INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Process Panel

Namecheap, Inc.

Claimant,

Case Number: 01-20-0000-6787

- and -

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."

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[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 hierachical 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,

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[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]

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[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, Afilias 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

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[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]

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[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

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[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]

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[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).

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- 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
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- 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]

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[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]

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[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]

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[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.
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> * * * *
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> 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 complaincecompliance; 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.

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[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

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[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

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[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 expet, 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.

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[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 competitiors 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

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[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-

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[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

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[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]

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[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-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:

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[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."

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[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 Afilias Limited (Afilias) ***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

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[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]

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[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."

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[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

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[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.

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[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]

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[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

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[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

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[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]

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[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 acccountability, 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

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[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 requriements.[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

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[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 conducconduct."[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

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[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:

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[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

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[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 .INFOthat 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

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[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

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[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

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[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

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[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

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[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

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[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-discrimation 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]

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[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 enhancments 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 efficiciencies 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 negotations 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

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[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

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[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

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[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 specifity in this context than general concepts of international law. Thus, the Panel focuses on ICANN's transparency obligations under its Articles and Bylaws.

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[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]

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[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 *Afilias* case, for the proposition that ICANN's

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[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

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[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

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[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

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[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

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[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

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[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

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[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 monpoly, 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

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[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,

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[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]

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[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

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[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]

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[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.

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[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.

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[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]

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[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

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[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]

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[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

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[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

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[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 reachings 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:

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[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

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[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

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[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, late 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.

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[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 irreconciliable 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

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[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

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[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.

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[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]

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[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.

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[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]

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[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

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[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.

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[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. Futhermore, 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-1 8aug15-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]

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[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.

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[422] Annexes 67 and 67*bis* ¶ 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 Agrements 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

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[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:

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[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]

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[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

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[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

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[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

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[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

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[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-discrimintory 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

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[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 commited 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.

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[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 takeholders.[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. Deparatment 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]

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[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

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[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.

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[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.

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[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

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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 expresssed 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 internationl 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

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[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 mechamism. 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 Incoporation 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]

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[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"

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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"?

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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,

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[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)
Afilias Final Decision	20 May 2021 Final Decision in *Afilias Domains No. 3 Limited v. ICANN*, 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 (*see* 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 *Gulf Cooperation Council v. ICANN*, 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.