presumably, very much wanted those Legacy TLDs to move onto the Base contract in 2013. The decision not to do that in 2013 was taken by the Legacy

⁴¹¹ ICANN Pre-Hearing Brief ¶ 91; ICANN Rebuttal ¶ 34.

registry operators, not by ICANN board or org, and ICANN board or org had -- ICANN board had long been of the view that there was significant value to moving the Legacy contracts onto the new gTLD Base Agreement.⁴¹²

392. Yet, as already discussed, this “no price caps” policy was limited to the new gTLDs launched in 2012, and the economic analysis underlying that policy was premised, at least in part, on continuing price controls with respect to legacy gTLDs, such as .ORG, .INFO, and .BIZ. The policy development process that culminated in the New gTLD Program and a Base Registry Agreement without price controls did not encompass the legacy TLDs at issue here. The Board adopted a policy approving use of the Base Registry Agreement for New gTLDs. It did not adopt a similar policy for legacy gTLDs.

393. Prior to 2019, the only legacy gTLD previously subject to price controls that was transitioned to the Base Registry Agreement was .PRO, an unsponsored, very small gTLD. The renewal attracted almost no public comment.⁴¹³ But the .PRO renewal occurred pursuant to Board action. ICANN org did not make the decision.⁴¹⁴ The ICANN Board provided a rationale for the resolution, including a summary of the concerns or issues raised by the community, the materials reviewed by the Board, the factors that the Board found to be significant, and the positive or negative community impacts of the Board’s resolutions.⁴¹⁵ Although the Board’s resolution included some discussion of the advantages of the Base Registry Agreement--stating, for example, that “[t]ransition to the new gTLD Registry Agreement will provide consistency across all registries leading to a more predictable environment for end-users” – the Board did not

⁴¹² Hearing Tr. Day II, 67:16–70:10.

⁴¹³ RM 131, ICANN, *Public Comments Report re Proposed Renewal of .PRO Unsponsored Registry Agreement*, 18 August 2015, <https://itp.cdn.icann.org/en/files/registry-agreement/reissued-report-comments-pro-renewal-18aug15-en.pdf>.

⁴¹⁴ ICANN, *Approved Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (RM 132).

⁴¹⁵ *Id.*

purport to decide that *all* legacy gTLDs should transition to the Base Registry Agreement.⁴¹⁶ Rather, the Board’s decision was singularly focused on the .PRO gTLD.

394. ICANN’s action transitioning a legacy gTLD, especially one of the three original gTLDs (.ORG), pursuant to staff action without a Board resolution was unprecedented. Prior to 30 June 2019 (when ICANN renewed the .ORG, .BIZ, and .INFO RAs without price controls), ICANN’s practice was as follows:

- New gTLD Registry Agreements could be entered into or approved by ICANN org without Board action (although some were approved at the Board level).⁴¹⁷ These Registry Agreements utilized the Base Registry Agreement template and did not include price controls.
- While .PRO, a gTLD that was previously subject to price controls, was transitioned to the Base Registry Agreement, this occurred only pursuant to Board action.⁴¹⁸ ICANN org did not make the decision.⁴¹⁹

⁴¹⁶ As previously noted, while other legacy gTLDs transitioned to the Base Registry Agreement before 2019 – including .JOBS, .TEL, .TRAVEL, .MOBI, and .CAT – these were “sponsored” gTLDs aimed at a specific community, rather than the general public. As a result, they were never subject to price controls.

⁴¹⁷ For example, the Board considered the application for the .PERSIANGULF gTLD at issue in the GCC IRP, presumably because GCC objected to that application. *See* GCC Partial Final Declaration ¶¶ 34-36. That case, however, involved whether the new gTLD should be approved despite objections, not the terms of a registry agreement. The Parties have not cited any Board approvals of registry agreements for New gTLDs, which are based on the Base Registry Agreement that the Board has already approved.

⁴¹⁸ ICANN, *Approved Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (RM 132).

⁴¹⁹ Even with the Board making the decision, ten of the fourteen commenters “objected to ICANN’s method of renewing legacy TLD Registry Agreements,” with “several” expressing the view that “[i]mposing URS [Uniform Rapid Suspension System] on an incumbent gTLD via the contracting process is an unacceptable staff intervention into the policymaking process. Approval of this draft contract would constitute top-down, staff-driven policymaking in direct violation of ICANN’s stated commitment to the bottom-up, private sector led policy development process.” (RM 131.) Although these comments related to the imposition of URS, rather than price controls, the concern about “an unacceptable staff intervention into the policymaking process” is similar to the concern that Namecheap has raised in this IRP. That concern applies with greater force to the Price Cap Decision, given that the decision was made by the ICANN org, and not by the Board.

395. Even if, as ICANN contends, “policy development process” is a term of art involving only policies developed by the Internet community through ICANN’s bottom-up, multistakeholder processes, no such policy development was required to *continue* the practice of transitioning legacy gTLDs to the Base Registry Agreement without price controls only pursuant to Board action. To the contrary, to the extent ICANN intended to allow ICANN org (not the Board) to transition legacy gTLDs to the Base Registry Agreement without price controls, it should have followed the policy development process to implement this change.

396. Indeed, ICANN staff seem to have been working under the assumption that the Board, not ICANN org, would make the Price Cap Decision – or at least they were uncertain on that point. For example:

- On 25 September 2018, as ICANN staff was preparing for the next ICANN Board meeting, Russell Weinstein responded to a colleague’s request for “subjects you would like the Board to discuss” by stating: “For Discussion: Price Caps in legacy gTLD renewals.”⁴²⁰ When shown this note at the hearing, Mr. Weinstein testified that he believed that “price caps in Legacy gTLD renewals” was “an important discussion for the board to have and for the board to be aware of.”⁴²¹
- While ICANN’s notes of another meeting on 5 December 2018 are almost entirely redacted, the unredacted fragment suggests that ICANN staff envisioned that the ICANN Board would issue a resolution on the renewal of the .ORG, .INFO and .BIZ Registry Agreements:
 - Resolution in works.
[Redacted]

⁴²⁰ Annex 64. ICANN designated Annex 64 and a number of the other documents discussed herein as “Confidential” or “Highly Confidential.” The Panel sees nothing that warrants that designation in the portions it refers to.

⁴²¹ Hearing Tr. Day III, 55:7-15.

- Biz info and org want to move to base agreements (without price caps)⁴²²
- On 6 January 2019, Mr. Weinstein provided a status update to Cyrus Namazi on the “renewals in progress,” stating:

Biz/Info/Org – pretty much waiting on price caps; [Redacted – Privileged] (...) I am still a bit unclear on what we want the board to do in January and if/or how some economic analysis is needed.⁴²³

- A timeline for “.ORG Public Comment” created by Mr. Weinstein’s team in January or February 2019 included the following dates for the following Board-related tasks:⁴²⁴

5. Draft Board Paper	May 13, 2019
6. Request to Add to Board Agenda	[blank]
7. Board Paper Complete and Sent	May 27, 2019
8. Board Review	May 27, 2019
9. Board Approval	June 10, 2019

- A draft of the Staff Report of Public Comment Proceedings on 14 May 2019 states the following:

As a next step, ICANN org intends to further consider the proposed renewal of the .org Registry Agreement taking into account the comments received in the comment forum.

⁴²² Annexes 67 and 67bis ¶ 7 (ICANN-NC-015289_A).

⁴²³ Annex 69.

⁴²⁴ Annex 82; see Hearing Tr. Day III, 122:8 to 123:16. The above chart is a summary of key points of the Annex 82 timeline that omits some items.

Thereafter, the proposed renewal of the .org Registry Agreement will be considered by ICANN's Board of Directors.⁴²⁵

Mr. Weinstein commented on this paragraph: "I think we just say the Board will consider not org."⁴²⁶

397. Mr. Weinstein testified that the timeline showing Board review and approval in May and June 2019 was a contingency plan in case it was decided that formal Board approval was needed.⁴²⁷ However, Mr. Weinstein's testimony makes clear that he not only sought the Board's approval of the Price Cap Decision, he believed that he had received that approval. Specifically, on 12 February 2019, Mr. Weinstein sent an email to Neustar, the registry operator of .BIZ, stating that in the September/October 2018, ICANN and Neustar were "closely aligned" on the renewal Registry Agreement, with "just a few items to close," but that ICANN org "needed to brief the Board primarily regarding the issue of price caps which are currently in place but not part of the Base RA."⁴²⁸ Mr. Weinstein stated that the Board briefing was deferred until the January 2019 Board workshop, and that following that workshop, "we received the 'all clear' we were looking for regarding price caps" (don't need to carry them over from the current agreements), and can resume to close out the negotiations....⁴²⁹

398. While Mr. Weinstein testified that the Board did not approve the Price Cap Decision at a formal Board meeting, his 12 February email and related testimony shows that he believed that the Board had given at least informal approval and that such approval was critical to moving the Registry Agreement forward.

399. The Feb06 Policy reinforces the conclusion that removing price caps from the 2019 Registry Agreements raised significant policy issues. As discussed above, the ICANN Board accepted the GNSO's recommendations in January 2008 regarding the Feb06 Policy.⁴³⁰ Those recommendations included that "[t]here should be a policy

⁴²⁵ Annex 109 ¶ 1 (Bates No. ICANN-NC-016487).

⁴²⁶ *Id.*

⁴²⁷ Hearing Tr. Day III, 124:12 to 125:13.

⁴²⁸ 12 February 2019 Email from Russell Weinstein to Raymond Zylstra, Annex 70.

⁴²⁹ *Id.*

⁴³⁰ See *supra*, Section IX.C.4(b); 23 January 2006 Special Board Meeting Minutes (RM 105).

guiding registry agreement renewal.”⁴³¹ While ICANN did not implement that recommendation, the Board’s agreement to develop a “policy” for registry agreement renewal suggests that general renewal practices – such as whether legacy gTLDs should continue to have price caps – rise to the level of policy.⁴³²

400. ICANN argues that “it would be nearly impossible for the Board to complete its other tasks if it were somehow required to intervene in every contract ICANN enters,” given that there are over 1,200 gTLDs in the DNS that must be periodically negotiated and renewed, as well as a large number of other ICANN contracts with various third parties.⁴³³ To be clear, the Board need not intervene in every contract or even most contracts.

401. But the decision to change course properly rests with the Board, not ICANN org, where, as here: (i) *the Board* previously attempted to remove price controls from legacy gTLD Registry Agreements, (ii) *the Board* subsequently reversed itself following a public outcry and reimposed these price controls, (iii) *the Board* then decided to remove price controls from *new* gTLD agreements (following a policy development process that encompassed only new gTLDs, *not* legacy gTLDs), and (iv) in each subsequent renewal of legacy gTLD RAs, *the Board* decided whether to include price controls.

402. ICANN also argues that “this Panel cannot “replace the Board’s reasonable judgment with its own” in this IRP.⁴³⁴ This Panel is not replacing the Board’s judgment. As emphasized by ICANN in this proceeding, the Board’s actions are not at issue here. As stated by ICANN:

⁴³¹ See *supra*, Section IX.C.4(b); 4 October 2007 GNSO Council Report to Board, Polices for Contractual Conditions Existing Registries PDF Feb 06 (RER 89).

⁴³² The Panel relies here on the Feb06 Policy not as a basis for a separate claim, but rather as a fact that supports Namecheap’s timely claim that the Price Cap Decision involved matters of policy.

⁴³³ ICANN Post-Hearing Brief ¶ 57.

⁴³⁴ *Id.*

- There is no “evidence indicating that the Board, rather than the organization, made the ultimate decision to enter into the 2019 Registry Agreements or otherwise to not include the price control provisions at issue in this IRP.”⁴³⁵
- “[T]he Board did not ... delegate some type of special authority to ICANN organization relating to ICANN’s decision to transition .BIZ, .INFO and .ORG to the Base Registry Agreement.”⁴³⁶
- “No decision was made or required whether to “approve” ICANN organization’s recommendation; the Board simply did not intervene in the process.”⁴³⁷

Thus, the ICANN’s Board’s judgment is not at issue, and this Panel is not replacing the Board’s reasonable judgment with its own.

403. ICANN also argues that:

To the extent Namecheap intends to argue that the Board should have considered the matter at a Board meeting and should have issued a Board resolution (notwithstanding that the delegation of authority to negotiate contracts was well within the Board’s reasonable business judgment), Namecheap’s argument suffers from a critical flaw. The ICANN Board was kept fully informed of ICANN staff’s work regarding the renewals, including its analysis of the public comments and its rationale for transitioning the .BIZ, .INFO, and .ORG Registry Agreements to the Base Registry Agreement. Based on those briefings in January and June 2019, the ICANN Board supported ICANN staff’s decision. Thus, there is no reason to believe that a Board resolution would have yielded a different result.⁴³⁸

⁴³⁵ *Id.* ¶ 51.

⁴³⁶ *Id.*

⁴³⁷ ICANN Closing Presentation Slide 37.

⁴³⁸ ICANN Pre-Hearing Brief ¶ 104.

404. It is possible that formal consideration by the Board would have yielded the same result. Indeed, the Board affirmed the Price Cap Decision in its ruling on Reconsideration Request 19-2. But the end result of ICANN's decision-making process is not at issue here. This Panel is not issuing a declaration that price controls should have been retained. This declaration is focused solely on the process underlying the Price Cap Decision, not its merits. At issue is whether the Price Cap Decision involved matters of policy that the Board should have decided at a formal Board meeting, after providing the advance notice and opportunity to comment required by the Bylaws. If, as the Panel has concluded, the answer is "Yes," then ICANN failed to comply with the procedural requirements of the Bylaws, regardless of whether following those requirements would have resulted in a different result.

405. A Board resolution after an official Board meeting, with advance notice and opportunity to comment, would have resulted from a more transparent process than the one followed here. As previously discussed, there is virtually no record of ICANN's deliberations. ICANN seeks to deflect this point as follows:

Namecheap complains that there are few "deliberative documents" regarding the renewal negotiations. Many of the "deliberations," however, occurred in telephonic or in-person staff meetings and not via email, or involved ICANN's internal and external legal counsel and thus are privileged.... Additionally, the basis for the decision is reflected in the publicly available Staff Report of Public Comment Proceedings that ICANN published for the respective gTLDs at the conclusion of the public comment period (as discussed more fully below), and in public correspondence.⁴³⁹

Yet the Staff Report of Public Comment Proceedings mostly just catalogs the public comments without providing the substance of ICANN's deliberations, if any, regarding the points made in those comments.⁴⁴⁰ Beyond the Staff Report, the only justification

⁴³⁹ ICANN Pre-Hearing Brief at 24, n. 88.

⁴⁴⁰ Annex 5 (ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .ORG Registry Agreement, 3 June 2019); Annex 6 (ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .INFO Registry Agreement, 3 June 2019); Annex 7 (ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .BIZ Registry Agreement, 3 June 2019).

ICANN provided to the Internet community were two paragraphs that did not address some of the more significant points made in the comments.

406. Accordingly, this Panel concludes that the decision to remove price controls should have been made by the ICANN Board, rather than ICANN org and that Sections 2.1 and 3.6(a) of ICANN's Bylaws were violated. That conclusion means that ICANN also violated related provisions of the Bylaws for formal Board action, such as the requirements that advance notice be given of the Board meeting and that minutes of the Board meeting be posted on the ICANN website.⁴⁴¹

XIV. ISSUE 7: WAS THE PRICE CAP DECISION IN CONNECTION WITH .ORG CONTRARY TO ICANN'S COMMITMENT TO APPLY FAIRLY ITS STANDARDS, POLICIES, AND PROCESSES?

C. The Issue and Legal Framework

407. Namecheap contends that ICANN failed to apply fairly its standards, policies and processes in connection with the .ORG renewal.⁴⁴² Namecheap relies on Sections 1.2(a)(v) and 2.3 of the Bylaws, which are the same clauses relied upon for its "discriminatory treatment" claim discussed in Issue 4 above. Those clauses state:

Section 1.2(a) COMMITMENTS

ICANN commits to do the following ...

- (v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties).

⁴⁴¹ Bylaws §§ 3.4 and 3.5.

⁴⁴² Namecheap Pre-Hearing Brief ¶¶ 394-99. Namecheap also claims that ICANN failed to apply fairly its policies and processes concerning cross-ownership and the Feb06 Policy. Namecheap Pre-Hearing Brief ¶¶ 390-93, 400-02. The Panel does not address those claims because Namecheap did not timely assert them, as discussed in Issue 2 above.

Section 2.3. NON-DISCRIMINATORY TREATMENT

ICANN ... shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.⁴⁴³

C. Namecheap's Position

408. The .ORG policies and procedures that Namecheap cites involve criteria for selecting the registry operator of .ORG that ICANN published in 2002 (the "2002 Criteria").⁴⁴⁴ One of the 2002 Criteria was "[t]he type, quality, and cost of the registry services proposed," which was explained as follows:⁴⁴⁵

In view of the noncommercial character of many present and future .org registrants, affordability is important. A significant consideration will be the price at which the proposal commits to provide initial and renewal registrations and other registry services. The registry fee charged to accredited registrars should be as low as feasible consistent with the maintenance of good-quality service.

409. Namecheap notes that in May 2019, PIR (the .ORG registry operator) reaffirmed that PIR "will not raise prices exorbitantly both because doing so would violate our values and because we are bound by the competitive market."⁴⁴⁶

410. Namecheap also asserts that in February 2020, ICANN "reaffirmed that the commitments made in response to the selection criteria are still valid."⁴⁴⁷ Namecheap relies on a comment made in connection with negative public reaction to

⁴⁴³ Bylaws §§ 1.2(a)(v), 2.3.

⁴⁴⁴ Namecheap Pre-Hearing Brief ¶¶ 394-98.

⁴⁴⁵ Namecheap Pre-Hearing Brief ¶ 395, quoting Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, posted 20 May 2002 (".ORG Criteria"), #7 (RM 11).

⁴⁴⁶ Namecheap Pre-Hearing Brief ¶ 397, quoting 1 May 2019 Letter from PIR to ICANN Board (Annex 113). Namecheap quotes the first part of this sentence only (ending at "violate our values"), omitting the second part ("and because we are bound by the competitive market"). The Panel quotes the entire sentence for completeness.

⁴⁴⁷ Namecheap Pre-Hearing Brief ¶ 396.

the proposed sale of PIR, the .ORG registry operator, to Ethos Capital, a private equity fund that proposed to convert PIR into a for-profit corporation. The Chair of the ICANN Board, Maarten Botterman, sent a letter to ISOC, the owner of PIR, which stated:

When ISOC applied for and was awarded the right to manage .ORG in 2002, ISOC made commitments to the Internet community on how it would differentiate and uphold the unique purpose of the .ORG TLD. *ICANN awarded the management of the .ORG registry with the belief that ISOC was uniquely positioned to live up to these commitments for the long run.* These commitments have been maintained since that 2002 award, and ICANN has heard loud and clear that the community of .ORG registrants is concerned that these commitments already have been abandoned or will be abandoned if the transfer to Ethos Capital is completed.⁴⁴⁸

411. Namecheap further asserts that ICANN reconfirmed its 2002 statement that the .ORG registry fee “should be as low as feasible consistent with the maintenance of good-quality service” by denying approval in April 2020 to the proposed sale of PIR to Ethos Capital.⁴⁴⁹

412. Based on the above points, Namecheap asserts that until 2019, ICANN ensured that the selection criterion requiring the registry fee to be “as low as feasible consistent with the maintenance of good-quality service” was met by including price controls in the .ORG Registry Agreement.⁴⁵⁰ Namecheap maintains that the lack of price caps in the 2019 Registry Agreement for .ORG was “inconsistent with the standards and

⁴⁴⁸ Namecheap Pre-Hearing Brief ¶ 396, quoting 13 February 2020 Letter from Maarten Botterman, Chair, ICANN Board of Directors to Gonzalo Camarillo, Chair, ISOC Board of Trustees, at 2 (Annex 117). ISOC (the Internet Society) is a not-for-profit corporation that created PIR for the purpose of operating .ORG “for the benefit of [its] end user consumers and the Internet as a whole.” Approved Board Resolutions, Special Meeting of the ICANN Board, 30 April 2020, “Background” section of “Rationale for Resolutions” (Annex 129, PDF page 5).

⁴⁴⁹ Namecheap Rebuttal ¶ 149, citing Approved Board Resolutions, Special Meeting of the ICANN Board, 30 April 2020 (Annex 129); and ICANN Minutes Special Meeting of the ICANN Board, 30 April 2020 (Annex 130).

⁴⁵⁰ Namecheap Pre-Hearing Brief ¶ 398.

processes that ICANN put in place for the operation of .ORG, contrary to ICANN's obligation "to apply these standards, policies, and processes fairly."⁴⁵¹

C. ICANN's Position

413. According to ICANN, Namecheap's claim fails for several reasons. First, ICANN maintains that the statements about keeping .ORG prices low in the 2002 Criteria was merely a "recommendation" to the ICANN Board about selection criteria that were included in a Request for Proposal ("RFP") that "ICANN issued in 2002 soliciting applications for the next registry operator of the .ORG TLD."⁴⁵² ICANN asserts that recommendation and RFP "*never was and never* became an ICANN 'policy.'⁴⁵³ ICANN also asserts that its statement about low .ORG prices "never formed part of ICANN's standard or processes, and therefore cannot form the basis for an IRP."⁴⁵⁴

414. Second, ICANN asserts that the 2002 Criteria related solely to the criteria for selecting the .ORG registry operator, and did not concern whether the .ORG Registry Agreement should contain price controls.⁴⁵⁵

415. Third, ICANN asserts that the ICANN Board made clear that its "paramount concern" was "demonstrated technical ability" to operate such a domain name with such a large number of DUMs, and not the registry fees to be charged.⁴⁵⁶ ICANN cites Minutes of a 14 March 2002 Board Meeting that noted that one of the points "supported by the majority of the Board" was "the crucial importance of demonstrated technical ability, without unduly restricting the pool off applicants."⁴⁵⁷

416. Fourth, ICANN argues that price controls are not necessary to constrain .ORG pricing "in a market saturated with over 1,2000 other gTLDs," especially "when

⁴⁵¹ Namecheap Pre-Hearing Brief ¶ 399.

⁴⁵² ICANN Pre-Hearing Brief ¶ 148.

⁴⁵³ ICANN Pre-Hearing Brief ¶ 150 (emphasis in original).

⁴⁵⁴ ICANN Rebuttal ¶ 67.

⁴⁵⁵ ICANN Pre-Hearing Brief ¶ 150.

⁴⁵⁶ ICANN Pre-Hearing Brief ¶ 150.

⁴⁵⁷ ICANN Pre-Hearing Brief ¶ 150 and footnote 248, citing Minutes of 14 March 2002 Regular Meeting of ICANN Board, comments on ".org Reassignment" (RM 10, PDF page 44).

the dominant registry, .COM, is still subject to a price control provision imposed by DOC.”⁴⁵⁸

417. Finally, ICANN emphasizes that PIR has not raised .ORG prices in six years, despite being able to do so by 10% per year under the 2013 Registry Agreement and being able to raise prices with no cap under the 2019 Registry Agreement.⁴⁵⁹ ICANN also emphasized that PIR “publicly committed not to unreasonably increase prices” in a 1 May 2019 blog post, after public comments on the proposed 2019 Registry Agreement had closed.⁴⁶⁰

C. The IRP Panel’s Analysis and Decision

418. The Panel concludes that ICANN’s statement about low .ORG prices in the 2002 Criteria constitutes a policy, standard, or process that is subject to ICANN’s obligation to act in an equitable and non-discriminatory manner. ICANN included the 2002 Criteria in the Request for Proposals for a new .ORG registry operator, which ICANN issued on 20 May 2002.⁴⁶¹ The 2002 Criteria stated that a “significant consideration will be the price at which the proposal commits to provide initial and renewal registrations,” and that the “registry fee charged to accredited registrars should be as low as feasible consistent with the maintenance of good-quality service.”⁴⁶² That statement is a “standard” or “process” that ICANN was required to apply in a non-discriminatory manner in assessing proposals to serve as the next .ORG registry operator.

419. Nevertheless, the Panel finds that the 2002 Criteria simply served the purpose of selecting the next .ORG registry operator in 2002; they did not establish a standard, process, or policy that required ICANN to include price controls in all later registry agreements. The 2002 Criteria stated that the applicant’s commitments about

⁴⁵⁸ ICANN Pre-Hearing Brief ¶ 151.

⁴⁵⁹ ICANN Pre-Hearing Brief ¶ 151.

⁴⁶⁰ ICANN Pre-Hearing Brief ¶ 151, citing 1 May 2019 PIR blog post, “An Open Letter to the .ORG Community.”

⁴⁶¹ .ORG Reassignment: Request for Proposal Materials, posed 20 May 2002 (RM 11, PDF pages 2) (including link to the Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, posted 20 May 2002).

⁴⁶² Namecheap Pre-Hearing Brief ¶ 395, quoting Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, posted 20 May 2002 (“.ORG Criteria”), #7 (RM 11).

prices were an “important consideration” in assessing proposals, but did not require commitments to be implemented in a specific manner. Thus, they did not prohibit ICANN from choosing an applicant whom ICANN believed was committed to keeping prices “as low as feasible consistent with the maintenance of good-quality service,” without including price controls in the registry agreement.

420. Further, the linchpin of ICANN’s non-discrimination obligation is not “*singling out any particular party* for discriminatory treatment (i.e., making an unjustified prejudicial distinction *between or among different parties*).”⁴⁶³ Thus, if ICANN rejected one applicant because it was not sufficiently committed to low prices but accepted another that also lacked that commitment, that could violate ICANN’s obligation to apply its standards and processes in a consistent and equitable manner. Here, however, PIR is the only party at issue. ICANN did not apply the 2002 Criteria in an inconsistent manner that unfairly favored PIR over another party.

421. Namecheap seeks to convert the 2002 Criteria into a general policy to maintain low prices through price caps by citing statements and actions of ICANN and PIR in 2019 and 2020. But when ICANN rejected the sale of PIR in 2020, ICANN had already approved the 2019 Registry Agreements for .ORG, .INFO, and .BIZ, even though they lacked price caps. When viewed in the context of ICANN’s approval of the 2019 Registry Agreements, those statements suggest that ICANN believed that PIR would honor its commitments, even if the price caps were removed.

422. As discussed above, ICANN did for many years have a practice of including price controls in the registry agreements for unsponsored legacy gTLDs, but ICANN’s non-discrimination obligations did not prohibit it from changing that practice in response to new developments, as long as it applied its new practice consistently.

423. In sum, Namecheap is mixing apples and oranges. The 2002 Criteria concern selection of the .ORG registry operator, not the inclusion of price caps in registry agreements. ICANN’s non-discrimination obligation concerns not unfairly singling out a particular party for treatment that is different from other parties. It does not apply when, as here, only one party is at issue.

⁴⁶³ Bylaws § 1.2(a)(v) (emphasis added); see Bylaws § 2.3. (ICANN shall not “*single out any particular party* for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition”) (emphasis added).

XV. ISSUE 8: WAS THE PRICE CAP DECISION CONTRARY TO ICANN'S OBLIGATION TO ACT FOR THE BENEFIT OF THE INTERNET COMMUNITY AS A WHOLE?

A. The Issue and Legal Framework

424. Namecheap claims that the Price Cap Decision violated ICANN's obligation to promote the global public interest for the benefit of the Internet community as a whole. Namecheap relies primarily on Section 1.2(b)(ii) of the Bylaws, which states that ICANN's "Core Values" include:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decisionmaking to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;⁴⁶⁴

425. Namecheap also cites Articles of Incorporation II and III, which state:

Articles of Incorporation II: ... [ICANN shall] pursue charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by carrying out the mission set forth in the bylaws of the Corporation ("Bylaws"). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.

Articles of Incorporation III: [ICANN shall] operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. To this

⁴⁶⁴ Namecheap Pre-Hearing Brief ¶ 358, citing Bylaws § 1.2(b)(ii).

effect, the Corporation shall cooperate as appropriate with relevant international organizations.⁴⁶⁵

426. The above clauses appear to focus primarily on procedural rather than substantive issues. Section 1.2(b)(ii) of the Bylaws and Article II of the Articles of Incorporation both refer to a “bottom-up multistakeholder community *process*” to “ascertain” and “determine” the global public interest. Similarly, Article III refers to using “open and transparent *processes* that enable competition and open entry in Internet-related markets,” for “the benefit of the Internet community as a whole.”

427. While these clauses focus primarily on process, they arguably impose substantive obligations as well. Article II states that ICANN shall “promote” the “global public interest.” Article III states that ICANN shall operate “for the benefit of the Internet community as a whole.”

428. The Parties have not addressed whether the “global public interest” clauses of the Articles and Bylaws impose substantive obligations, in addition to procedural obligations. Nor have the Parties discussed any prior IRP decisions that shed light on the test for determining whether ICANN complied with any substantive obligation to promote the “global public interest” and to operate “for the benefit of the Internet community as a whole.” The Panel will focus on procedural rather than substantive obligations for the reasons sets forth below.

B. Namecheap’s Position

429. Namecheap makes both procedural and substantive arguments about ICANN’s global public interest obligations. As to procedure, Namecheap argues that:

- ICANN “did not care” about how removing price caps from .ORG, .INFO, and .BIZ would affect the interests of the Internet community.⁴⁶⁶

⁴⁶⁵ Namecheap Pre-Hearing Brief ¶ 357.

⁴⁶⁶ Namecheap Pre-Hearing Brief ¶ 360.

- ICANN received an “overwhelming” number of public comments that strongly opposed the removal of price controls, but ignored those comments instead of “addressing the genuine concerns of the Internet community.”⁴⁶⁷
- The California Attorney General recognized the concern that ICANN is no longer responsive to the needs of its stakeholders.⁴⁶⁸

430. As to substance, Namecheap argues that the removal of price caps is contrary to the global public interest for multiple reasons, including:

- ICANN’s own studies show that legacy gTLDs have “attributes of monopoly power” and that there was no basis to remove price controls.⁴⁶⁹
- The U.S. Department of Justice and Department of Commerce have both supported price controls on legacy gTLDs.⁴⁷⁰
- “Independent experts” confirm that .ORG and .INFO have market power, which calls for maintaining price caps.⁴⁷¹

C. ICANN’s Position

431. ICANN focuses on substance, arguing that the global public interest does not require price caps because (1) Namecheap relies on obsolete studies and statements that pre-date the new gTLD program; and (2) maintaining price controls is not justified in the current competitive landscape.⁴⁷² In addition, ICANN emphasizes that its “core values” include “depending on market mechanisms to promote and sustain a competitive environment in the DNS,” where “feasible and appropriate.”⁴⁷³

⁴⁶⁷ Namecheap Pre-Hearing Brief ¶ 376.

⁴⁶⁸ Namecheap Pre-Hearing Brief ¶ 377.

⁴⁶⁹ Namecheap Pre-Hearing Brief ¶ 357.

⁴⁷⁰ Namecheap Pre-Hearing Brief ¶¶ 370-75.

⁴⁷¹ Namecheap Pre-Hearing Brief ¶¶ 378-84.

⁴⁷² ICANN Pre-Hearing Brief ¶¶ 131-42.

⁴⁷³ ICANN Sur-Rebuttal ¶ 57, citing Bylaws, § 1.29B0(iii).

432. ICANN does not discuss process in the sections of its briefs that specifically address Namecheap's "global public interest" claim.⁴⁷⁴ In other sections, however, ICANN argues that it solicited and considered a large number of public comments before making its Price Cap Decision.⁴⁷⁵

D. The IRP Panel's Analysis and Decision

433. As to ICANN's procedural obligation to consider the global public interest through a "bottom-up, multistakeholder" process, the Panel finds that this obligation largely overlaps with ICANN's obligation to act in an "open and transparent" manner. As discussed above, transparency includes soliciting comments from the Internet community, considering those comments, and explaining why ICANN accepted or rejected the primary comments.

434. The Panel has concluded that ICANN violated its transparency obligations, for the reasons set forth above. The Panel finds that Namecheap's procedural arguments related to the global public interest do not materially add to its transparency arguments. Therefore, the Panel incorporates its prior analysis of transparency and will not repeat it here.

435. As to whether ICANN has violated any substantive obligations related to the "global public interest" – or, indeed, whether the "global public interest" requirement imposes any substantive (as opposed to procedural) obligations on ICANN's part – the Panel does not consider it to be necessary or appropriate to reach this issue for several reasons.

436. First, the Panel's rulings that ICANN acted contrary to its transparency obligations and that the Price Cap Decision should have been made by the Board mean that the ICANN Board will need to consider that decision further. Accordingly, it is not necessary to decide now whether ICANN also acted contrary to any substantive obligations related to the global public interest.

437. Second, the ICANN Board's further consideration of the Price Cap Decision will likely involve obtaining further feedback from the Internet community and conducting additional analysis. As a result of that further consideration and

⁴⁷⁴ See ICANN Pre-Hearing Brief ¶¶ 131-42.

⁴⁷⁵ ICANN Pre-Hearing Brief ¶¶ 112-21; ICANN Sur-Rebuttal ¶¶ 52-55.

analysis, ICANN may receive new information that bears on the Price Cap Decision. Ruling now on whether the Price Cap Decision complies with any substantive obligations, without the benefit of any such additional information or analysis, would be premature.

438. Third, the record is not developed on this issue. Neither Namecheap nor ICANN addressed this issue or cited any prior IRP decisions that discuss the standard for assessing ICANN's compliance with any substantive obligation. While global public interest is a concept used in some fields of international law,⁴⁷⁶ the parties have not sought to employ those concepts in this case, perhaps because they would not translate well to the present context.

439. In short, the Panel deems it inappropriate to opine on an issue that is not necessary to its decision and that could have significant implications for other IRP proceedings, especially in the absence of detailed briefing by the Parties.

XVI. ISSUE 9: HOW SHOULD FEES AND COSTS BE ALLOCATED IN THIS PROCEEDING?

C. The Issue and Legal Framework

440. Namecheap has requested an award of "its costs in this proceeding, including but not limited to its internal costs, legal advice and representation costs, costs of expert witnesses, and any other costs such as for document review and transportation, made or still be made until the final resolution of this IRP."⁴⁷⁷ ICANN has not requested an award of its costs, but opposes Namecheap's request.

441. Article 34 of the ICDR Rules states that the "arbitral tribunal shall fix the costs of the arbitration," which are defined to include the reasonable legal and other costs incurred by the parties, as well as the fees and expenses of the arbitrators and of the ICDR.

⁴⁷⁶ See, e.g., Yann Aguila & Marie-Cécile de Bellis, *On the Concept of a Global Public Interest: Some Reflections*, 52 ENV'T POL'Y & L. 13 (2022) (discussing global public interest in the context of global environmental challenges); ANDREAS KULICK, *GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW* (2014) (discussing global public interest in the context of international investment law).

⁴⁷⁷ Namecheap Pre-Hearing Brief ¶¶ 362-69.

442. Article 34 further states that the tribunal may “allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.”

443. Nevertheless, the discretion to allocate costs is limited by Section 4.3(r) of the Bylaws, which states:

ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

444. Similarly, Section 13 of the IRP Procedures states:

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

445. The “Community IRP” and Section 4.3(e)(ii) exceptions noted above do not apply here. A Community IRP must be filed by the “Empowered Community,” which is a special non-profit association.⁴⁷⁸

⁴⁷⁸ See Bylaws §§ 4.3(d), 6.1(a).

446. Section 4.3(e) of the Bylaws entitles ICANN to an award of costs if the Claimant does not engage in a “Cooperative Engagement Process” and ICANN prevails. That does not apply here because Namecheap engaged in a Cooperative Engagement Process and ICANN has not prevailed.

447. Because these two exceptions do not apply, this IRP is governed by the general rule that ICANN “shall bear all administrative costs” and “each party to an IRP proceeding shall bear its own legal expenses,” except that “the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.”

C. Namecheap’s Position

448. Namecheap has requested an award of fees and costs but has provided no supporting analysis.

449. In its Post-Hearing Brief, Namecheap requested “the opportunity to specify in a further submission its costs of this IRP that Namecheap asks the Panel to order ICANN to pay to Namecheap.”⁴⁷⁹ That request, however, goes to the amount of costs, not whether costs should be awarded in the first place.

C. ICANN’s Position

450. ICANN has asked the Panel to deny all relief sought by Namecheap, but has not specifically addressed allocation of costs.

C. The IRP Panel’s Analysis and Decision

451. Namecheap has prevailed on some, but not all of its claims. The Panel finds that neither party has asserted “frivolous or abusive” claims or defenses. Counsel for both Parties advocated zealously and effectively for their respective clients while conducting themselves in a professional manner. Accordingly, the Panel applies the general rules that ICANN shall bear all administrative costs paid to the ICDR (including arbitrator fees), and that each party should bear its own legal and expert witness fees and expenses.

⁴⁷⁹ See Bylaws §§ 4.3(d), 6.1(a).

452. ICDR records indicate that the administrative costs of the ICDR include (a) \$ 13,835.00 in administrative fees paid to the ICDR; and (b) \$ 841,895.76 in fees and expenses of the IRP Panel members and the Emergency Panelist. ICANN has already paid most of those costs, but Namecheap has paid \$58,750.00. ICANN shall bear all administrative costs and shall reimburse Namecheap for the \$58,750.00 that Namecheap has paid.

XVII. ISSUE 10: WHAT IS THE SCOPE OF THE PANEL'S AUTHORITY TO AWARD RELIEF?

C. The Issue and Legal Framework

453. An important issue is the scope of this Panel's authority to award relief. The Bylaws define this authority as follows:

- o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:
 - (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
 - (ii) Request additional written submissions from the Claimant or from other parties;
 - (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
 - (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
 - (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

- (vi) Determine the timing for each IRP proceeding; and
- (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).⁴⁸⁰

454. “Covered Action” is defined as “any actions or failure to act by or with ICANN ... committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”⁴⁸¹ “Disputes” involve “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”⁴⁸²

455. Thus, Section 4.3(o)(iii) of the Bylaws authorizes an IRP Panel to declare whether a challenged action or inaction by ICANN (whether by the Board, Staff, or officers or directors) violated the Articles or Bylaws.

456. The Parties agree that this Panel may “declare” whether the challenged ICANN conduct violates the Articles and Bylaws. The Parties dispute whether the Panel also has the authority to issue a binding order that nullifies the ICANN’s conduct and requires ICANN to take specific remedial action.

457. The Parties’ dispute about the scope of the Panel’s authority to declare relief implicates Section 4.3(x) of the Bylaws, which states:

- (x) The IRP is intended as a final, binding arbitration process.
 - (i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.
 - (ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision

⁴⁸⁰ Bylaws § 4.3(o).

⁴⁸¹ Bylaws § 4.3(b)(ii).

⁴⁸² Bylaws § 4.3(b)(ii).

of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

- (iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.
 - (A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.
 - (B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.
 - (C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.
- (iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that

such a non-binding IRP decision is not intended to be and shall not be enforceable.⁴⁸³

458. Section 4.3(x) states that the Panel’s decision is “binding” and “final,” but also states that the ICANN Board “shall affirm or reject compliance with the decision on the public record based on an expressed rationale,” and if the decision is rejected, the Claimant “may seek enforcement in a court of competent jurisdiction.” The Panel discusses these seemingly inconsistent statements in its analysis below.

C. Namecheap’s Position

459. Namecheap contends that this Panel not only has authority to declare that ICANN has violated the Articles and Bylaws, but also “has broad inherent discretion to fashion relief,” by “order[ing] affirmative declaratory relief” that “requir[es] ICANN to put an end to this violation by adopting the Panel’s decision.”⁴⁸⁴

460. The specific relief that Namecheap requests is a declaration that the Price Cap decision “must be annulled as inconsistent with and violative of” the Articles and Bylaws, as well as with international law.⁴⁸⁵

461. Namecheap asserts that “[t]he Panel is fully empowered under the Bylaws to resolve disputes by ordering remedies that ensure ICANN complies with its Articles of Incorporation and Bylaws.”⁴⁸⁶ Namecheap cites the “Purposes of the IRP” in the Bylaws, which include “**Ensure** that ICANN ... **complies** with its Articles of Incorporation and Bylaws”; “**Ensure** that ICANN ... is **accountable** to the global Internet community and Claimants”; “**Lead to binding, final resolutions** consistent with international arbitration norms that are enforceable in any court with proper jurisdiction”; and “Provide a mechanism for the **resolution** of Disputes, as an

⁴⁸³ Bylaws § 4.3(x). It should be noted that the “Standing Panel” has not been constituted, so references to the Standing Panel are effectively inoperative.

⁴⁸⁴ Namecheap Pre-Hearing Brief ¶ 266.

⁴⁸⁵ Namecheap Pre-Hearing Brief ¶ 425.

⁴⁸⁶ Namecheap Pre-Hearing Brief ¶ 261.

alternative to legal action in the civil courts of the United States or other jurisdictions.”⁴⁸⁷

462. Namecheap also emphasizes that Bylaws Section 4.3(x) states that IRP Panel decisions are “binding final decisions” and that “ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.”⁴⁸⁸

463. Namecheap notes that the Bylaws were amended in October 2016 to strengthen the IRP accountability mechanism. Those amendments included adding the “Purposes of the IRP” quoted above, as well as the explicit statement that IRP decisions are final and binding.⁴⁸⁹

464. Namecheap argues that the October 2016 Amendments were adopted in response to ICANN’s “absurd reasoning,” which it had invoked in prior IRPs, that an IRP Panel “has the authority to declare that ICANN has violated its Articles of Incorporation and Bylaws, but that ICANN retains the discretion to maintain the violation.”⁴⁹⁰ Namecheap cites a 2015 IRP decision which held that the Panel could “recommend” that ICANN take action, but lacked authority “to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.”⁴⁹¹

C. ICANN’s Position

465. ICANN contends that the Bylaws authorize this Panel to only (1) “declare” that ICANN action violates the Articles and Bylaws; and (2) “recommend” that ICANN take specific actions. ICANN asserts that the Panel has no authority to order ICANN to take specific actions.⁴⁹²

⁴⁸⁷ Namecheap Pre-Hearing Brief ¶ 262, quoting Bylaws § 4.3(a) (emphasis added by Namecheap).

⁴⁸⁸ Namecheap Pre-Hearing Brief ¶ 263, quoting Bylaws § 4.3(x).

⁴⁸⁹ Namecheap Post-Hearing Brief ¶ 34.

⁴⁹⁰ Namecheap Rebuttal Brief ¶ 103.

⁴⁹¹ Namecheap Rebuttal Brief ¶ 103 footnote 101, citing 9 October 2015 Final Declaration in *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505 (RM 4) ¶ 149.

⁴⁹² ICANN Pre-Hearing Brief ¶ 176.

466. ICANN argues that Namecheap's request for a declaration that the Price Cap Decision "must be annuled" is a "disguised" order that ICANN reinstate price caps, which this Panel has no authority to grant.⁴⁹³

467. ICANN contends that the express terms of the Bylaws preclude Namecheap's request for an order requiring ICANN to reinstate price caps.⁴⁹⁴

468. ICANN asserts that Namecheap has presented no evidence that a declaration that ICANN has violated the Bylaws is not sufficient to achieve the general purposes of an IRP, as stated in the Bylaws.⁴⁹⁵ ICANN cites prior IRPs where the ICANN Board considered and then took action to implement the Panel's decision.⁴⁹⁶

469. ICANN further asserts that October 2016 Bylaws amendments actually support ICANN, because they did not expand the scope of relief a Panel may grant.⁴⁹⁷

470. Finally, ICANN states that the Panel in the *Afilias* IRP rejected a similar attempt to obtain an order requiring ICANN to take specific remedial action.⁴⁹⁸

C. The IRP Panel's Analysis and Decision

471. The Panel agrees with Namecheap that the power to declare that a respondent has violated the law typically goes hand-in-hand with the power to order specific action to remedy that violation.

472. IRPs, however, are special, *sui generis* proceedings created and governed by the Bylaws and IRP Procedures. Section 4.3 draws a clear distinction between the Panel's power to "declare" and its power to "recommend." An IRP Panel may "declare"

⁴⁹³ ICANN Pre-Hearing Brief ¶ 177.

⁴⁹⁴ ICANN Sur-Rebuttal ¶¶ 80-81.

⁴⁹⁵ ICANN Sur-Rebuttal ¶ 82.

⁴⁹⁶ ICANN Sur-Rebuttal ¶ 82; ICANN Post-Hearing Brief ¶¶ 83-84, discussing ICANN's implementation of the 10 July 2017 Final Declaration in *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-0000-7056 (RM 177); and the 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001-83 (RM 165).

⁴⁹⁷ ICANN Post-Hearing Brief ¶ 46.

⁴⁹⁸ ICANN Sur-Rebuttal ¶ 85, citing *Afilias v. ICANN IRP*, Corrected Final Decision ¶¶ 361-364, Ex. R-43.

that ICANN action violates the Articles and Bylaws, but can only “recommend” that ICANN take specific action.⁴⁹⁹

473. The Bylaws have distinguished between the power to “declare” and the power to “recommend” ever since provision was made for IRPs the Bylaws in December 2002.⁵⁰⁰

474. As Namecheap has noted, the Bylaws were amended in October 2016 to strengthen the IRP process; however, those amendments did not change the longstanding distinction between the power to “declare” and the power to “recommend.” In particular, they did not authorize IRP Panels to “order” (as opposed to merely recommend) that ICANN take specific action.⁵⁰¹

475. The October 2016 Amendments added the “Purposes of the IRP,” which include ensuring that ICANN complies with the Articles and Bylaws.⁵⁰² But those amendments did not expand panel authority to “recommend” remedial action to include the power to “order” such action.

476. The October 2016 Amendments added the statement that ICANN “intends, agrees, and consents to be bound by all IRP Panel decisions...”⁵⁰³ Yet those amendments also added the statement that the ICANN Board “shall affirm or reject compliance with the decision on the public record based on an expressed rationale.”⁵⁰⁴

477. Reconciling these two statements is difficult. How can ICANN “consent to be bound by all IRP Panel decisions,” but retain the power to “reject compliance with the decision”?

⁴⁹⁹ Bylaws § 4.3(o)(iii), (iv).

⁵⁰⁰ 15 December 2002 Bylaws § 3(8) (Independent Review Panel shall have the authority to “b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”

⁵⁰¹ See October 2016 Bylaws § 4.3(o)(iii), (iv).

⁵⁰² See October 2016 Bylaws § 4.3(a)(i).

⁵⁰³ See October 2016 Bylaws § 4.3(x)(iii).

⁵⁰⁴ See October 2016 Bylaws § 4.3(x)(iv).

478. The Panel’s role is to interpret the Bylaws as written, not to rewrite the text. Faced with two contradictory statements, the Panel applies the principle that when interpreting an unclear document, a more specific clause overrides a more general clause. The statement that the Board shall “affirm or reject compliance with the decision” is more specific than ICANN’s general acceptance of the binding nature of an IRP decision. Thus, the more specific statement controls.

479. Of course the option to reject compliance does not mean the ICANN Board should choose that option, especially since the Bylaws authorize the Claimant “to enforce compliance in a court of competent jurisdiction.”

480. Finally, the Panel notes that prior IRP panels that have declared that ICANN violated the Articles or Bylaws have only recommended remedial action and have declined to order ICANN to take specific actions.

481. For example, the panel in the *Afilias* IRP – which was decided under a post-October 2016 version of the Bylaws – declared that ICANN violated its Articles and Bylaws, but was “firmly of the view that it is for the Respondent [ICANN] to pronounce in the first instance” on the propriety of a contract under which Verisign agreed to fund a bid by NDC for the new gTLD, “.WEB.”⁵⁰⁵ The *Afilias* panel accepted ICANN’s argument that “it would be improper for the Panel to dictate what would be the consequence of NDC’s violation of the New gTLD Program Rules, assuming a violation is found.”⁵⁰⁶

482. In sum, substantial logic supports Namecheap’s argument that the power to declare a violation should be accompanied by the power to order remedial action; however, that is not what the Bylaws say. Accordingly, the Panel will only declare whether ICANN violated the Articles or Bylaws, and will limit itself to recommending (not ordering) remedial action to the extent a violation is found.

XVIII. ISSUE 11: WHAT RELIEF SHOULD BE AWARDED HERE?

⁵⁰⁵ *Afilias* Final Decision (RM 190) ¶¶ 361-62.

⁵⁰⁶ *Afilias* Final Decision (RM 190) ¶ 363.

C. The Issue and Legal Framework

483. As explained in Issue 10 above, the Panel's authority is limited to "declaring" that the challenged ICANN action or inaction violates the Articles or Bylaws, and "recommending" that ICANN take specific action. Thus, there are two issues (1) what declarations should the Panel make about any violations of the Articles and Bylaws; and (2) what recommendations should the Panel make about remedial action in view of any violations.

C. Namecheap's Position

484. As also discussed above, Namecheap seeks a declaration that ICANN has violated its Articles and Bylaws in multiple respects, as well as a declaration that the Price Cap Decision "must be annulled as inconsistent with and violative of" the Articles and Bylaws. The Panel agrees with ICANN that a declaration that the Price Cap Decision "must be annulled" is effectively an order that ICANN take specific action to nullify that decision. The Panel lacks authority to make such an order. At most, the Panel can only "recommend" that ICANN take specific action to nullify the Price Cap Decision.

C. ICANN's Position

485. ICANN concedes that the Panel has the power to declare that ICANN action violates the Articles and Bylaws, as well as the power to recommend that ICANN take specific action. ICANN does not take a specific position as to the recommendations the Panel should make, in the event the Panel finds a violation of the Articles and Bylaws.

C. The IRP Panel's Analysis and Decision

1. Declarations Regarding Non-Compliance with Articles and Bylaws

486. It is undisputed that Section 4.3(o) of the Bylaws authorizes the Panel to declare that the challenged ICANN action or inaction violated the Articles of Incorporation or Bylaws. In view of the violations found above, the Panel issues the following declarations:

- (a) The Panel declares that ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Article III of the Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws because ICANN did not act in an open and transparent manner;
- (b) The Panel declares that ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Sections 2.1, 3.4, 3.5, and 3.6(a) of the Bylaws because it involved a policy decision to be made by the ICANN Board, and the ICANN Board did not approve this decision or comply with the procedural requirements for formal Board action;
- (c) The Panel declares that ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price caps violated Articles II and III of the Articles of Incorporation and Section 1.2(b)(ii) of the Bylaws because ICANN did not comply with the procedural requirements for ensuring that ICANN promotes the global public interest and acts for the benefit of the Internet community as a whole.

487. The Panel rejects Namecheap's request to declare that ICANN violated the Articles and Bylaws on other grounds, for the reasons set forth in this Declaration.

2. Recommendations Regarding Violations of the Articles and Bylaws

488. As an initial matter, the Panel finds that making recommendations about what steps ICANN should take in view of the above violations is appropriate for several reasons.

489. First, the violations that the Panel has found are procedural rather than substantive in nature. Thus, ICANN may be able to remedy those violations by following the proper procedures, although the Panel recognizes that remedying the violations related to ICANN's approval of the 2019 Registry Agreements for .ORG and .INFO without price controls is complicated by the fact that ICANN and the registry operators have already signed those agreements, which have ten year terms. Thus, any revisions to the 2019 Registry Agreements may require further negotiations between ICANN and the applicable registry operators.

490. Furthermore, providing recommendations is consistent with the purposes of an IRP, which include (a) ensuring that ICANN “complies with its Articles of Incorporation and Bylaws”; (b) reducing Disputes by creating precedents to guide ICANN and the global Internet community; and (c) securing “the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.”⁵⁰⁷

491. Providing recommendations will help to ensure that ICANN complies with its Articles and Bylaws going forward and provide guidance on future actions that may assist in reducing future Disputes. It will also promote the transparent, efficient, and coherent resolution of the Disputes raised by this IRP.

492. While providing recommendations is consistent with the purpose of the independent review process, the Panel notes that it has no expertise or experience regarding the internal operations of ICANN, or with the diverse stakeholders in the global Internet community, aside from information presented in this proceeding. Thus, the Panel’s recommendations are directed at identifying issues and measures that ICANN should consider and analyze further, in consultation with the Internet community.

493. The Panel’s overall recommendation is that the ICANN Board analyze and discuss what steps to take to remedy both the specific violations found by the Panel, and to improve its overall decisionmaking process to ensure that similar violations do not occur in the future.

494. With regard to the 2019 Registry Agreements for .ORG and .INFO, the fundamental issue is that ICANN does not appear to have given sufficient consideration to the strong public opposition to removal of price controls, especially as to .ORG. While ICANN may have discussed and considered this issue internally, ICANN’s public explanation of its decision did not specifically explain why it concluded that price caps were no longer needed, or take into account any market power that .ORG may have in its particular niche of the domain market.

495. ICANN’s lack of a detailed public explanation was exacerbated by its assertion of the attorney-client privilege as to almost all of its internal documents. The result is that there is virtually no documentary record of ICANN’s internal deliberations or why ICANN decided that price controls were no longer needed. As discussed above,

⁵⁰⁷ Bylaws § 4.3(b)(ii).

the Panel has decided not to address the precise extent of any obligation to maintain a non-privileged record, but has serious concerns on this subject.

496. In addition, while the Board discussed the Price Cap Decision at an informal workshop, there is no record of those discussions, and the Board did not make any formal decisions until after the 2019 Registry Agreement had already been signed and Namecheap submitted Reconsideration Request 19-2.

497. To remedy these violations and address these concerns, the Panel recommends that the ICANN Board consider taking the following actions.

498. First, decisions as to how to implement the Panel's rulings in this IRP should be made by the ICANN Board. The ICANN staff may of course assist with the decisionmaking process, but the Board should make the ultimate decisions. This is consistent with Section 4.3(x)(ii), which states that the Board shall consider its response to IRP Panel decisions at the Board's next meeting, if feasible, and shall accept or reject compliance with the decision on the public record based on an expressed rationale.

499. Second, given that the violations and concerns are procedural in nature, the ICANN Board should consider creating and implementing a process to conduct further analysis of whether including price caps in the Registry Agreements for .ORG and .INFO is in the global public interest. That process should encourage participation of diverse stakeholders and directly and fully consider and respond to the primary concerns raised. The process should be conducted in an open and transparent manner that avoids the violations found by the Panel.

500. Third, as discussed above, the Panel finds that the evidence that price controls should be retained is much stronger for .ORG than for .INFO, given that .ORG is an original gTLD with a much larger number of DUMs, and serves a special market focused on not-for-profit organizations. Thus, while the ICANN Board should consider what remedial measures to take as to both .ORG and .INFO, the measures for .ORG may be stronger and more extensive than for .INFO.

501. Fourth, the Panel recommends that the Board consider whether to retain an expert consultant to conduct a study on issues raised by the Price Cap Decision, such as whether .ORG and .INFO have sufficient market power that price caps may be desirable. ICANN has already done considerable work on this subject, although that work does not include a formal study of the extent of market power of .ORG and

.INFO. In particular, ICANN submitted reports and testimony from an expert economist and also obtained a draft opinion from the same expert before making the Price Cap Decision, although that opinion was provided to only two ICANN employees. The Panel's view is that those reports are not complete as they do not analyze a number of points that Namecheap made about .ORG's special market power. Nevertheless, the expert reports provide a foundation for additional analysis. If the Board decides not to conduct further expert analysis, it should explain the reasons for that decision.

502. Fifth, if the Board concludes that some form of price controls for .ORG and/or .INFO are in the global public interest, the Panel recommends that ICANN seek to amend the 2019 Registry Agreements to include appropriate price controls. The registry operator of .ORG has publicly represented that it will not raise prices unreasonably, so it presumably would be willing to agree to some form of price controls. The registry operator for .INFO may also be willing to agree to price controls, given that prices do not appear to have increased by more than what would have been allowed under the prior price control provisions.

503. Sixth, the ICANN Board may wish to consider approaching the registry operators for .ORG and .INFO about agreeing to some form of price controls, even before evaluating whether price caps are needed and taking the other measures noted above. If the registry operators are willing to agree to amend their registry agreement, that may moot the need to implement the other measures above.

504. Seventh, the Panel recommends that the Board consider revisions to ICANN's decisionmaking process to reduce the risk of similar procedural violations in the future. For example, the Board could adopt guidelines for determining what decisions involve policy matters for the Board to decide, or what are the issues on which public comments should be obtained.

XIX. CONCLUSION

505. For the foregoing reasons, the Independent Review Process Panel hereby declares, in accordance with Section 4.3(o)(iii) of the Bylaws, that:

- a. ICANN's action with respect to the Price Cap Decision was inconsistent with Sections 1.2(a), 1.2(b), 2.1, 3.1, 3.4, 3.5, and 3.6(a) of the Bylaws and Article III of the Articles of Incorporation.

- b. Pursuant to Section 4.3(o)(iii) of the Bylaws, the IRP Panel makes the recommendations set forth in Section XIII.D.2 of this Declaration.
- c. Each party shall bear its own legal and expert witness fees and expenses, except that the administrative costs of the ICDR, totaling \$13,825.00 and the IRP Panel members' along with the Emergency Panelist's fees and expenses, totaling \$ 841,894.76 shall be borne entirely by ICANN. Therefore, ICANN shall reimburse Namecheap the sum of \$58,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Namecheap.

506. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Declaration of this IRP Panel.

As at Los Angeles, California, USA
December 23, 2022



Glenn P. Hendrix
Chair



Grant L. Kim



Christof Siefarth

APPENDIX A

Table of Abbreviations

Abbreviation	Meaning
1999 Registry Agreement	November 1999 Registry Agreement between ICANN and NSI for .COM, .NET, and .ORG, which was the original ICANN Registry Agreement (RM 41)
2002 Selection Criteria	Criteria for selecting new registry operator for .ORG, posted 20 May 2002 as “Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals” (RM 11)
2013 Registry Agreements	The registry agreements for .ORG, .INFO, and .BIZ that ICANN entered into on 22 August 2013 (RM 18, 27, 28)
2019 Registry Agreements	The registry agreements for .ORG, .INFO, and .BIZ that ICANN entered into on 30 June 2019 (RM 29, 30, 31)
<i>Afilias</i> Final Decision	20 May 2021 Final Decision in <i>Afilias Domains No. 3 Limited v. ICANN</i> , ICDR Case No. 01-18-0004-2702 (RM 190)
Annex ##	Factual exhibits submitted by Namecheap in this IRP, which are numbered sequentially
April 22 List	The issues that the Panel identified on 22 April 2022, so the Parties could address them in their post-hearing briefs
Articles	ICANN’s Articles of Incorporation; unless otherwise noted, this is the version approved by the ICANN Board on 9 August 2016 and filed with the California Secretary of State on 3 October 2016 (RM 001)
Base Registry Agreement (or Base RA)	Standard registry agreements for New gTLDs (see RE-7)
.BIZ Claim	Namecheap’s claim that ICANN’s Price Cap Decision regarding the .BIZ gTLD violated ICANN’s AOI and Bylaws

Abbreviation	Meaning
Bylaws	ICANN’s Bylaws; unless noted otherwise, this is the version of 28 November 2019, which was in effect when this IRP was filed and on which both Parties have relied (RM 002)
Burr WS	Witness Statement of J. Beckwith Burr (14 January 2022)
Carlton 2009 Preliminary Report	Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, 4 March 2009 (RM 183)
Carlton Presentation	Presentation slides that Dr. Carlton referred to during his testimony on March 31, 2022
Carlton Report	Expert Report of Dennis Carlton (14 January 2022)
Carlton Reply Report	Reply Expert Report of Dennis Carlton (14 March 2022)
ccTLD	country code Top Level Domain (such as .US or .EU)
CIACA	California International Arbitration and Conciliation Act
Decision on Request for Emergency Relief	Decision on Request for Emergency Relief, issued in this IRP on 20 March 2020 by Emergency Panelist Gary L. Benton
Delegation of Authority Guidelines	Guidelines adopted by the ICANN Board on 8 November 2016, which describe the general roles of the ICANN Board and CEO, and the delegation of authority from the Board to the CEO and key ICANN staff (R-37)
DNS	Domain Name System
DOC	U.S. Department of Commerce
EER-###	Exhibit cited in the Economic Expert Reports with the indicated number (such as EER-122)

Abbreviation	Meaning
EER-I (Economic Expert Report I)	Expert Report of 20 December 2020 by Professor Dr. Frank Verboven and Dr. Gregor Langus
EER-II (Economic Expert Report II)	Expert Report of 25 November 2021 by Professor Dr. Frank Verboven and Dr. Gregor Langus
EER-III (Economic Expert Report II)	Expert Report of 8 January 2022 by Professor Dr. Frank Verboven and Dr. Gregor Langus
Emergency Panelist	Gary L. Benton, appointed in this IRP to decide Namecheap's Emergency Request
Emergency Relief Request	Namecheap's 25 February 2020 Request for Emergency Arbitrator and Interim Measures of Protection
Feb06 PDP	The policy development process concerning conditions for registry agreements for gTLDs, which the GNSO kicked off on 6 February 2006 (<i>see</i> RER 80, 81; Namecheap Pre-Hearing Brief, ¶¶ 74-80; Neumann Expert Report, ¶¶ 81-91)
Feb06 Policy	GNSO policy recommendations regarding contractual conditions for gTLDs, accepted by the ICANN Board on 23 January 2008 (RER 89, RM 103)
Feb06 Policy Claim	Namecheap's claim that ICANN failed to apply fairly its policies and processes regarding the Feb06 Policy
GCC Partial Final Declaration	19 October 2016 Partial Final Declaration in <i>Gulf Cooperation Council v. ICANN</i> , ICDR Case No. 01-14-002-1065 (RM 176)
GNSO	Generic Names Supporting Organization
GoDaddy	GoDaddy, Inc. (largest registry; acquired Neustar's registry operations in 2020)
gTLD	Generic Top Level Domain (such as .COM, .ORG, .INFO, or .BIZ)
Hearing Tr.	Transcript of Merits Hearing, cited by the volume, page, and line number. For example, Hearing Tr. V, 67:14-19 refers to Volume V of the Hearing Transcript, page 67, lines 14-19.

Abbreviation	Meaning
ICANN	Respondent Internet Corporation for Assigned Names and Numbers
ICANN org	ICANN organization or staff (in contrast to the ICANN Board)
ICANN Post-Hearing Brief	ICANN's 27 May 2022 Post-Hearing Brief
ICANN Pre-Hearing Brief	ICANN's 14 January 2022 Pre-Hearing Brief on the Merits
ICANN Response to IRP Request	ICANN's 10 April 2020 Response to Namecheap's Request for Independent Review Process
ICANN Sur-Rebuttal	ICANN's 14 March 2022 Sur-Rebuttal Brief on the Merits
ICDR	International Centre for Dispute Resolution
ICDR Rules	International Arbitration Rules of the International Centre for Dispute Resolution (1 June 2014)
IRP	Independent Review Process
IRP Procedures	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (25 October 2018, RE-1)
Langus Presentation	The presentation slides that Dr. Langus explained during his testimony on March 31, 2022
Legacy gTLDs	The original gTLDs (such as .COM and .ORG), plus gTLDs introduced in the first and second round expansions (such as .BIZ and .INFO)
Merits Hearing	The evidentiary hearing held by videoconference from 28 March to 1 April 2022
Namecheap	Claimant Namecheap, Inc.

Abbreviation	Meaning
Namecheap IRP Request	Namecheap's 25 February 2020 Request for Independent Review Process
Namecheap Post-Hearing Brief	Namecheap's 27 May 2022 Post-Hearing Brief
Namecheap Pre-Hearing Brief	Namecheap's 30 November 2021 Pre-Hearing Brief on the Merits
Namecheap Rebuttal	Namecheap's 8 February 2022 Rebuttal Brief
Namecheap's Rebuttal to Proposed Determination	Namecheap's 18 November 2019 Rebuttal to Proposed Determination re Reconsideration Request 19-2 (Annex 10)
Neuman Expert Report (or RER)	19 November 2021 Regulatory Expert Report of Jeffrey J. Neuman
Neustar	Neustar, Inc. (registry operator of .BIZ in 2019; sold its registry operations to Go-Daddy in 2020)
New gTLDs	New gTLDs created as a result of the New gTLD Program
New gTLD Program	The program for the large, third round expansion of gTLDs, which reflected the GNSO Policy adopted by ICANN in 2008, and first took applications in 2012 (ICANN Pre-Hearing Brief, ¶¶ 26-28; Namecheap Pre-Hearing Brief, ¶¶ 89-91)
New gTLD Guidebook	gTLD Applicant Guidebook for New gTLD Program (RE-6)
NSI	Network Solutions, Inc., the original registrar for .COM, .NET, and .ORG
NTIA	National Telecommunications and Information Administration (agency of U.S. Department of Commerce that created plan to manage the Internet)

Abbreviation	Meaning
October 2016 Amendments	Significant amendments to the Bylaws effective 1 October 2016. RER 10 is the October 2016 version of the Bylaws; the changes can be seen by comparing to the prior version of 11 February 2016 (RM 74).
Panel	The Panel appointed to decide this IRP
Parties	Claimant Namecheap and Respondent ICANN
PIR	Public Interest Registry (currently registry operator of .ORG)
Price Cap Decision	ICANN's 30 June 2019 decisions to renew the 2019 Registry Agreements for .ORG, .INFO, and .BIZ, without including price caps. This term refers to the renewal for all three gTLDs, unless specifically limited to some gTLDs only
Proposed Determination	Proposed Determination of the ICANN Board of Directors regarding Reconsideration Request 19-2 (R-53)
R-##	Exhibit of Respondent ICANN, numbered sequentially
RE-##	Exhibit in support of Respondent ICANN's Opposition to Namecheap's Emergency Request, numbered sequentially
Reconsideration Request 19-2	Reconsideration Request that Namecheap filed with ICANN on 12 July 2019 (Annex 8)
Registrar	Entity that sells the right to use specific domain names to end-users (such as Namecheap and Go-Daddy)
Registry Operator (or Registry)	Entity responsible for the technical operation of specific gTLDs (such as Verisign, PIR, Afilias, and Neustar)
RER (or Neumann Report)	19 November 2021 Regulatory Expert Report of Jeffrey J. Neuman
RER ##	Document cited in the Regulatory Expert Report of Jeffrey J. Neuman, numbered sequentially
RFP	Request for Proposals (used for ICANN's 2002 RFP for a new registry operator for .ORG to replace NSI)

Abbreviation	Meaning
RLA-##	Respondent's Legal Authority, numbered sequentially
RM ##	Reference Material (term used by Namecheap to cite legal authorities and other documents submitted in this IRP, which are sequentially numbered)
Supplemental List of Issues	The list of issues that the Panel provided to the Parties on 20 June 2022, so the Parties could address them in the oral closing arguments on 29 June 2022.
TLD	Top Level Domain that appears at the end of an Internet address, including both gTLDs (such as .COM or .ORG) and ccTLDs (such as .US or .EU)
Vertical Integration Claim	Namecheap's claim that ICANN failed to apply fairly its policies and processes regarding vertical integration of registry operators and registries
Weinstein Statement	13 January 2022 Witness Statement of Russell Weinstein

APPENDIX B**List of the Parties' Primary Written Submissions**

- Namecheap's Request for Independent Review Process, 25 February 2020
- Namecheap's Request for Emergency Arbitrator and Interim Relief, 25 February 2020
- ICANN's Response to Namecheap's Request for Emergency Arbitrator and Interim Relief, 11 March 2020
- ICANN's Response to Namecheap's Request for Independent Review Process, 10 April 2020
- Namecheap's Request for the Production of Documents, 18 August 2020;
- ICANN's Request for the Production of Documents, 28 August 2020;
- ICANN's Responses to Namecheap's Request for the Production of Documents, 8 September 2020;
- Namecheap's Response to ICANN'S Request for the Production of Documents, 18 September 2020;
- Namecheap's Motion to Compel, 4 November 2020;
- ICANN's Motion to Compel Production of Documents from Claimant, 4 November 2020;
- Namecheap's Response Motion to Compel, 24 November 2020;
- ICANN's Opposition to Namecheap's Motion to Compel, 24 November 2020;
- Namecheap's Prima Facie Showing of Standing, 21 December 2020;
- ICANN's Motion to Dismiss, 13 January 2021;
- Namecheap's Response to ICANN's Motion to Dismiss, 26 January 2021;
- Namecheap's Objection to ICANN's ESI Protocol, 29 January 2021;

- ICANN's Response to Namecheap's Objection to ICANN's ESI Protocol, 5 February 2021;
- Namecheap's Reply supporting Namecheap's Objection to ICANN's ESI Protocol, 12 February 2021;
- ICANN's Sur-Reply in response to Namecheap's Reply, 18 February 2021;
- Namecheap's Motion for Reconsideration regarding Procedural Order No. 6, 19 February 2021;
- Namecheap's Motion to Compel and Motion for Sanctions, 29 September 2021;
- ICANN's Response to Namecheap's Motion to Compel and Motion for Sanctions, 14 October 2021.
- Namecheap Pre-Hearing brief on the Merits, 30 November 2021;
- Respondent filed a Pre-Hearing brief on the Merits, 14 January 2021;
- Namecheap' Brief on the Need to Subpoena Designated Witnesses and Motion for an In-Person Hearing, 26 January 2022;
- ICANN's Brief in Opposition to the Subpoenaing of Additional Witnesses and Claimant's Motion for an in-person hearing, 7 February 2022;
- Namecheap's Limited Rebuttal to ICANN's Pre-Hearing brief on the merits, 8 February 2022;
- ICANN's Sur-Reply Rebuttal Brief on the Merits, 14 March 2022;
- Namecheap's Post-Hearing Brief, 27 May 2022;
- ICANN's Post-Hearing Brief, 27 May 2022;
- Namecheap's Closing Statement in the form of a presentation on 29 June 2022 as a response to ICANN's Post-Hearing brief and to the Panel's Supplemental List of Issues;

- ICANN's Closing presentation on 29 June 2022 as a response to Namecheap's Post-Hearing brief and to the Panel's Supplemental List of Issues.