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# **Annex 66bis**

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# **Annex 67bis**

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# **Annex 90**

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE  
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION**

**NAMECHEAP, INC.**

*Claimant*

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**

*Respondent*

**ICDR Case No. 01-20-0000-6787**

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**AFFIDAVIT OF RUSSELL WEINSTEIN**

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14 October 2021

I, Russell Weinstein, declare as follows:

1. Currently, I am Vice President, Global Domains Division (“GDD”) Accounts and Services for the Internet Corporation for Assigned Names and Numbers (“ICANN”), the respondent in this Independent Review Process (“IRP”). I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Response to Claimants’ Motion to Compel and Motion for Sanctions.

2. As Vice President, GDD Accounts and Services, I lead the GDD Accounts and Services team responsible for supporting the global network of gTLD registries and ICANN accredited registrars. In 2018 and 2019, my titles were Director, Registry Services and Engagement; then Senior Director, Registry Services and Engagement; then Senior Director, gTLD Accounts and Services. In those roles, I managed the negotiations regarding the renewal of the .ORG, .BIZ, and .INFO registry agreements, executed on 30 June 2019 (“2019 Registry Agreements”). This included communicating with the respective registry operators.

3. Negotiations with the .ORG, .BIZ, and .INFO registry operators regarding the 2019 Registry Agreements began in or around May 2018. Price control provisions were not a predominant topic because the discussions initially focused on transitioning to the Base gTLD Registry Agreement, which does not have any price control provisions, and then focused on negotiating certain terms within the Base gTLD Registry Agreement that were not applicable for these legacy gTLDs.

4. Some of the negotiations with these three registry operators occurred via email, but the majority of the negotiations occurred via telephone meetings. I recall very few telephone conversations or emails that discussed price control provisions in the 2019 Registry Agreements, since there is no such provision in the Base gTLD Registry Agreement.

5. Similarly, draft agreements exchanged with the registry operators reflected changes to the Base gTLD Registry Agreement. The draft agreements did not reflect changes to the prior versions of the .ORG, .BIZ, and .INFO registry agreements. Accordingly, because there were no price control provisions in the Base gTLD Registry Agreement, these drafts do not

reflect any changes related to price control provisions.

6. With regard to the 2019 Registry Agreements, my team and I conducted the majority of our business by email or by telephone, and occasionally used the Google drive folders for the .ORG, .BIZ, and .INFO TLDs to edit and maintain documents pertaining to the 2019 Registry Agreements. Draft and final versions of documents located in these Google drive folders were also regularly exchanged via email.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 13 day of October, 2021 at Los Angeles, California.

By: *Russ Weinstein*  
Russell Weinstein



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# **Annex 91**

**Redacted – Confidential Information**

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# **Annex 92**

26 July 2019

Mr. Zak Muscovitch  
General Counsel  
Internet Commerce Association (ICA)

RE: ICA Letter – Renewal of .org Registry Agreement

Dear Mr. Muscovitch,

Thank you for [your letter of 3 July 2019](#) regarding the renewal of the .org Registry Agreement.

I want to assure you that the decision to renew the .org registry agreement utilizing the [Base gTLD Registry Agreement](#) (Base RA) form was taken with care and deep consideration by both the ICANN organization and the ICANN Board.

The Base RA was developed to support the new generic top-level domains (gTLDs) being created through the 2012 New gTLD Program. It was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment and aligns with the underlying Generic Names Supporting Organization's (GNSO's) policy recommendations for new gTLDs. Established in 2013, the Base RA now applies to over 1,200 gTLDs. The ICANN org has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements. The Base RA provides additional safeguards and security and stability requirements compared to legacy agreements. Since 2014, several legacy gTLDs have renewed their agreements adopting the Base RA: cat, .jobs, .mobi, .pro, .tel, .travel, and most recently, .asia, .biz, .info, and .org.

While the Base RA does not contain price control provisions, it does contain requirements designed to protect registrants from a price perspective. These include requirements to provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals.

Additionally, these registry operators must enable registrants to renew for as many as 10 years prior to a price change taking effect. Moreover, the Base RA requires the registry operator to offer uniform pricing for renewals unless the registrant opts-in to premium pricing at the time of registration, thus preventing discriminatory pricing. Utilizing the Base RA as proposed, without additional price control provisions for .biz, .info, and .org, is consistent with the gTLDs launched via the new gTLD program and will further reduce ICANN org's role in domain pricing. ICANN's primary mission is to ensure the stable and secure operation of the DNS and other unique identifiers.

ICANN's core values, as enumerated in the [Bylaws](#) approved by the ICANN community, instruct ICANN to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.

The Uniform Rapid Suspension (URS) system, a rights protection dispute resolution mechanism, was developed and adopted into the Base RA through a process involving extensive community input including review by the GNSO Council. While there is policy development in progress regarding rights protection mechanisms, there is currently no policy requiring or prohibiting registries from adopting URS. Further, it has been affirmed by the Board that ICANN org should not stop its work because a topic is or might be the subject of policy development discussions.

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.

After consultation with the Board at the Los Angeles workshop, and with the Board's support, ICANN's President and CEO decided to continue with the plan to complete the renewal negotiations utilizing the Base RA. After the negotiations were completed with each registry operator in February/March 2019, each agreement was posted for public comment. The ICANN org team did review and consider all 3,200+ comments received. Staff shared the summary and [analysis of the public comments](#) with the ICANN Board prior to posting the summary analysis. In addition, briefing papers were provided to the Board in advance of its workshop in June 2019 in Marrakech. The briefing papers summarized the key issues raised in the public comment process and correspondence (removal of price controls and inclusion of URS), and outlined the rationale for the recommendation to renew the agreements as proposed.

Following the discussion with the ICANN Board in Marrakech, and consistent with the Board's support, ICANN President and CEO made the decision to continue with renewal agreements as proposed, using the Base gTLD Registry Agreement. These agreements were effective on 30 June 2019.

As outlined, these decisions were taken by the ICANN organization after the appropriate consideration and oversight by the ICANN Board.

I hope that you find this information helpful.

Best regards,



Cyrus K. Namazi  
Senior Vice-President  
Global Domains Division

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# **Annex 93**

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# **Annex 94**

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# **Annex 95**

# Minutes | Regular Meeting of the ICANN Board

This page is available in:

English |

العربية (<http://www.icann.org/resources/board-material/minutes-2019-11-03-ar>) |

Español (<http://www.icann.org/resources/board-material/minutes-2019-11-03-es>) |

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Русский (<http://www.icann.org/resources/board-material/minutes-2019-11-03-ru>) |

中文 (<http://www.icann.org/resources/board-material/minutes-2019-11-03-zh>).

03 Nov 2019

**A Regular Meeting of the ICANN Board of Directors was held in person on 3 November 2019 in Montreal, Canada at 10:37 local time.**

**Cherine Chalaby, Chair, promptly called the meeting to order.**

**In addition to the Chair, the following Directors participated in all or part of the meeting: Becky Burr, Maarten Botterman, Ronda Silva, Sarah Deutsch, Chris Disspain, Avri Doria, Rafael Lito Ibarra, Danko Jevtovic, Akinori Maemura, Göran Marby (President and CEO), León Sánchez, Matthew Shears, Tripti Sinha, and Nigel Roberts.**

**The following Directors sent their apologies: Khaled Koubaa.**

**The following Board Liaisons participated in all or part of the meeting: Harald Alverstrand (IETF Liaison), Manal Ismail (GAC Liaison), Merike Kão (SSAC Liaison), and Kaveh Ranjbar (RSSAC Liaison).**

**Secretary: John Jeffrey (General Counsel and Secretary).**

1. **Main Agenda:**

a. **Consideration of Reconsideration Request 19-2**

*Rationale for Resolution 2019.11.03.01*b. **Consideration of Reconsideration Request 19-3***Rationale for Resolution 2019.11.03.02*c. **Independent Review Process Implementation Oversight Team Recomposition***Rationale for Resolutions 2019.11.03.03 – 2019.11.03.05*d. **Ombudsman FY19 At-Risk payment***Rationale for Resolutions 2019.11.03.06 – 2019.11.03.07*1. **Main Agenda:**

The Chair introduced the Main Agenda and requested that the shepherd for each agenda item to introduce the item.

a. **Consideration of Reconsideration Request 19-2**

León Sánchez, the Chair of the Board Accountability Mechanisms Committee (BAMC), introduced the agenda item. Becky Burr, Sarah Deutsch, and Nigel Roberts abstained from consideration of the matter indicating potential or perceived conflicts of interest, or out an abundance of caution.

Léon explained that this matter is before the Board for consideration at this stage in the Reconsideration process because the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 (Request 19-2) due to potential or perceived conflicts, or out an abundance of caution. Because of this, the BAMC does not have a quorum to consider Request 19-2, and the Board is considering Request 19-2 in lieu of a Recommendation by the BAMC.

Liz Le briefed the Board on Request 19-2, which was submitted by Namecheap, Inc. (Requestor), seeking

reconsideration of ICANN org's renewal of the registry agreements (RAs) with the .ORG and .INFO top-level domains (TLDs) in so far as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO. The Requestor claims that ICANN org's decision to allegedly ignore public comments to keep price caps in legacy gTLDs contradicts with ICANN's Commitments and Core Values. The Requestor also claims that ICANN Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO renewed RAs.

Both renewals went out for public comments. ICANN org reviewed and evaluated all of the 3700 comments received. The comments were discussed in the report of public comments as well through briefing with the ICANN Board.

The Board considered the recommendation to deny Request 19-2 because ICANN org's execution of the .ORG/.INFO renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements. Avri Doria mentioned that the Reconsideration Request rests largely on the number of comments received. She emphasized that the number of comments received should not be determinative; rather, the Board should endeavor to understand the content of the comments and consider the content as part of its deliberations.

León Sánchez moved, and Maarten Botterman seconded the proposed resolution. After the discussion, the Board took the following action:

Whereas, Namecheap Inc. (Requestor) filed a reconsideration request (Request 19-2) challenging 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 (collectively, .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.<sup>1</sup>

Whereas, the Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."<sup>2</sup> The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.<sup>3</sup>

Whereas, pursuant to Article 4, Section 4.2(I), the Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board," and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."<sup>4</sup>

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (See Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.<sup>5</sup>

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore,

the Board is considering Request 19-2 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-2 and all relevant materials and concludes that ICANN org's execution of the .ORG/.INFO 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 Agreements. Accordingly, the Board proposes denying Request 19-2.

Resolved (2019.11.03.01), the Board adopts the Proposed Determination on Reconsideration Request 19-2 (</en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf>).

**Twelve Directors voted in favor of Resolution 2019.11.03.01. Becky Burr, Sarah Deutsch, and Nigel Roberts abstained. Khaled Koubaa was unavailable to vote. The Resolution carried.**

### *Rationale for Resolution 2019.11.03.01*

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. See Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.<sup>6</sup> The majority of the BAMC members have recused themselves from voting



on Reconsideration Request 19-2 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2. Therefore, the Board has considered and issues the Proposed Determination in lieu of a Recommendation by the BAMC.

The Board has carefully considered the merits of Request 19-2 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that ICANN org's execution of the .ORG/.INFO 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 Agreements. Accordingly, the Board proposes denying Request 19-2.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-2 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-2 in accordance with Article 4, Section 4.2(r) of the Bylaws.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and

resiliency of the domain name system.

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

## b. **Consideration of Reconsideration Request 19-3**

León Sánchez, the Chair of the Board Accountability Mechanisms Committee (BAMC), introduced the agenda item. Sarah Deutsch abstained from consideration of the matter indicating potential or perceived conflicts of interest, or out an abundance of caution.

León explained that this matter is before the Board for consideration at this stage in the Reconsideration process because the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 (Request 19-3) due to potential or perceived conflicts, or out an abundance of caution. As a result, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board is considering Request 19-3 in lieu of a Recommendation by the BAMC.

Liz Le briefed the Board on Request 19-3, which was submitted by Electronic Frontier Foundation (Requestor), seeking reconsideration of ICANN org's renewal of the registry agreement (RA) with the .ORG top-level domain (TLD). The Requestor challenges the renewal insofar as the renewal permits the registry operator at its election to implement additional protections of legal rights of third parties unilaterally, without further consultation with existing .ORG registrants or the ICANN community, and applies the Uniform Rapid Suspension (URS) rules to .ORG registrants. The Requestor claims that the inclusion of this rights protection mechanism is contrary to ICANN's Bylaws.

The Requestor also seeks reconsideration of the Board inaction on the basis that the Board did not formally vote on the renewal of the .ORG RA itself. The Requestor asks ICANN org and the Board to amend the renewed agreement to eliminate the section that relates to the addition of the URS in the RA. Liz presented each of the claims in the Reconsideration Request, and explained that the evidence did not support reconsideration.

The Board considered the recommendation to deny Request 19-3 because ICANN org's execution of the .ORG renewed RA was consistent with ICANN's Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN Staff to execute the .ORG Renewed RA without voting on it prior to execution.

Ron da Silva noted his support for the recommended action, as well as ICANN org's approach to add some of the additional safeguards and improvements from the new gTLD registry agreement into the legacy agreements. He commented that the ongoing GNSO policy development process concerning rights protection mechanisms would be the right place to address issues raised in the Reconsideration Request about the potential impacts of rights protection mechanisms on free speech.

After discussion, Tripti Sinha moved, and Becky Burr seconded the proposed resolution, and the Board took the following action:

Whereas, Electronic Frontier Foundation (Requestor) filed a reconsideration request (Request 19-3) challenging ICANN organization's renewal of the Registry Agreement (RA) with Public Interest Registry (PIR) for the .ORG generic top-level domain (gTLD) (the .ORG Renewed RA), insofar as the

renewal permits PIR to, "at its election, implement additional protections of the legal rights of third parties,' unilaterally and without further consultation with existing .ORG registrants or the ICANN community" and applies the Uniform Rapid Suspension (URS) rules to .ORG registrants (collectively, the URS Rights Protection Mechanisms or URS RPMs).<sup>7</sup> The Requestor also seeks reconsideration of an alleged Board inaction, insofar as the ICANN Board of Directors did not vote on the .ORG Renewed RA.

Whereas, the Requestor claims that ICANN org's inclusion of the RPMs in the .ORG Renewed RA "run[s] contrary to ICANN's bylaws."<sup>8</sup> The Requestor also claims that the Board's inaction (i.e., that the Board did not vote on the .ORG Renewed RA) was based on the Board's consideration of inaccurate relevant information and the Board's failure to consider material information.<sup>9</sup>

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman accepted Request 19-3 for consideration, and, after investigating, concluded that the selection of terms to include in RAs is "ICANN org's choice to make as directed by the Board—and as such, the actions of the Staff, acting with the authority vested in the CEO by the Bylaws and the Board, do not merit any kind of recommendation from me to the BAMC or the Board under [Request] 19-3."<sup>10</sup> The Ombudsman further concluded that "[i]n action or inaction, the Board did nothing improper in deciding to stay the course, so far as I can see. It heard the Community, it read the public comments (at the very least the comprehensive Staff Report summary), and in the end, it decided that the renewal terms for the Legacy

gTLDs (including .org) were acceptable."<sup>11</sup>

Whereas, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests and make recommendations to the Board on the merits of those Requests. (See Bylaws, Art. 4, § 4.2(e).) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.<sup>12</sup>

Whereas, the majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board is considering Request 19-3 in lieu of a Recommendation by the BAMC.

Whereas, the Board has carefully considered the merits of Request 19-3 and all relevant materials and concludes that reconsideration is not warranted because ICANN org's execution of the .ORG Renewed RA was consistent with ICANN's Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN Staff to execute the .ORG Renewed RA without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Resolved (2019.11.03.02), the Board adopts the [Proposed Determination on Reconsideration Request. 19-3](/en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf) (</en/system/files/files/reconsideration-19-3-electronic-frontier-board-proposed-determination-03nov19-en.pdf>).

**Fourteen Directors voted in favor of Resolution 2019.11.03.02. Sarah Deutsch abstained. Khaled Koubaa was unavailable to vote. The Resolution carried.**

*Rationale for Resolution  
2019.11.03.02*

The Board is taking this action today pursuant to Article 4, Section 4.2 of the ICANN Bylaws. Under Section 4.2 of the Bylaws, the Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. See Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee.<sup>13</sup> The majority of the BAMC members have recused themselves from voting on Reconsideration Request 19-3 due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-3. Therefore, the Board has considered and issues the Proposed Determination in lieu of a Recommendation by the BAMC.

The Board has carefully considered the merits of Request 19-3 and all relevant materials. For the reasons set forth in the Proposed Determination, which are incorporated here, the Board concludes that reconsideration is not warranted because ICANN org's execution of the .ORG Renewed RA was consistent with ICANN's Bylaws, policies, and procedures. Further, the Board did not fail to consider material information or rely on false or inaccurate material information by allowing ICANN Staff to execute the .ORG Renewed RA

without voting on it prior to execution. Accordingly, the Board proposes denying Request 19-3.

Pursuant to Article 4, Section 4.2(q), the Requestor has 15 days from the receipt of the Board's Proposed Determination on Request 19-3 to submit a rebuttal. Following the rebuttal period, the Board will issue a final determination on Request 19-3 in accordance with Article 4, Section 4.2(r) of the Bylaws.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

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

### c. **Independent Review Process Implementation Oversight Team Recomposition**

León Sánchez, the Chair of the Board Accountability Mechanisms Committee (BAMC), introduced the agenda item. He explained that the Independent Review Process Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP supplementary rules of procedure for Board

consideration and approval, and developing rules for the Cooperative Engagement Process. The IRP-IOT was formed during CCWG-Accountability Work Stream 1 (WS1) as a group envisioned to include seven volunteers of experts in IRPs, arbitration or alternative dispute resolution mechanisms. Over time, the IRP-IOT had difficulties in achieving active participation or quorum with its current membership at regularly scheduled meetings. The BAMC, in its oversight role of ICANN's accountability mechanisms, has undertaken to repopulate the IRP-IOT with members who have the substantive qualifications and time availability to help the IOT conclude its work in a timely fashion. This process was done in consultation with the Supporting Organizations and Advisory Committees. León then read the resolved clauses into the record.

Several Directors remarked on the importance of the proposed resolution. Becky Burr highlighted the importance of this work to bring the IANA stewardship transition to fruition. She also commented that the Board and the BAMC take this work seriously and acknowledge their responsibility for continuing to move it forward. Sarah Deutsch and León agreed, and commented on the need to move this work forward as soon as possible.

The Board discussed a revision to the proposed resolution to address how to handle future changes to the IRP-IOT and who would be responsible for them. Following discussion, Chris Disspain moved, and Lito Ibarra seconded the proposed resolution. The Board took the following action:

Whereas, the Independent Review Process (IRP) is an accountability mechanism established by the ICANN Bylaws that allows for third party review of ICANN Board or staff actions (or inactions) alleged by an affected party to be inconsistent with ICANN's Articles of



## Incorporation or Bylaws.

Whereas, the Bylaws specify that IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP supplementary rules of procedure for Board consideration and approval, and developing rules for the Cooperative Engagement Process.

Whereas, the Bylaws further specify that an IRP-IOT shall be "established in consultation with the Supporting Organizations [SOs] and Advisory Committees [ACs]" and that the IRP-IOT shall be "comprised of members of the global Internet community." (See Bylaws, Art. 4, § 4.3(n).)

Whereas, the IRP-IOT was formed during CCWG-Accountability Work Stream 1 (WS1) as a group envisioned to include seven volunteers of experts in IRPs, arbitration or alternative dispute resolution mechanisms.

Whereas, the IRP-IOT had difficulties in achieving active participation or quorum with its current membership at regularly scheduled meetings.

Whereas, the Board Accountability Mechanisms Committee (BAMC), in its oversight role of ICANN's accountability mechanisms, has undertaken to repopulate the IRP-IOT with members who have the substantive qualifications and time availability to help the IOT conclude its work in a timely fashion.

Whereas, at the request of the BAMC, ICANN organization issued a Call for Expressions of Interest and conducted community outreach seeking new volunteers to join the IRP-IOT.

Whereas, the BAMC specified that volunteers should have the necessary legal or judicial skills and experience in IRPs, arbitrations, or other alternate dispute resolution mechanisms, specific familiarity with ICANN's accountability mechanisms, the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, and sufficient availability to contribute to the work online.

Whereas, the BAMC has confirmed with the current members of the IRP-IOT who have actively participated in the IRP-IOT since January 2018 that they would like to continue serving on the IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online.

Resolved (2019.11.03.03), the Board delegates to the BAMC the authority in this instance to select the members according to the documentation submitted to the Board, and the Board directs the BAMC to provide a proposal to the Board for the future process of finalizing changes to the composition of the IRP-IOT, if needed.

Resolved (2019.11.03.04), the Board acknowledges the work of the BAMC in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

Resolved (2019.11.03.05), the Board thanks the SOs and ACs for their work in consulting with the BAMC on the recomposition of the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further thanks all candidates who submitted expressions of interest to join the IRP-IOT. The

Board further thanks all members of the IRP-IOT for their efforts to date.

**All members of the Board present voted in favor of Resolutions 2019.11.03.03 – 2019.11.03.05. Khaled Koubaa was unavailable to vote. The Resolutions carried.**

### *Rationale for Resolutions 2019.11.03.03 – 2019.11.03.05*

The Independent Review Process (IRP) is an accountability mechanism provided by the ICANN Bylaws that allows for third party review of ICANN Board or staff actions (or inactions) alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. Per the Bylaws, an IRP Implementation Oversight Team (IRP-IOT) is responsible for, among other things, updating the IRP Supplementary Procedures for Board approval, and developing rules for the Cooperative Engagement Process (CEP). The Board is taking this action today because it is committed to ensuring that the work of the IRP-IOT is completed in a timely and efficient manner to bring the IRP in line with the updated Bylaws.

The IRP-IOT's scope of work involves drafting the Updated Supplementary Procedures for Board consideration and approval, developing rules for the CEP, making recommendations of trainings for the IRP standing panel, and developing the rules governing appeals from IRP panel decisions.<sup>14</sup> The current IRP-IOT was formed in late 2015 within CCWG-ACCT WS1 as a group envisioned to include seven volunteers of experts in the IRPs, arbitration or alternative dispute resolution mechanisms, as well as participants from ICANN's legal department.<sup>15</sup>

Over the past several years, the IRP-IOT has experienced difficulties in achieving active participation and quorum from the current membership at regularly scheduled meetings.

The participation level of the IRP-IOT needs to improve dramatically in order to complete the remaining work in the estimated time frame. The Board Accountability Mechanisms Committee (BAMC), as the Board Committee with oversight responsibility of ICANN's accountability mechanisms, identified that as part of re-composing the IRP-IOT and supporting the important role that the IRP has within ICANN's overall accountability, it is important to focus on bringing the correct mix of skills to the group to complete the work. The BAMC identified those as specific legal or judicial skills and experience in disputes such as IRPs, arbitrations, or other alternate dispute resolution mechanisms, as well as specific familiarity with ICANN's accountability mechanisms. In terms of time commitment, the BAMC asked for volunteers who have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online.

Pursuant to the Bylaws requirement that an IRP-IOT be "established in consultation with the Supporting Organizations [SOs] and Advisory Committees [ACs]", the process to re-compose the IRP-IOT was done in consultation with the SOs and ACs. The BAMC and ICANN org conducted several community outreach efforts, including an issuance of a Call for Expressions of Interest through the Community Leadership Digest in April 2019 and a letter from the BAMC Chair to the SO/AC leadership in which the BAMC Chair asked for the help of the SO/AC

leadership in the recomposition process. ([See Letter from León Sanchez to SO/AC leadership dated 26 June 2019 \(/en/system/files/correspondence/sanchez-to-siddiqui-et-al-26jun19-en.pdf\)](#)). The BAMC encouraged the SO/ACs, if interested, to use their own selection processes to provide inputs to the BAMC on candidates. If invited, representatives of ICANN org were available for discussion on the issue.

Following community outreach and a Call for Expressions of Interest, the BAMC then considered whether each of the volunteers that responded to the call for expressions of interest satisfied the substantive qualifications and time requirements sufficient to serve on the IRP-IOT. Some of the volunteers were presented to the BAMC with endorsement from the Generic Names Supporting Organization Council.

With respect to those IRP-IOT members that have actively participated in the IRP-IOT since January 2018, the BAMC, through ICANN org, sought confirmation from each as to whether they wished to continue serving on the IRP-IOT and that they have the time and availability to attend at least a one hour call each week to participate on IRP-IOT telephonic meetings, as well as sufficient availability to contribute to the work online. The full composition from the BAMC also continues the participation from ICANN org's legal department, which brings a practical and important view of how the proposals out of the IRP align in practice as well as potential implications on the ICANN Bylaws and resourcing issues. As the ICANN Board has responsibility to make sure that the IRP, envisioned as the "constitutional court" of ICANN, operates properly under the Bylaws, the BAMC also recommends that two ICANN

Board members are formally identified as members of the IRP-IOT and actively participate in this work. The Board notes that other members of the reconstituted IRP-IOT have been, or anticipate to be, involved as claimants against ICANN in IRPs, and the Board notes that their experience is also extremely valuable when finalizing the procedures and other aspects of an IRP that is fit for purpose. The Board further notes that the BAMC may add new members to the IRP-IOT as appropriate should the need to do so arise, and provided that the new members meet the substantive and time requirements for IRP-IOT membership. The Board affirms the BAMC's work in recomposing the IRP-IOT and directs the BAMC to provide regular updates to the Board on the status of the work of the recomposed IRP-IOT.

The BAMC has also recommended that the recomposed IRP-IOT include a leadership refresh as part of reinvigorating and renewing the cadence of the work of the IRP-IOT. The Board agrees with BAMC's recommendation and thanks the IRP-IOT leadership for the work to date.

The Board thanks the SOs and ACs for their work in identifying additional members the IRP-IOT and hopes that the SOs and ACs will remain engaged with the effort. The Board further thanks all candidates who submitted expressions of interest to join the IRP-IOT. The Board further thanks all members of the IRP-IOT for their efforts to date.

This action is within ICANN's Mission and is in the public interest as part of implementing and achieving the enhanced outcomes of the IRP in accordance with the recommendations of the community. This action is also within ICANN's

Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request third-party review of that action or inaction by the Board.

Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

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

#### d. **Ombudsman FY19 At-Risk payment**

The Chair introduced the agenda item, which was initially intended for a closed Board session. John Jeffrey, the General Counsel and Secretary, explained the process of going from a closed to open Board session, wherein certain portions of the resolution will remain confidential as an "action relating to personnel or employment matters", pursuant to Article 3, section 3.5b of the ICANN Bylaws. The Chair read the resolved clauses into the record.

Following discussion, Ron da Silva moved, and Avri Doria seconded the proposed resolutions. The Board took the following action:

Whereas, the Compensation Committee recommended that the Board approve payment to the Ombudsman of his FY19 at-risk compensation.

Resolved (2019.11.03.06), the Board hereby approves a payment to the Ombudsman of his FY19 at-risk compensation component.

Resolved (2019.11.03.07), a portion of this action by the Board shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article 3, section 3.5b of the ICANN Bylaws.

**All members of the Board present voted in favor of Resolutions 2019.11.03.06 and 2019.11.03.07. Khaled Koubaa was unavailable to vote. The Resolutions carried.**

### *Rationale for Resolutions 2019.11.03.06 – 2019.11.03.07*

Annually the Ombudsman has an opportunity to earn a portion of his compensation based on specific performance goals set by the Board, through the Compensation Committee. This not only provides incentive for the Ombudsman to perform above and beyond his regular duties, but also leads to regular touch points between the Ombudsman and Board members during the year to help ensure that the Ombudsman is achieving his goals and serving the needs of the ICANN community.

Evaluation of the Ombudsman's objectives results from both the Ombudsman self-assessment, as well as review by the Compensation Committee, which lead to a recommendation to the Board with which the Board agrees.

Evaluating the Ombudsman's annual performance objectives is in furtherance of the goals and mission of ICANN and helps increase



the Ombudsman's service to the ICANN community, which is in the public interest.

While there is a fiscal impact from the results of the scoring, that impact was already accounted for in the FY19 budget. This action will have no impact on the security, stability or resiliency of the domain name system.

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

The Chair then called the meeting to a close.

Published on 27 January 2020

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<sup>1</sup> Request 19-2, § 3, at Pg. 2.

<sup>2</sup> *Id.* at § 3.

<sup>3</sup> *Id.*

<sup>4</sup> <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf> ([/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf)).

<sup>5</sup> See BAMC Charter <https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en> ([/resources/pages/charter-bamc-2017-11-02-en](https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en)).

<sup>6</sup> See *id.*

<sup>7</sup> Request 19-3, § 3, at Pg. 2.

<sup>8</sup> *Id.*, § 8, at Pg. 5.

<sup>9</sup> *Id.*, § 8, at Pgs. 8-9.

<sup>10</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-3, at Pg. 3, 7 September 2019,

<https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf> ([/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-19-3-electronic-frontier-evaluation-icann-ombudsman-request-07sep19-en.pdf)).

<sup>11</sup> *Id.*, at Pg. 6.

<sup>12</sup> See BAMC Charter

<https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en> ([/resources/pages/charter-bamc-2017-11-02-en](https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en)).

<sup>13</sup> See *id.*

<sup>14</sup> See Bylaws, Art. 4, § 4.3(j)(i) and 4.3(j)(iii)

(<https://www.icann.org/resources/pages/governance/bylaws-en/#article4> ([/resources/pages/governance/bylaws-en/#article4](https://www.icann.org/resources/pages/governance/bylaws-en/#article4))).

<sup>15</sup> See <https://community.icann.org/display/IRPIOTI>

(<https://community.icann.org/display/IRPIOTI>).

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# **Annex 96**

# Minutes | Board Accountability Mechanisms Committee (BAMC) Meeting

21 Apr 2020

BAMC Attendees: Becky Burr, Chris Disspain, Avri Doria, Mandla Msimang, Nigel Roberts, and León Sánchez (Chair)

BAMC Apologies: Sarah Deutsch

ICANN Org Attendees: Michelle Bright (Board Content Coordination Director), Franco Carrasco (Board Operations Specialist), Casandra Furey (Associate General Counsel), John Jeffery (General Counsel & Secretary), Elizabeth Le (Associate General Counsel), Jennifer Scott (Senior Counsel), and Amy Stathos (Deputy General Counsel)

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The following is a summary of discussions, actions taken and actions identified:

1. [Evaluation of Reconsideration Request 20-1 \(Namecheap, Inc.\)](#) – The BAMC evaluated the remaining claim in Reconsideration Request 20-1 in which Namecheap, Inc. "seeks reconsideration of the ICANN Board's and Staff's lack of transparency insofar as the Requestor alleges that ICANN org has not disclosed the criteria that it will use to evaluate the [PIR] Change of Control Request and is not applying a 2002 Report of the Dot Org Task Force (the 2002 DNSO Policy Guidelines) to the Change of Control Request." BAMC member Nigel Roberts recused himself from the discussion and subsequent vote on the evaluation out of an abundance of caution. The Committee Chair reported that Sarah Deutsch also would have recused herself out of an abundance of caution had she attended and therefore she chose not to attend. After having read and considered all of the materials, including the ICANN Ombudsman's [evaluation \(/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf\)](#) of the request, the BAMC concluded that the ICANN Board and

Staff have not violated ICANN's Commitment to transparency, ICANN's Commitment to apply documented policies consistently, or ICANN's established policies in relation to the Change of Control Request. The BAMC suggested some revisions to the Recommendation, and recommend that the Board deny Reconsideration Request 20-1 subject to those revisions

- Actions: ICANN org to ensure revisions suggested by BAMC members are made to the Recommendation, then publish the BAMC's Recommendation and notify the requester.

Published on 05 May 2020

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# **Annex 97**

# Minutes | Special Meeting of the ICANN Board

This page is available in:

English |

العربية (<http://www.icann.org/resources/board-material/minutes-2020-05-20-ar>) |

Español (<http://www.icann.org/resources/board-material/minutes-2020-05-20-es>) |

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中文 (<http://www.icann.org/resources/board-material/minutes-2020-05-20-zh>).

20 May 2020

**A Special Meeting of the ICANN Board of Directors was held telephonically on 20 May 2020 at 21:00 UTC.**

**Maarten Botterman, Chair, promptly called the meeting to order.**

**In addition to the Chair, the following Directors participated in all or part of the meeting: Becky Burr, Ron da Silva, Chris Disspain, Avri Doria, Rafael Lito Ibarra, Danko Jevtović, Akinori Maemura, Göran Marby (President and CEO), Mandla Msimang, Ihab Osman, Nigel Roberts, León Sánchez (Vice Chair), Matthew Shears.**

**The following Directors sent their apologies: Sarah Deutsch and Tripti Sinha.**

**The following Board Liaisons participated in all or part of the meeting: Harald Alvestrand (IETF Liaison), Manal Ismail (GAC Liaison), Merike Kão (SSAC Liaison), and Kaveh Ranjbar (RSSAC Liaison).**

**Secretary: John Jeffrey (General Counsel and Secretary).**

**The following ICANN Executives and Staff participated in all or part of the meeting: Susanna Bennett (SVP, Chief Operations**

**Officer), Michelle Bright (Board Content Coordination Director), Xavier Calvez (Chief Financial Officer), Franco Carrasco (Board Operations Specialist), Mandy Carver (Senior Vice President for Government and Intergovernmental Organization (IGO) Engagement), Sally Newell Cohen (SVP, Global Communications), David Conrad (Chief Technology Officer), Sam Eisner (Deputy General Counsel), Jamie Hedlund (SVP, Contractual Compliance & Consumer Safeguard and Managing Director - Washington D.C. Office), John Jeffrey (General Counsel and Secretary), Aaron Jimenez (Board Operations Specialist), Vinciane Koenigsfeld (Senior Director, Board Operations), Elizabeth Le (Associate General Counsel), David Olive (Senior Vice President, Policy Development Support), Wendy Profit (Board Operations Senior Manager), Erika Randall (Associate General Counsel), Amy Stathos (Deputy General Counsel), Theresa Swinehart (Senior Vice President, Multistakeholder Strategy and Strategic Initiatives), and Gina Villavicencio (SVP, Global Human Resources).**

1. **Consent Agenda:**

a. **Approval of Minutes**

2. **Main Agenda:**

a. **Consideration of BAMC's Recommendation on Reconsideration Request 20-1**

**Rationale for Resolution 2020.05.20.02**

1. **Consent Agenda:**

The Chair introduced the items on the Consent Agenda and called for a vote. Lito Ibarra moved and Akinori Maemura seconded the proposed resolution to approve the items on the Consent Agenda. The Board took the following action:

The following items on the Consent Agenda are approved:

a. **Approval of Minutes**

Resolved (2020.05.20.01), the Board approves the minutes of the 12 March 2020 Regular Meeting of the



ICANN Board, the 8 April 2020 Special Meeting of the ICANN Board, the 16 April 2020 Special Meeting of the ICANN Board, and the 30 April 2020 Special Meeting of the ICANN Board.

**Fourteen members of the Board voted in favor of Resolution 2020.05.20.01. Sarah Deutsch and Tripti Sinha were unavailable to vote on the Resolution. The Resolution carried.**

## 2. Main Agenda:

### a. Consideration of BAMC's Recommendation on Reconsideration Request 20-1

León Sánchez introduced the agenda item and highlighted prior discussions of the Board on this matter. Nigel Roberts noted potential conflicts of interest and indicated he would recuse himself from the matter.

Amy Stathos briefed the Board on the claims made by Namecheap, Inc. in Reconsideration Request 20-1. The claims included ICANN's alleged lack of transparency when failing to disclose the specific list of criteria that it would use to evaluate Public Interest Registry's (PIR) change of control request, and a failure to apply the recommendations from a 2002 Domain Name Supporting Organization (DNSO) report regarding the selection of a new .ORG registry operator in 2002. The briefing also included a discussion of the Ombudsman's evaluation of the claims in the Reconsideration Request. Additionally, Amy noted that notwithstanding the Board's action on 30 April 2020 directing the President and CEO to withhold ICANN's consent to PIR's change of control request, the requestor continued with Reconsideration Request 20-1 and submitted a rebuttal to the Proposed Determination. The claims in the rebuttal were taken into account in preparing the proposed

Final Determination under considered by the Board.

After discussion, Chris Disspain moved and León Sánchez seconded the proposed resolution. The Board took the following action:

Whereas, Namecheap, Inc. (Requestor) submitted Reconsideration Request 20-1 seeking reconsideration of ICANN organization's: (a) alleged lack of transparency insofar as the Requestor alleges that ICANN organization has not disclosed the criteria that it will use to evaluate Public Interest Registry's (PIR) request for indirect change of control of PIR (Change of Control Request); and (b) alleged failure to apply established policies consistently insofar as the Requestor alleges that ICANN org is not applying recommendations from a 2002 Report of the Domain Name Supporting Organization Dot ORG Task Force (2002 DNSO Recommendations) to the Change of Control Request (collectively, the Transparency and Consistency Claims).

Whereas, the Requestor claims that the ICANN Board's and Staff's alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations contradict: (1) ICANN org's Commitment to "operate . . . through open and transparent processes"; (2) ICANN org's Commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment"; and (3) the 2002 DNSO Recommendations.

Whereas, pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws, the Board Accountability

Mechanisms Committee (BAMC) reviewed Request 20-1 "to determine if it is sufficiently stated," and determined that, except for the Transparency and Consistency Claims set forth above, the other three claims in Request 20-1 did not meet the requirements for bringing a reconsideration request and, on that basis, summarily dismissed those claims.<sup>1</sup>

Whereas, the BAMC determined that the Transparency and Consistency Claims are sufficiently stated and sent them to the Ombudsman for consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.<sup>2</sup>

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman considered the Transparency and Consistency Claims and, after investigating, concluded that ICANN organization has been transparent about the information it is considering in its evaluation of the Change of Control Request and that ICANN organization is not required to "apply" the 2002 DNSO Recommendations to the Change of Control Request.<sup>3</sup>

Whereas, the BAMC carefully considered the merits of the Transparency and Consistency Claims and all relevant materials and recommended that Request 20-1 be denied because the ICANN Board and Staff have not violated ICANN's Commitment to transparency, ICANN's Commitment to apply documented policies consistently, or ICANN's established policies in relation to the Change of Control Request.<sup>4</sup>

Whereas, on 30 April 2020, the **ICANN Board considered (/resources/board-material/resolutions-2020-04-30-en)** "the reasonableness of consent to the change of

control as it relates to the new form of entity ICANN [wa]s asked to consent with, . . . including in light of ICANN's mission to support and enhance the security, stability and resiliency of the Internet's unique identifiers,"<sup>5</sup> concluded that withholding consent to the Change of Control Request was reasonable in light of the balancing of all the circumstances addressed or discussed by the Board, and therefore directed ICANN's President and CEO to reject without prejudice the Change of Control Request by withholding ICANN's consent to PIR's Change of Control Request.<sup>6</sup>

Whereas, the Requestor submitted a [Rebuttal \(/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf) to the [BAMC's Recommendation \(/en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf) pursuant to Article 4, Section 4.2(q) of the ICANN Bylaws.

Resolved (2020.05.20.02), the Board adopts the [BAMC Recommendation on Request 20-1 \(/en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf) and denies Reconsideration Request 20-1.

**Thirteen members of the Board voted in favor of Resolution 2020.05.20.02. Nigel Roberts abstained from voting on the Resolution. Sarah Deutsch and Tripti Sinha were unavailable to vote on the Resolution. The Resolution carried.**

*Rationale for Resolution  
2020.05.20.02*

#### 1. **Brief Summary and Recommendation**

The full factual background is set forth in the **BAMC Recommendation on Request 20-1**

**(/en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf)** (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 21 April 2020, the BAMC evaluated the portion of Request 20-1 that the BAMC previously found to be sufficiently stated<sup>7</sup> and all relevant materials, and recommended that the Board deny Request 20-1 because the ICANN Board and Staff have not violated ICANN's Commitment to transparency, ICANN's Commitment to apply documented policies consistently, or ICANN's established policies in relation to its evaluation of the Change of Control Request (collectively, the Transparency and Consistency Claims).

On 7 May 2020, the Requestor submitted a Rebuttal to the **BAMC**

**Recommendation**  
**(/en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf)** (**Rebuttal**  
**(/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf)**)

pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. The Requestor claims that: (1) Request 20-1 is not mooted by the Board's direction to ICANN.org to withhold consent for the Change of Control Request;<sup>8</sup> (2) "ICANN's undue reliance on the formal requirements" of

the Reconsideration Request process is unfair; (3) the BAMC Recommendation does not address the Requestor's "concerns regarding the lack of transparency" concerning ICANN organization's consideration of the Change of Control Request; and (4) the 2019 renewals of the registry agreements for .ORG, .BIZ, and .INFO violated ICANN's Bylaws and Articles of Incorporation.<sup>9</sup>

The Board has carefully considered the BAMC's Recommendation (</en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf>) and the Requestor's Rebuttal (</en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf>), as well as all relevant materials for Request 20-1, and concludes that Request 20-1 is denied.

## 2. **Issue**

The issue as presented by the Requestor is as follows:

Whether the ICANN Board's and Staff's alleged failure to disclose the criteria they will use to evaluate the Change of Control Request and alleged failure to apply the 2002 DNSO Recommendations to the Change of Control Request contradict:

- ICANN org's Commitment to "operate . . . through open and transparent processes."
- ICANN org's Commitment to "

[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment."

- The 2002 DNSO Recommendations.

### 3. Analysis and Rationale

#### a. Request 20-1 Is Moot.

The Requestor asserts on Rebuttal that Request 20-1 "is not rendered moot" by the 30 April 2020 [Board Action on Change of Control Request \(/resources/board-material/resolutions-2020-04-30-en\)](#).<sup>10</sup> The Board disagrees. The [Board Action on Change of Control Request \(/resources/board-material/resolutions-2020-04-30-en\)](#) eliminated the alleged harm that the Requestor asserted in Request 20-1, thereby rendering the Request moot.

The Requestor asserted that "[a]llowing . . . radical changes [to registry operator ownership] in undocumented and/or non-transparent processes . . . have immediate repercussions upon the Requestor's business, as it significantly affects the level of trust of customers in the domain name industry."<sup>11</sup> The alleged "radical change"—approving the Change of Control Request—did not happen. Instead, the Board "direct[ed] ICANN's President and

CEO to withhold ICANN's consent to PIR's Change of Control Request pursuant to Section 7.5 of PIR's Registry Agreement[], thereby *rejecting* PIR's request."<sup>12</sup> Without the predicate "radical change" that formed the basis for the Requestor's alleged harm, Request 20-1 is moot.

b. Neither Request 20-1 Nor The Rebuttal Support Reconsideration of the Transparency and Consistency Claims. Notwithstanding that Request 20-1 is moot, the Board has considered the Transparency and Consistency Claims, and the Rebuttal, and concludes that they do not support reconsideration.

i. ICANN Organization's Evaluation of the Change of Control Request Has Been Open and Transparent. The Requestor claims that ICANN organization violated its Commitment to transparency by not disclosing "the criteria ICANN intends to use for evaluation" of the Change of Control Request.<sup>13</sup> The BAMC concluded, and the Board agrees, that ICANN organization not only took extensive steps to seek additional information from PIR, ISOC, and the public in support of its consideration of the



Change of Control Request, but thoughtfully considered the materials and issues over time and published multiple updates reflecting those considerations.

The Board also agrees with the BAMC and the Ombudsman that ICANN organization's extensive public postings concerning its considerations of the Change of Control Request demonstrate that ICANN organization and the Board did not contradict ICANN's Commitment to transparency.

The [Board Action on Change of Control Request \(/resources/board-material/resolutions-2020-04-30-en\)](#) provides even more transparency concerning ICANN organization's evaluation of PIR's Change of Control Request. The Board Action on Change of Control Request highlights the following considerations relevant to the Board's decision to direct ICANN organization to withhold its approval for the Change of Control Request:

- The Change of Control would be "fundamental" and would affect "one of the longest-standing and largest registries."
- It would "include a change in corporate form from a viable not-for-profit entity to a for-profit entity with a US\$360 million debt obligation, and with new and untested community engagement mechanisms relying largely upon ICANN contractual compliance enforcement to hold the new entity accountable to the .ORG community."
- "[T]he new proposed for-profit entity . . . no longer has the embedded protections that come from not-for-profit status, which has fiduciary obligations to its new investors and is obligated to service and repay US\$360 million in debt."
- "[W]hile technically

ICANN will still hold a contract with PIR, the changes in the form of that entity are of meaningful significance to the Board's consideration of the Change of Control Request."

- "[T]he public interest is better served in withholding consent as a result of various factors that create unacceptable uncertainty over the future of the third largest gTLD registry."<sup>14</sup>

In addition to the above statements, the Board Action on Change of Control Request (/resources/board-material/resolutions-2020-04-30-en) contains an entire section titled "ICANN's Evaluation Process," which explains that the Board considered the following information in its evaluation of the Change of Control Request:<sup>15</sup>

- Public comments "rais[ing] concerns and questions about the future

commitments for how PIR will continue to serve the .ORG community."<sup>16</sup>

- The fact that "the 'new' PIR would look to ICANN to enforce [the relationship between end users and PIR] through an untested 'Stewardship Council' . . . including on matters of PIR's internal policies."<sup>17</sup>
- "[T]he lack of transparency concerning Ethos Capital's exit strategy for the PIR investment or its plans relating to capital disbursements from PIR's operations to Ethos Capital and the other investors."<sup>18</sup>
- "[T]he fact that Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator."<sup>19</sup>
- "[T]he information provided by PIR concerning the investors involved in

the transaction,  
[including] that PIR  
declined to provide  
the specific  
ownership interests  
of the investors in the  
transaction (it only  
provided general  
categories of  
ownership levels)."<sup>20</sup>

- "[T]he ability of PIR to engage in the business operations and practices that Ethos Capital and PIR argue will benefit the .ORG community solely as a result of the transaction."<sup>21</sup>
- Each letter sent to the Board concerning its evaluation of the Change of Control Request.<sup>22</sup>
- A 15 April 2020 letter from the California Attorney General's Office (CA-AGO), "urg[ing] ICANN to reject the [Change of Control Request]," and stating "that approval of PIR's change of control request would be in contravention of the CA-AGO's declared public interest."<sup>23</sup>

- "[T]he lack of approval from the Pennsylvania [Attorney General]." <sup>24</sup>

In its Rebuttal, the Requestor asserts that it "still . . . challenges the opaque way in which ICANN handled the . . . PIR Change of Control process[]." <sup>25</sup> This assertion ignores the extensive information that ICANN organization and the Board have published concerning their evaluation of the Change of Control Request, including the information addressed in the BAMC Recommendation (</en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf>), and the additional information provided in the Board Action on Change of Control Request (</resources/board-material/resolutions-2020-04-30-en>).

The Board concludes that ICANN organization has acted consistent with its Commitment to transparency in posting voluminous materials concerning ICANN

organization's evaluation of the Change of Control Request, culminating in the Board Action on Change of Control Request (/resources/board-material/resolutions-2020-04-30-en), which sets forth ICANN's evaluation process.

- ii. ICANN Organization's Evaluation of the Change of Control Request Has Adhered to its Commitment to Apply Documented Policies Consistently, Neutrally, Objectively, and Fairly. The Requestor asserts that "[u]nless the Internet community develops a specific policy for evaluating the [Change of Control Request], the criteria [set forth in the 2002 DNSO Recommendations] should comprise the policy and the evaluation criteria."<sup>26</sup> The Requestor then claims that because ICANN org is not applying the 2002 DNSO Recommendations, ICANN org's actions are inconsistent with its Commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any

particular party for discriminatory treatment."<sup>27</sup>

The BAMC concluded, and the Board agrees, that the 2002 DNSO Recommendations were not adopted as an established ICANN policy as the Requestor is defining them and, therefore, cannot support a reconsideration request alleging violation of ICANN organization's Commitment to apply documented policies consistently. As noted in the BAMC Recommendation, the Board considered the 2002 DNSO Recommendations, adopting only some and rejecting others<sup>28</sup>; and then defined its own principles and criteria for evaluating and selecting from among the proposals received in 2002 for operating .ORG (ICANN's 2002 Assessment Criteria).<sup>29</sup> In addition, it should be noted that none of the eleven proposals received for the operation of .ORG perfectly satisfied all of ICANN's 2002 Assessment Criteria.<sup>30</sup>



Moreover, ICANN organization is not required to apply the 2002 DNSO Recommendations or ICANN's 2002 Assessment Criteria to a request for indirect change of control in 2020 in the way the Requestor suggests.<sup>31</sup> Nonetheless, ICANN organization has made clear that it recognizes the principles found in the ICANN 2002 Assessment Criteria and considered them, along with all relevant information, in its evaluation of the Change of Control Request, as did the Board in coming to its decision on the Change of Control Request.

- iii. The BAMC's Summary Dismissal of The Requestor's Other Claims is Final.  
The Requestor asserts that the BAMC "unduly dismissed part of [Request 20-1]" in the BAMC's Partial Summary Dismissal.<sup>32</sup> The Requestor asks the Board to grant reconsideration on the claims that the BAMC summarily dismissed, by "correct[ing] the illicit removal of price caps" in the .ORG, .INFO, and .BIZ registry agreements.<sup>33</sup>

The Board finds that the Requestor's new claims are not properly asserted. The rebuttal shall "be limited to rebutting or contradicting the issues raised in the [BAMC's] final recommendation."<sup>34</sup> The BAMC's Partial Summary Dismissal is not an "issue[] raised in the [BAMC's] final recommendation" and is therefore not properly raised on rebuttal.

The Board also notes that the BAMC is empowered to summarily dismiss claims that fail to meet the requirements for bringing a Reconsideration Request without Board action;<sup>35</sup> summary dismissal is not part of the Board's review process in Request 20-1, and therefore is not properly challenged through the Rebuttal.

Notwithstanding the above, and as the BAMC explained in the Partial Summary Dismissal, challenges to the 2019 registry agreement renewals for .ORG, .BIZ, and .INFO are now untimely. Requests for Reconsideration must be

submitted "within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action."<sup>36</sup> The registry agreement renewals were announced on 30 June 2019 and Request 20-1 was submitted on 8 January 2020, 192 days after the Requestor became aware of the renewals.<sup>37</sup>

The Requestor attempts in the Rebuttal to argue there is no time bar by arguing that "[e]ach day that ICANN fails to reintroduce the price caps and to provide the necessary transparency, ICANN commits a new inaction, *i.e.*, a wrongful act by omitting to correct an ongoing violation, that can be challenged."<sup>38</sup> This is an incorrect reading of the time limits for submitting Reconsideration Requests. The Requestor is attempting to challenge ICANN Staff *action*: ICANN Staff's renewal of the .ORG, .BIZ, and .INFO registry agreements without provisions that the Requestor believes should have been included in the agreements. That action

occurred on a date certain, i.e., 30 June 2019, and the time to challenge it commenced on 30 June 2019. The Requestor's suggestion that an alleged improper action *also* creates a "new inaction" or "wrongful act by omission" *every day* thereafter is unsupported and, moreover, is not tenable as it would render meaningless the time requirement for filing a reconsideration request.

Finally, challenges to the 2019 .ORG and .INFO registry agreement renewals do not support reconsideration for the reasons set forth in the Board's Final Determination on Request 19-2, which are incorporated here.<sup>39</sup>

- iv. The Requestor's New Claims are Not Properly Raised on Rebuttal. The Requestor makes several new claims in its Rebuttal. These claims are not properly raised on rebuttal, which shall "be limited to rebutting or contradicting the issues raised in the [BAMC's] final recommendation," and shall "not offer new evidence to support an

argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request."<sup>40</sup>

First, the Requestor complains about the Reconsideration Request process, as set forth in the Bylaws, asserting that: (1) "ICANN's undue reliance on the formal requirements" of the Bylaws provisions concerning the scope of rebuttals is unfair; and (2) the Reconsideration Request process does not provide the Requestor "access to essential documents," so the Requestor believes that it lacks "a fair opportunity to contest all arguments and evidence adduced by the BAMC."<sup>41</sup>

The Requestor did not seek reconsideration of these Bylaws provisions in Request 20-1, so they are not properly raised on rebuttal.<sup>42</sup> Moreover, these Bylaws provisions have been in effect since October 2016.<sup>43</sup> The

Requestor submitted Request 20-1 on 8 January 2020 and submitted the Rebuttal on 7 May 2020—well beyond the 30-day time limit for bringing a Reconsideration Request.<sup>44</sup> As to the Requestor's complaints about access to ICANN's documents, the Board notes that the Reconsideration Request process is not designed to provide litigation-style discovery to requestors.<sup>45</sup>

Second, the Requestor "calls for an investigation regarding the involvement of former ICANN officials in the proposed PIR/Ethos Capital transaction," and third, the Requestor "calls for clear criteria and processes that should govern major changes to legacy TLDs going forward."<sup>46</sup> These requests were likewise not raised in Request 20-1 and are therefore not properly raised on rebuttal.<sup>47</sup> Additionally, for the reasons explained above, all of the Requestor's claims arising out of the 2019 .ORG, .INFO, and .BIZ registry agreement renewals are time-barred.

#### 4. **Conclusion.**

The Board has considered the merits of the Transparency and Consistency Claims and all relevant materials. The Board adopts the **BAMC Recommendation on Request 20-1** (</en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf>) because the ICANN Board and Staff have not violated ICANN's Commitment to transparency, ICANN's Commitment to apply documented policies consistently, or ICANN's established policies in relation to the Change of Control Request.

We note that in Request 20-1, the Requestor stated: "In the event that ICANN does not immediately grant [its] request[s in Request 20-1], the Requestor asks that ICANN engage in conversations with the Requestor and that a hearing be organized"; and that, "prior to the hearing," ICANN provide the Requestor various documents and information.<sup>48</sup> The Board does not read the Requestor's request to be heard after "ICANN does not immediately grant" Request 20-1 to be a request pursuant to the Bylaws to be heard *before* the BAMC issues its Recommendation to the Board. Rather, the Requestor asks to be heard only in the event the Board fails to grant (in other word denies) Request 20-1, which the Bylaws do not provide for.

In any event, the Board concludes that hearing from the Requester is not necessary because Request 20-1 is both moot and does not support reconsideration for the reasons

described above.

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

This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

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

The Chair called the meeting to a close.

Published on 19 June 2020

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<sup>1</sup> [BAMC Partial Summary Dismissal of Request 20-1 \(/en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf), at Pg. 6-7.

<sup>2</sup> *Id.* at Pg. 6.

<sup>3</sup> [Evaluation by the ICANN Ombudsman of Reconsideration Request 20-1 \(/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-evaluation-icann-ombudsman-request-03apr20-en.pdf) ("Ombudsman Evaluation"), at Pgs. 13-14.



<sup>4</sup> BAMC Recommendation on Request 20-1  
(</en/system/files/files/reconsideration-20-1-namecheap-bamc-recommendation-request-21apr20-en.pdf>).

<sup>5</sup> ICANN Board Resolution 2020.04.30.02 (</resources/board-material/resolutions-2020-04-30-en>).

<sup>6</sup> *Id.*

<sup>7</sup> *See* BAMC Partial Summary Dismissal of Request 20-1  
(</en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf>), at Pg. 6. The Requestor brought three other challenges in Request 20-1; the BAMC summarily dismissed those challenges because each was either untimely or not sufficiently stated. *Id.* at Pgs. 6-7.

<sup>8</sup> Rebuttal (</en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf>), at Pg. 2.

<sup>9</sup> *Id.* at Pgs. 5-9.

<sup>10</sup> *Id.*, at Pg. 2.

<sup>11</sup> Request 20-1 (</en/system/files/files/reconsideration-20-1-namecheap-request-redacted-08jan20-en.pdf>), § 6, at Pg. 5.

<sup>12</sup> Board Action on Change of Control Request (</resources/board-material/resolutions-2020-04-30-en>) (emphasis added).

<sup>13</sup> Request 20-1 (</en/system/files/files/reconsideration-20-1-namecheap-request-redacted-08jan20-en.pdf>), § 8, at Pg. 7.

<sup>14</sup> Board Action on Change of Control Request (</resources/board-material/resolutions-2020-04-30-en>).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> [Rebuttal \(/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf), at Pg. 2.

<sup>26</sup> [Request 20-1 \(/en/system/files/files/reconsideration-20-1-namecheap-request-redacted-08jan20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-request-redacted-08jan20-en.pdf), § 8, at Pg. 10.

<sup>27</sup> ICANN Bylaws, Art. 1, § 1.2(a)(v); [Request 20-1 \(/en/system/files/files/reconsideration-20-1-namecheap-request-redacted-08jan20-en.pdf\)](/en/system/files/files/reconsideration-20-1-namecheap-request-redacted-08jan20-en.pdf), § 8, at Pgs. 8-11.

<sup>28</sup> See [ICANN Board Minutes \(/resources/board-material/minutes-2002-03-14-en\)](/resources/board-material/minutes-2002-03-14-en), 14 March 2002.

<sup>29</sup> [Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals \(https://archive.icann.org/en/tlds/org/criteria.htm\)](https://archive.icann.org/en/tlds/org/criteria.htm), 20 May 2002 (ICANN's 2002 Assessment Criteria).

<sup>30</sup> See <https://archive.icann.org/en/tlds/org/final-evaluation-report-23sep02.htm> (<https://archive.icann.org/en/tlds/org/final-evaluation-report-23sep02.htm>).

<sup>31</sup> ICANN's "Criteria for Assessing Proposals [to operate .ORG]," posted on 20 May 2002. ICANN's 2002 Assessment Criteria "discusses the criteria that ICANN intends to consider in evaluating and selecting from among the proposals that are received" to operate .ORG. [Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals \(https://archive.icann.org/en/tlds/org/criteria.htm\)](https://archive.icann.org/en/tlds/org/criteria.htm), 20 May 2002.

<sup>32</sup> [Rebuttal \(/en/system/files/files/reconsideration-20-1-namecheap-](/en/system/files/files/reconsideration-20-1-namecheap-)

[requestors-rebuttal-to-bamc-request-07may20-en.pdf](#)), at Pg. 1.

<sup>33</sup> *Id.* at Pgs. 5, 8-9.

<sup>34</sup> ICANN Bylaws, Art. 4, § 4.2(q)(i).

<sup>35</sup> *Id.*, § 4.2(e)(ii); *id.* § 4.2(k).

<sup>36</sup> **BAMC Partial Summary Dismissal**  
([/en/system/files/files/reconsideration-20-1-namecheap-partial-summary-dismissal-18mar20-en.pdf](#)), at Pg. 7, quoting ICANN Bylaws, Art. 4, § 4.2(g)(i)(B).

<sup>37</sup> *Id.* at Pgs. 7-8.

<sup>38</sup> **Rebuttal** ([/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf](#)), at Pg. 7.

<sup>39</sup> **Board Final Determination on Request 19-2**  
([/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf](#)).

<sup>40</sup> ICANN Bylaws, Art. 4, § 4.2(q)(i).

<sup>41</sup> **Rebuttal** ([/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf](#)), at Pg. 3.

<sup>42</sup> ICANN Bylaws, Art. 4, § 4.2(q).

<sup>43</sup> See **ICANN Bylaws, Art. 4, § 4.2(q), 1 October 2016**  
([/resources/pages/bylaws-2016-09-30-en#article4](#)).

<sup>44</sup> See ICANN Bylaws, Art. 4, § 4.2(g)(i).

<sup>45</sup> The Requestor says that it was not given access to "essential documents kept by ICANN" and thus cannot "contest all arguments and evidence adduced by the BAMC" in its Recommendation. **Rebuttal** ([/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf](#)), at Pg. 3. However, the **Board Action on Change of Control Request** ([/resources/board-material/resolutions-2020-04-30-en](#)) rendered this argument moot when it "direct[ed] ICANN's President and CEO to

withhold ICANN's consent to PIR's Change of Control Request" and set forth all of the information the Board considered in its evaluation of the Change of Control Request (set forth above). **Board Action on Change of Control Request (/resources/board-material/resolutions-2020-04-30-en)**. This argument does not support reconsideration.

<sup>46</sup> **Rebuttal (/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf)**, at Pg. 2. See also *id.* at Pg. 7 (asserting that "ICANN should have already had a policy in place for contract renewals"); *id.* at Pg. 8 (arguing that "ICANN failed to consider the specific nature of the .ORG and the .BIZ and .INFO legacy gTLDs when deciding to renew the registry agreements without maintaining the price caps").

<sup>47</sup> See ICANN Bylaws, Art. 4, § 4.2(q).

<sup>48</sup> **Request 20-1 (/en/system/files/files/reconsideration-20-1-namecheap-request-redacted-08jan20-en.pdf)**, § 9, at Pgs. 12-13; see also **Rebuttal (/en/system/files/files/reconsideration-20-1-namecheap-requestors-rebuttal-to-bamc-request-07may20-en.pdf)**, at Pg. 1 (reiterating request).

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# **Annex 98**

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# **Annex 99**

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# **Annex 100**

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# **Annex 101**

18 November 2021

Attn.: Glenn P. Hendrix, Chair  
Grant L. Kim, Arbitrator  
Christof Siefarth, Arbitrator

Cc: Jeff Levee, Kelly Watne, Counsel to ICANN

Via email

Dear Mr. Chairman and Members of the Panel,

**Re: Namecheap v. ICANN – ICDR Case No. 01-20-0000-6787**

We are writing to you in response to ICANN's submission, as requested by the Panel in Procedural Order No. 13, para. 81.

Namecheap regrets that it must inform the Panel that ICANN did less than it was ordered to do.

**1. No native versions of spreadsheets**

In Procedural Order No. 12, para. 24, the Panel ordered ICANN to produce '*[n]ative versions of the spreadsheets submitted as Annexes 82 and 83 that include metadata showing the dates that they were created and last modified.*'

Instead of producing the native versions, ICANN submitted a metadata overlay for Annexes 82 and 83, allegedly reflecting the correct created date and last modified date. ICANN explains that, 'because these documents originally were Google Sheets collected from ICANN's Google drive, the act of collecting and exporting the documents converts them to Excel files and the dates "Created" and "Modified" are automatically updated as of that date.'

That still does not explain why, originally the 'Modified' date predated the 'Created' date. Namecheap understands the difficulty in exporting Google Sheets. However, Google Sheets

are designed for sharing. ICANN could have easily shared access to the original document, which would allow to verify the correctness of the metadata overlay.

## **2. No adequate certification regarding handwritten notes**

In Procedural Order No. 12, para. 25, the Panel ordered ICANN 'to certify on or before 29 October 2021, that it has asked **all ICANN personnel who participated in phone conferences in 2018 or 2019** with registry operators regarding renewal of the Registry Agreements for .ORG, .BIZ, and .INFO if they have any handwritten notes of those conferences, and to state whether any such notes exist.'

ICANN replied by certifying that it 'has conferred with all **current** ICANN personnel who, **to the best of ICANN's knowledge**, participated in phone conferences in 2018 or 2019 with the .ORG, BIZ, or .INFO registry operators regarding renewal of the Registry Agreements for .ORG, .BIZ and .INFO, and confirmed that they do not have any handwritten notes of those conferences, to the best of their recollection.'

However, ICANN was not ordered to inquire all 'current' personnel about the existence of such notes, but 'all personnel who participated in phone conferences in 2018 or 2019'. It is apparent from the record that Cyrus Namazi was involved in negotiations with the registry operators and that he ultimately executed the registry agreements on behalf of ICANN. Cyrus Namazi has left ICANN in April 2020. ICANN should have inquired with Mr. Namazi (and potentially others who might have left ICANN) about the existence of notes from phone conferences with registry operators.

## **3. Slack communications can be produced easily**

In Procedural Order No. 13, para. 81, the Panel directed ICANN 'to provide information on or before 12 November 2021 that is sufficient for the Panel to determine whether searches of Slack data should be ordered.'

In response, ICANN has informed the Panel about the nature of their Slack account and the fact that ICANN's custodians likely utilized Slack for internal direct messaging in connection with the negotiations leading up to the 2019 Registry Agreements for .ORG, .INFO and .BIZ.

ICANN then contends that such communications are not recoverable, alleging that the ICANN slack system has a default thirty-day retention period, after which all messages are permanently deleted, and that no custodian lengthened the retention period for such communications.

ICANN then produces a Slack communication immediately refuting ICANN's contention. ICANN explains that this Slack communication is a communication identified in the course of ICANN's interview with Russell Weinstein. It is a communication from 12 July 2019, which was thus preserved long after the thirty-day retention period.

In any event, ICANN's production of this communication shows that Slack communications can be identified and produced easily.

#### **4. Inappropriate privilege designations**

##### **a. Annex 78**

In Procedural Order No. 13, para. 64, the Panel agrees with Namecheap that it is unclear why ICANN redacted portions of the Annex 78 email (including an attachment) as privileged and directed ICANN 'to explain why it contends that the redacted text and attachments are privileged'.

In response, ICANN argues:

*'As for the redacted portions of the email chain, ICANN's privilege log explains that they*  
**Redacted - Confidential Information**

*The redacted attachment also appears on ICANN's privilege log with the description*  
**Redacted - Confidential Information**

*As with each of Namecheap's challenges to ICANN's privilege log, Namecheap's claims regarding Annex 78 are unwarranted, and similar arguments were recently rejected by another IRP Panel in a precedential opinion, as set forth in detail in ICANN's response to Namecheap's Motion to Compel.'*

This argument is no different from what ICANN has argued in response to Namecheap's Motion to Compel, alleging in para. 55 that '[e]ach entry on ICANN's privilege log makes out a prima facie claim for privilege, which itself is dispositive of Namecheap's unsupported request.'

ICANN fails to respond to Namecheap's argument that the communication involves no inside or outside counsel and that the redacted sentence seems to pertain to instructions  
**Redacted - Confidential Information**

. It looks as if the redacted sentence relates to  
**Redacted - Confidential Information** . The attachment to the email is withheld entirely as privileged. However, there is no indication whatsoever that the

attachment **Redacted - Confidential Information**  
would be privileged. The custodian for these documents is unspecified and no information is provided as to the author of the attachment.

It is all too easy for ICANN to assert that a communication between two non-legal staff members reflects legal advice from ICANN counsel, to redact even the document name of the attachment, and to allege that the attachment consists of an

**Redacted - Confidential Information** These mere assertions do not make out a *prima facie* case that the attachment and the redactions in the e-mail contain privileged information.

More specifically, there is no reason for ICANN to redact the document name of the attachment, as a document name cannot be seen as containing legal advice that is protected under privilege. The point is all the stronger, as the custodian for these documents is unspecified and no information is provided as to the author of the attachment.

As a result, Namecheap has rebutted ICANN's *prima facie* claim for privilege and ICANN has failed to respond to Namecheap's arguments. Therefore, the redacted information and the attachment should be produced.

## **b. Annex 67**

In Procedural Order No. 13, para. 80, the Panel ordered ICANN, *inter alia* to produce unredacted versions of Annexes 64, 66, and 67 to the Panel for *in camera* review.

Although Annex 67 is not mentioned on ICANN's privilege log, ICANN now maintains that '[p]arts of Annex 67 comprise information protected by the attorney-client privilege; thus, ICANN has redacted that information in the documents provided for the Panel's *in camera* review.'

ICANN provides no explanation for its privilege claim. In addition, there is no support for ICANN's privilege claim. **Redacted - Confidential Information**

Consequently, ICANN should remove all redactions from Annex 67 to allow for the Panel's *in camera* review.

## **c. Communications** **Redacted - Confidential Information**

Namecheap discovered that ICANN's privilege log refers to the following communications

between Redacted - Confidential Information :

– Redacted - Confidential Information

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<sup>1</sup> Document ID: REV00023228.

<sup>2</sup> In cc to this email: Redacted - Confidential Information

<sup>3</sup> Document ID: REV00023228.

<sup>4</sup> In cc to this email: Redacted - Confidential Information

<sup>5</sup> Document ID: REV00006303.

<sup>6</sup> In cc to this email: Redacted - Confidential Information

<sup>7</sup> Document ID: REV00006307.

<sup>8</sup> In cc to this email: Redacted - Confidential Information

<sup>9</sup> Document ID: REV00006308.

<sup>10</sup> In cc to this email: Redacted - Confidential Information

<sup>11</sup> Document ID: REV00023264.

<sup>12</sup> In cc to this email: Redacted - Confidential Information

<sup>13</sup> Document ID: REV00023267.



Redacted - Confidential Information

For all these communications, ICANN invokes attorney-client privilege. However, as an **Redacted - Confidential Information** can be neither the client, nor the outside attorney of ICANN and its counsel.

Redacted - Confidential Information

Therefore, communications with him are not covered by privilege, and certainly not as he is **Redacted - Confidential Information**, hired by ICANN.

Redacted - Confidential Information

Therefore, communications with a third party, who is not ICANN's legal counsel, are not covered by

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<sup>14</sup> In cc to this email: **Redacted - Confidential Information**

<sup>15</sup> Document ID: REV00023268.

<sup>16</sup> In cc to this email: **Redacted - Confidential Information**

<sup>17</sup> Document ID: REV00023270.

<sup>18</sup> In cc to this email: **Redacted - Confidential Information**

<sup>19</sup> Document ID: REV00023591.

privilege, and certainly not when that third party <sup>Redacted - Confidential Information</sup>, hired by ICANN.  
**Redacted - Confidential Information**

In any event, any such communication would not be protected by privilege.

Finally, the last communication **Redacted - Confidential Information**

\*

In view of the above, Namecheap respectfully requests that the Panel:

- declare that ICANN failed to comply with the Panel's Orders;
- order ICANN to produce native versions of the spreadsheets submitted as Annexes 82 and 83 that include metadata showing the dates that they were created and last modified;
- order ICANN to produce all responsive Slack communications;
- order ICANN to produce Annex 78 (email and attachments) without redactions;
- order ICANN to produce Annex 67 without redactions to allow for the Panel's *in camera* review;
- order ICANN to produce all communications **Redacted - Confidential Information** ;  
and
- grant Namecheap an extension – the duration of which to be determined upon receipt of these additional documents – to file its pre-hearing brief in order to allow Namecheap to analyze and comment upon this new information.

Yours sincerely,

*Flip Petillion*

Flip Petillion

*Petillon*

# **Annex 102**

# JONES DAY

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November 18, 2021

## VIA EMAIL

Glenn Hendrix, Chairman  
Grant Kim, Panel Member  
Christof Siefarth, Panel Member

Re: Namecheap, Inc. v. ICANN, ICDR Case No. 01-20-0000-6787

Dear Mr. Chairman and Members of the Panel:

We are writing on behalf of the Internet Corporation for Assigned Names and Numbers (“ICANN”) in response to the 18 November 2021 letter from Namecheap, Inc. (“Namecheap”). ICANN has a number of objections to Namecheap’s letter, as discussed more fully below.

First and foremost, Namecheap’s letter addresses topics far beyond the limited response allowed by the Panel in paragraph 81 of Procedural Order No. 13. Paragraph 81 clearly limits any response by Namecheap to the Panel’s questions regarding ICANN’s Slack communications. Yet, Namecheap’s letter improperly raises a number of additional arguments, including arguments about ICANN’s privilege log that have never been raised before despite the ample opportunity to do so (and which are unfounded in all events).

As a result, ICANN requests that the Panel disregard the remainder of Namecheap’s letter. In the alternative, if the Panel intends to consider Namecheap’s extraneous arguments, ICANN requests leave to respond. In no event, however, should any response delay the schedule of this IRP.

Second, as to the Slack communications regarding the price control provisions in the .ORG, .BIZ, and .INFO registry agreements (the “2019 Registry Agreements”), ICANN already has explained that such communications simply are not recoverable, but that ICANN identified a single Slack communication tangentially related to the 2019 Registry Agreements from the relevant time period that was retained. ICANN provided Namecheap with that communication. ICANN cannot produce other Slack communications because they do not exist.

Third, Namecheap’s request for an extension—let alone an indefinite extension—of its 30 November 2021 deadline to identify witnesses and submit its pre-hearing brief is ludicrous. Namecheap has had an inordinate amount of time to prepare its brief on the merits, and there is no reason to delay any further. It is time to move to the merits and the merits hearing in this matter. Additionally, any further delays are likely to impair ICANN’s ability to prepare its

Mr. Chairman and Members of the Panel  
November 18, 2021  
Page 2

defense, given the trial schedule of ICANN's lead counsel and the parental leave of ICANN's lead associate.

There already have been significant delays in this IRP. The Panel clearly set forth the briefing and hearing schedule for this IRP, Namecheap and ICANN agreed to that schedule, and Namecheap should be required to abide by that schedule.

Sincerely,

*/s/ Jeffrey A. LeVee*

Jeffrey A. LeVee

*Petillon*

# **Annex 103**

19 November 2021

Attn.: Glenn P. Hendrix, Chair  
Grant L. Kim, Arbitrator  
Christof Siefarth, Arbitrator

Cc: Jeff Levee, Kelly Watne, Counsel to ICANN

Via email

Dear Mr. Chairman and Members of the Panel,

**Re: Namecheap v. ICANN – ICDR Case No. 01-20-0000-6787**

We are writing to you on behalf of Namecheap in response to the 18 November 2021 letter from ICANN and Mr. Hendrix' email of earlier today.

We are surprised and disappointed by the Panel's decision to deny the extension request before deliberating on the substance of the parties' most recent submissions.

With regard to the specific issue of the communications **Redacted - Confidential Information**, we ask the Panel to make a fresh assessment of the situation, regardless of its previous orders.

Namecheap firmly believes that an urgent deliberation and order is required. It will greatly benefit the efficiency of the proceedings.

**1. What documents is Namecheap pointing to?**

In the preparation of its pre-hearing brief, Namecheap found out that one of ICANN's privilege logs of over 60 pages (in small font) incorrectly qualifies a number of documents as privileged whereas these documents (i) are not covered by privilege, and (ii) go to the core of the dispute. These documents should have been produced on or before 23 July 2021.

The content of these documents may have an impact on Namecheap's position and arguments in this arbitration. Namecheap requests a fair opportunity to examine these documents before submitting its pre-hearing brief. The proceedings would be handled more efficiently if Namecheap is given the opportunity to comment on the substance of this information in its pre-hearing brief.

The documents in question mainly concern exchanges between ICANN and -  
**Redacted - Confidential Information**

If, as expected, Document ID No. REV00023592, dated 22 January 2019, **Redacted - Confidential Information**

## **2. Importance of these documents?**

At this stage, Namecheap has no means to assess the extent and the complexity of the exchanges between **Redacted - Confidential Information**. Namecheap does not know when ICANN will submit this evidence.

Namecheap is requesting for an extension upon receipt of this information. The duration is to be determined by the Panel on the basis of reasonableness. It may be a day, a week or longer.

## **3. Additional context for the Panel's assessment**

Namecheap has acted diligently in making this request.

In Procedural Order No. 13, the Panel invited Namecheap to respond to ICANN's

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<sup>1</sup> ICANN's privilege log identifies Document ID No. REV00023592 as a



submission on or before 22 November 2021.<sup>2</sup> The Panel has also highlighted the issue of ICANN's cloaking of documents in privilege and invited both Parties to address it in their submissions.

Namecheap did not wait until the submission of its pre-hearing brief to raise the issue about ICANN's cloaking of non-privileged documents in privilege. With a view to maintaining efficiency and economy, Namecheap raised the issue upon its discovery.

Namecheap also did not wait until the deadline of 22 November 2021 to respond to ICANN's submission.

Instead of responding to the issues raised by Namecheap in its 18 November 2021 letter, ICANN tries to limit Namecheap's opportunity to present its case, requesting the Panel to disregard virtually all issues raised in Namecheap's letter. In addition, ICANN only addresses the issue about the Slack communications and, also there, ICANN fails to respond to Namecheap's arguments.

If ICANN truly wanted to avoid unnecessary delays, ICANN would have included this information in its initial production. If ICANN wanted to avoid further delays, ICANN should have responded to Namecheap's 18 November 2021 letter by providing the information.

#### **4. Conclusion**

The proceedings would benefit from an urgent decision and a reasonable extension. It would not be fair and a violation of the equality of arms to have Namecheap prepare its legal brief without access to seemingly critical documents that are likely to have an impact on Namecheap's arguments. We are now less than eleven days before the deadline for Namecheap to submit its pre-hearing brief. ICANN and its counsel had over two years to examine these documents and determine their litigation strategy.

In view of the above, Namecheap reiterates its request, as formulated in its 18 November 2021 letter and reserves the right to request sanctions.

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<sup>2</sup> Contrary to ICANN's allegation, the Panel's invitation for Namecheap to respond to ICANN's submission on or before 22 November 2021 is not limited to the Panel's questions regarding ICANN's Slack communications. ICANN's submission is by no means limited to the information ICANN provided on Slack communications. Claimant has the right to be heard and must be given a fair opportunity to present its case. No such opportunity would be given if Namecheap were prevented from responding to all aspects of ICANN's deficient submission.

Namecheap would appreciate that the Panel deliberates on the issue as soon as possible and that the Panel orders ICANN to produce the documents within 24 hours of the Panel's order, so that the Panel is in a position to reconsider its decision on the timing and grant a reasonable extension in view of the extent and the complexity of the information.

Yours sincerely,

*Flip Petillion*  
Flip Petillion

*Petillon*

# **Annex 104**

# JONES DAY

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November 24, 2021

## VIA EMAIL

Glenn Hendrix, Chairman  
Grant Kim, Panel Member  
Christof Siefarth, Panel Member

Re: Namecheap, Inc. v. ICANN, ICDR Case No. 01-20-0000-6787

Dear Mr. Chairman and Members of the Panel:

We are writing on behalf of the Internet Corporation for Assigned Names and Numbers (“ICANN”) in response to the Panel’s questions sent via email on 22 November 2021. ICANN addresses each of the Panel’s questions below.

1. **Communications Between ICANN’s Internal/External Legal Counsel And Economic Consultant Dennis Carlton Are Privileged.**

Namecheap claims (without support) that ICANN’s internal and external legal counsel’s communications with Mr. Carlton should be produced. California and federal case law, however, absolutely establish that these communications are protected by the attorney-client privilege.<sup>1</sup>

The attorney-client privilege “has been a hallmark of Anglo-American jurisprudence for almost 400 years.” *Costco Wholesale Corp. v. Super. Court*, 47 Cal. 4th 725, 732 (2009) (internal quotation marks omitted). “[I]ts fundamental purpose is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.” *Id.* (internal quotation marks omitted). Indeed, “the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.” *Id.* (internal quotation marks omitted).

Under California law, communications are protected by the attorney-client privilege if they are “transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no

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<sup>1</sup> In a precedential opinion, a recent IRP Panel ruled that California law, supplemented by U.S. federal law, applies to ICANN’s claims for privilege. *Affiliis Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4, ¶ 33 (12 June 2020).

Mr. Chairman and Members of the Panel  
 November 24, 2021  
 Page 2

third persons ***other than who are present to further the interest of the client in the consultation*** or those to whom disclosure is ***reasonably necessary*** for the transmission of information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” Cal. Evid. Code § 952. California and federal courts have routinely held that communications between a client or its counsel and a consultant retained for the purpose of assisting the client or counsel in providing legal advice are protected by the attorney-client privilege. *State Farm Fire and Casualty Co. v. Super. Court of L.A. Cnty*, 54 Cal. App. 4th 625, 643 (1997) (upholding the attorney-client privilege for communications between client and consultant retained by counsel); *Fireman’s Fund Ins. Co. v Super. Court*, 196 Cal. App. 4th 1263, 1274 (2011) (finding that “legal opinions may be shared with a non-attorney agent retained by the attorney to assist with the representation without losing their confidential status” because the agent “fall[s] into the category of ‘those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted’”); *In re 3dfx Interactive, Inc.*, 347 B.R. 394, 405 (N.D. Cal. 2006) (holding that the attorney-client privilege “is not waived when documents [are] provided to third parties necessary to further the interests of the client, especially the accountants and consultants retained by [the client] to assist it in negotiating and closing the transaction”) (applying California law); *Clavo v. Zarrabian*, Case No. SACV030864CJRCX, 2003 WL 24272641, at \*2 (C.D. Cal. Sept. 24, 2003) (applying the attorney-client privilege to communications “between outside counsel and the . . . consultant hired by outside counsel” because they “concern confidential communications by a consultant hired to assist outside counsel in the rendition of legal services”).

The communications Namecheap challenges here fall well within the protection of the attorney-client privilege. First, Redacted - Confidential Information

These communications were reasonably necessary to accomplish that purpose. Second, the communications occurred during the course of the attorney-client relationship and were not disclosed to any unnecessary third party. In fact, the only people included on the communications were: Redacted - Confidential Information

Because the clear purpose of the communications

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<sup>2</sup> Each of the entries on ICANN’s privilege log confirms that

Mr. Chairman and Members of the Panel  
 November 24, 2021  
 Page 3

Redacted - Confidential Information was to facilitate the provision of legal advice by ICANN's internal and external counsel, and because these communications were not disclosed to any unnecessary third party, these communications fall squarely within the attorney-client privilege.<sup>3</sup> There simply is no basis to invade this sacrosanct privilege and Namecheap does not cite any.

**2. The Redacted Portions of Annexes 67 and 78 Are Protected By The Attorney-Client Privilege.**

The Panel questions whether the redactions applied to Annexes 67 and 78 "recite confidential communications containing or requesting legal advice from ICANN's counsel." ICANN can confirm as much. This is true even though no lawyers are included on the communications. Indeed, California and federal case law make clear that the attorney-client privilege attaches to communications between non-lawyer representatives where the communications reflect or discuss confidential attorney-client communications or advice received from counsel:

The attorney-client privilege may attach to communications between nonlegal employees where: (1) 'the employees discuss or transmit legal advice given by counsel'; and (2) 'an employee discusses her intent to seek legal advice about a particular issue.'

*Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993, at \*5 (N.D. Cal. March 11, 2011); *Zurich Am. Ins. Co. v. Superior Court*, 155 Cal. App. 4th 1485, 1502

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(continued...)

Redacted - Confidential Information

If the Panel prefers that ICANN supplement its privilege log accordingly, ICANN is more than happy to do so, notwithstanding that it has already made out a *prima facie* claim for privilege.

<sup>3</sup> Namecheap also questions

Redacted - Confidential Information

Mr. Chairman and Members of the Panel  
 November 24, 2021  
 Page 4

(2007) (“If legal advice is discussed or contained in [a] communication between [corporate] employees, then to that extent, it is presumptively privileged.”).<sup>4</sup>

As to Annex 67, the information redacted as privileged reflects ICANN staff’s intent to seek legal advice from ICANN’s internal and external legal counsel regarding specific topics, or ICANN legal counsel’s provision of legal advice on specific issues. This information, therefore, is protected by the attorney-client privilege and appropriately redacted.

Annex 78 also contains appropriate redactions of information protected by the attorney-client privilege. ICANN redacted the name of the attachment to Annex 78 as privileged, but the general subject matter is reflected on ICANN’s privilege log, as ICANN previously explained. Specifically, the attachment comprises an <sup>Redacted - Confidential Information</sup> that is prepared in consultation with ICANN’s legal counsel for the purpose of providing legal advice regarding renewal of registry agreements. The <sup>Redacted - Confidential Information</sup> is not distributed outside of ICANN, and it reflects topics (i.e., contract negotiations) that are inherently legal in nature. Therefore, this attachment, including the specific name of the attachment, contains confidential legal advice by ICANN’s legal counsel.

Likewise, the redactions in the body of the email are appropriate. They apply to a single sentence that specifically references confidential content contained in the privileged ICANN Issues Scorecard. As a result, the body of the email recites ICANN counsel’s legal advice.

Additionally, the Panel questions whether <sup>Redacted - Confidential Information</sup>

<sup>Redacted - Confidential Information</sup> That no lawyers are included on this communication, however, is of no import. Instead, it is more than sufficient that the information redacted reflects ICANN counsel’s legal advice, as set forth on ICANN’s

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<sup>4</sup> See also, e.g., *U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1077 (N.D. Cal. 2002) (attorney-client privilege attaches to communications between non-lawyer employees where “the employees discuss or transmit legal advice given by counsel . . . .”); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D. N.Y. 1995) (“[T]he privilege protects from disclosure communications among corporate employees that reflect advice rendered by counsel to the corporation . . . . This follows from the recognition that since the decision-making power of the corporate client may be diffused among several employees, the dissemination of confidential communications to such persons does not defeat the privilege.”); *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 477 (E.D. Pa. 2005) (“‘A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds.’ . . . In the case of a corporate client, privileged communications may be shared by non-attorney employees in order to relay information requested by attorneys . . . . Moreover, ‘documents subject to the privilege may be transmitted between non-attorneys . . . so that the corporation may be properly informed of legal advice and act appropriately.’”) (citations omitted);

Mr. Chairman and Members of the Panel  
November 24, 2021  
Page 5

privilege log. *See Datel Holdings Ltd.*, 2011 WL 866993, at \*5; *Zurich Am. Ins. Co.*, 155 Cal. App. 4th at 1502.

**3. ICANN Provided Namecheap With All Available Information Regarding Annexes 82 and 83.**

Namecheap complains that ICANN produced a metadata overlay for Annexes 82 and 83—which reflects the accurate Created Date and Modified Date metadata—instead of the native versions of these documents. As ICANN explained to Namecheap, these documents comprise Google Sheets located on ICANN’s Google Drive, which, when exported, are converted to Excel. The act of exporting the Google Sheets to Excel in order to produce them to Namecheap updates the Created Date and Modified Date, thereby resulting in inaccurate metadata fields. To address Namecheap’s concerns regarding the metadata, ICANN reviewed the documents in their native form on the Google Drive, identified the correct Created Date and Modified Date, and provided that information to Namecheap over a month ago.

ICANN also investigated whether it could provide Namecheap with not only the Excel spreadsheets, but also the native Google Sheets, but determined that it could not. Because these Google Sheets are internal to ICANN, as a security measure, these documents can only be shared among ICANN staff, not with external parties such as Namecheap’s counsel. Therefore, in order to provide any third party with the Google Sheets, ICANN must export the documents in Excel format, which is exactly what ICANN did here. ICANN understands that this is common practice and industry standard when collecting and producing Google Sheets in litigation. As an alternative to providing Namecheap access to the native Google Sheets, ICANN produced the correct metadata overlay, which reflects the same information Namecheap would have received had ICANN been able to share the Google Sheets (which it could not).

We note further that Namecheap received the Google Sheets in Excel form in mid-August and has had the accurate metadata since mid-October. There should be no additional issues with these two spreadsheets, and Namecheap’s repeated challenges to a minor metadata issue that was remediated long ago is inappropriate.

**4. ICANN’s Slack Communications.**

The Panel asks whether ICANN’s Slack Plus account allows ICANN to request that Slack export messages posted in public channels on ICANN’s Slack platform. ICANN confirmed that it is possible to export messages posted in public channels, to the extent such messages still exist. ICANN reviewed each of its public channels, however, and confirmed that there are no communications from the relevant time period (1 January 2018 to 18 November



Mr. Chairman and Members of the Panel  
November 24, 2021  
Page 6

2019) that have been retained. Therefore, there are no Slack messages on any such public channel that can be exported from the relevant time period.

Sincerely,

*/s/ Jeffrey A. LeVee*

Jeffrey A. LeVee

*Petillon*

# **Annex 105**

**Redacted – Confidential Information**

*Petillon*

# **Annex 106**

**Redacted – Confidential Information**

*Petillon*

# **Annex 107**

**Redacted – Confidential Information**

*Petillon*

# **Annex 108**



# Minutes | Special Meeting of the ICANN Board

This page is available in:

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العربية (<http://www.icann.org/resources/board-material/minutes-2013-08-22-ar>) |

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中文 (<http://www.icann.org/resources/board-material/minutes-2013-08-22-zh>).

22 Aug 2013

**A Special Meeting of the ICANN Board of Directors was held telephonically on 22 August 2013 at 22:00 UTC.**

**Steve Crocker, Chair, promptly called the meeting to order.**

**The following Directors participated in all or part of the meeting:**

**Sébastien Bachollet, Fadi Chehadé (President and CEO), Cherine Chalaby, Bertrand de La Chapelle, Chris Disspain, Bill Graham, Olga Madruga-Forti, Gonzalo Navarro, Ray Plzak, George Sadowsky, Mike Silber, Bruce Tonkin (Vice Chair), Judith Vazquez, and Kuo-Wei Wu. Erika Mann sent apologies.**

**The following Board Liaisons participated in all or part of the meeting: Francisco da Silva (TLG Liaison), Ram Mohan (SSAC Liaison), and Jonne Soininen (IETF Liaison). Heather Dryden (GAC Liaison) sent apologies.**

**The following ICANN Staff participated in all or part of the meeting: Akram Atallah (President, Generic Domain Names Division), John Jeffrey (General Counsel and Secretary), David Olive (Vice President, Policy Development), Megan Bishop, Michelle Bright, Samantha Eisner, Dan Halloran, Cyrus Namazi and Amy Stathos.**

## 1. **Consent Agenda**

- a. Approval of Board Meeting Minutes
- b. FY14 Budget Approval

### Rationale for Resolution 2013.08.22.02

## 2. Approval of Contract with General Contractor for Los Angeles Office Expansion

### Rationale for Resolutions 2013.08.22.03 – 2013.08.22.04

## 3. Redelegation of the .BW domain representing Botswana

### Rationale for Resolutions 2013.08.22.05 – 2013.08.22.06

- Redelegation of the .PT domain representing Portugal  
Rationale for Resolutions 2013.08.22.07 – 2013.08.22.08

- **Main Agenda**

- a. Ombudsman FY13 At-Risk Compensation – EXECUTIVE SESSION

### Rationale for Resolution 2013.08.22.09

- Renewal of .INFO Registry Agreement  
Rationale for Resolution 2013.08.22.10

- Renewal of .ORG Registry Agreement  
Rationale for Resolution 2013.08.22.11

- Renewal of .BIZ Registry Agreement  
Rationale for Resolution 2013.08.22.12

## 1. **Consent Agenda:**

The Chair opened up the meeting. Prior to introducing the Consent Agenda, the Chair discussed the planning and logistics of the upcoming ICANN Board workshop in Los Angeles, California on 26-28 August 2013, the IETF meeting

in Vancouver, Canada in November 2013, and the next ICANN public meeting in Buenos Aires, Argentina. The President and CEO also provided an update on the Executive Strategy Panels, which are estimated to be up and running with input and participation from the community within 30 days.

The Chair introduced the items on the Consent Agenda. The items were moved and George Sadowsky seconded the following resolutions. The Board then took the following action:

Resolved, the following resolutions in this Consent Agenda are approved:

a. **Approval of Board Meeting Minutes**

Resolved (2013.08.22.01), the Board approves the minutes of the 27 June Special Meeting of the ICANN Board.

b. **FY14 Budget Approval**

Whereas, the draft FY14 Operating Plan and Budget was posted for public comment in accordance with the Bylaws on 10 May 2013, which was based upon numerous community consultations, and consultations throughout ICANN staff and the Board Finance Committee, during the past fiscal year.

Whereas, intervening activities, and comments received from the public comment forum resulted in some significant revisions to the 10 May 2013 draft FY14 Operating Plan and Budget.

Whereas, due to the revisions to the draft FY Operating Plan and Budget communicated during the Durban meeting on 17 July 2013, ICANN re-opened the public comment forum until 4 August 2013.

Whereas, in addition to the public comment forum, ICANN actively solicited community feedback and

consultation with the ICANN community by other means, including online conference calls, meetings in Beijing and Durban, and email communications.

Whereas, the Board Finance Committee has discussed, and guided staff on, the development of the FY14 Operating Plan and Budget at each of its recent, regularly scheduled meetings.

Whereas, the Board Finance Committee met on 7 August 2013 to discuss the final draft FY14 Operating Plan and Budget, and recommended that the Board adopt the FY14 Operating Plan and Budget.

Whereas, per section 3.9 of the 2001, 2009 and 2013 Registrar Accreditation Agreements, respectively, the Board is to establish the Registrar Variable Accreditation Fees, which must be established in order to develop the annual budget.

Whereas, the description of the Registrar fees, including the recommended Registrar Variable Accreditation Fees, for FY14 has been included in the FY14 Operating Plan and Budget.

Resolved (2013.08.22.02), the Board adopts the FY14 Operating Plan and Budget and in doing so establishes the Variable Accreditation Fees (per registrar and transaction) as set forth in the FY14 Operating Plan and Budget.

## **Rationale for Resolution 2013.08.22.02**

In accordance with Article XVI, Section 4 of the ICANN Bylaws, the Board is to adopt an annual budget and publish it on the ICANN website. On 10 May 2013, a draft the FY14 Operating Plan and Budget was posted for public comment. This version was based on numerous discussions with members of the Executive team, and extensive consultations with ICANN Supporting Organizations, Advisory Committees, and other stakeholder groups throughout the prior several

months. Intervening activities, and comments received from the public comment forum resulted in some limited but significant revisions to the 10 May 2013 draft FY14 Operating Plan and Budget. Accordingly, to ensure full transparency and accountability, on 17 July 2013, ICANN communicated the revisions during a public session at the Durban Meeting and re-opened the public comment forum until 4 August 2013.

All comments received in all manners were considered in developing the final version of the FY14 Operating Plan and Budget, and where feasible and appropriate have been adopted.

In addition to the day-to-day operational requirements, the FY14 Operating Plan and Budget includes the FY14 new gTLD budget items and amounts allocated to various FY14 budget requests received from community leadership. The annual budget also discloses the impacts of the new gTLD program. Further, because the Registrar Variable Accreditation Fee is key to the development of the budget, the FY14 Operating Plan and Budget sets out and establishes those fees, which are consistent with recent years, and will be reviewed for approval by the Registrars.

This FY14 Operating Plan and Budget will have a positive impact in that it provides a proper framework by which ICANN will be managed and operated. It also provides the basis for the organization to be held accountable in a transparent manner. This will have a fiscal impact on ICANN and the community as is intended. This should not have anything but a positive impact on the security, stability and resiliency of the domain name system (DNS) with respect to any funding that is dedicated to those aspects of the DNS.

**c. Approval of Contract with General Contractor for Los Angeles Office Expansion**

Whereas, on 2 February 2013, the Board approved amending the lease for ICANN's Los Angeles office to include an additional 5800 square feet.

Whereas, construction is required to make the additional square footage usable.

Whereas, ICANN has received a construction proposal that is in alignment with the design of the current office space.

Resolved (2013.08.22.03), the President and CEO, or his designee, is authorized to enter into an agreement between ICANN and Cannon Constructors Group South, Inc. in an amount not to exceed [redacted], and to make all disbursements over US\$500,000, if necessary, in furtherance of the agreement.

Resolved (2013.08.22.04), pursuant to Article III, Section 5.2 of the ICANN Bylaws, portions of this resolution and rationale may be redacted and kept confidential until the President and CEO deems it is appropriate to release such redacted information.

## **Rationale for Resolutions 2013.08.22.03 – 2013.08.22.04**

On 2 February 2013 the Board approved amending the lease for the ICANN office in Los Angeles to include an additional 5800 square feet, for a total of 35,000 square feet. The Board noted in the rationale <http://www.icann.org/en/groups/board/documents/resolutions-02feb13-en.htm#1.c.rationale> ([/en/groups/board/documents/resolutions-02feb13-en.htm#1.c.rationale](http://www.icann.org/en/groups/board/documents/resolutions-02feb13-en.htm#1.c.rationale)) that long term staffing plans required the additional seating, that the current lease expires in June 2022 and that there are no current plans to relocate its headquarters. Construction requiring a capital outlay is required to make this additional square footage usable for the remaining years of the lease. A proposal has been received for the project that is in alignment with the design of the

third floor.

Based on cost and their performance on the third floor build out, and in accordance with the terms of ICANN's Procurement Guidelines (see <http://www.icann.org/en/about/financials/procurement-guidelines-21feb10-en.pdf> (</en/about/financials/procurement-guidelines-21feb10-en.pdf>)) [PDF, 1.03 MB], Cannon Constructors Group South, Inc. has been selected as the general contractor for the project. The total amount of the proposed contract is [redacted]. This resolution is necessary because the contract amount is over US\$500,000 and therefore requires Board approval in accordance with the ICANN Contracting and Disbursement Policy (see <http://www.icann.org/en/about/financials/signing-authority> (</en/about/financials/signing-authority>)).

The fiscal impact was anticipated and taken into account in the budget process for FY2014. This decision will have no impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

d. **Redelegation of the .BW domain representing Botswana**

Resolved (2013.08.22.05), as part of the exercise of its responsibilities under the IANA Functions Contract, ICANN has reviewed and evaluated the request to redelegate the .BW country-code top-level domain to Botswana Communications Regulatory Authority. The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2013.08.22.06), the Board directs that pursuant to Article III, Section 5.2 of the ICANN Bylaws, that certain portions of the rationale not appropriate for public distribution within the

resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

## Rationale for Resolutions 2013.08.22.05 – 2013.08.22.06

### **Why the Board is addressing the issue now?**

In accordance with the IANA Functions Contract, the ICANN staff has evaluated a request for ccTLD redelegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that ICANN staff has followed the proper procedures.

### **What is the proposal being considered?**

The proposal is to approve a request to the IANA Department to change the sponsoring organisation (also known as the manager or trustee) of the .BW country-code top-level domain to Botswana Communications Regulatory Authority.

### **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, ICANN staff consults with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD, and their applicability to their local Internet community.

### **What concerns or issues were raised by the community?**

Staff are not aware of any significant issues or concerns raised by the community in relation to this request.



*[Rationale Redacted]*

### **What factors the Board found to be significant?**

The Board did not identify any specific factors of concern with this request.

### **Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, the local communities to which country-code top-level domains are designated to serve, and responsive to ICANN's obligations under the IANA Functions Contract.

### **Are there financial impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the financial impact of the internal operations of country-code top-level domains within a country.

### **Are there any security, stability or resiliency issues relating to the DNS?**

ICANN does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

#### **e. Redelegating of the .PT domain representing Portugal**

Resolved (2013.08.22.07), as part of the exercise of

its responsibilities under the IANA Functions Contract, ICANN has reviewed and evaluated the request to redelegate the .PT country-code top-level domain to Associação DNS.PT. The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2013.08.22.08), the Board directs that pursuant to Article III, Section 5.2 of the ICANN Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

## **Rationale for Resolutions 2013.08.22.07 – 2013.08.22.08**

### **Why the Board is addressing the issue now?**

In accordance with the IANA Functions Contract, the ICANN staff has evaluated a request for ccTLD re-delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that ICANN staff has followed the proper procedures.

### **What is the proposal being considered?**

The proposal is to approve a request to IANA Department to change the sponsoring organisation (also known as the manager or trustee) of the .PT country-code top-level domain to Associação DNS.PT.

### **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, ICANN staff consults with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the

ccTLD, and their applicability to their local Internet community.

### **What concerns or issues were raised by the community?**

Staff are not aware of any significant issues or concerns raised by the community in relation to this request.

*[Rationale Redacted]*

### **What factors the Board found to be significant?**

The Board did not identify any specific factors of concern with this request.

### **Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, the local communities to which country-code top-level domains are designated to serve, and responsive to ICANN's obligations under the IANA Functions Contract.

### **Are there financial impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the financial impact of the internal operations of country-code top-level domains within a country.

### **Are there any security, stability or resiliency issues relating to the DNS?**

ICANN does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

**Fifteen members of the Board approved Resolutions 2013.08.22.01, 2013.08.22.02, 2013.08.22.03, 2013.08.22.04, 2013.08.22.05, 2013.08.22.06, 2013.08.22.07, and 2013.08.22.08. Erika Mann was unavailable to vote. The Resolutions carried.**

## 2. Main Agenda:

### a. Ombudsman FY13 At-Risk Compensation – EXECUTIVE SESSION

The Board entered an executive session without staff present. The Board undertook the following actions during its executive session:

Whereas, the Compensation Committee recommended that the Board approve payment to the Ombudsman of his FY13 at-risk compensation.

Resolved (2013.08.22.09), the Board hereby approves a payment to the Ombudsman of his FY13 at-risk compensation component.

### **Rationale for Resolution 2013.08.22.09**

Annually the Ombudsman has an opportunity to earn a portion of his compensation based on specific performance goals set by the Board, through the Compensation Committee. This not only provides incentive for the Ombudsman to perform above and beyond his regular duties, but also leads to regular touch points between the Ombudsman and the Board during the year

to help ensure that the Ombudsman is achieving his goals and serving the needs of the ICANN community.

Scoring of the Ombudsman's objectives results from both the Ombudsman self-assessment, including a discussion with the Ombudsman, as well as review by the Compensation Committee, with a recommendation to the Board. The score provides the Ombudsman with an understanding of areas in which he has done well and where he may need to improve or increase certain activities.

Scoring the Ombudsman's annual performance objectives is in furtherance of the goals of ICANN and helps increase the Ombudsman's service to the ICANN community. While there is a fiscal impact from the results of the scoring, that impact is already accounted for in the annual budget. This action will have no impact on the security, stability or resiliency of the domain name system.

## b. **Renewal of .INFO Registry Agreement**

The Board resumed its regular session and invited staff back to the call.

The Board consolidated the discussion on the .INFO, .ORG and .BIZ renewal agreements (Items 2.b., 2.c., and 2.d.). Bruce Tonkin and Ram Mohan noted that they had conflicts of interest relating to each of these agenda items and withdrew from the Board meeting prior to the commencement of the discussion.

Akram Atallah reported that the .BIZ and .INFO Registry Agreements have already been extended twice to finish the negotiations, and the .ORG Registry Agreement was extended once, with all extensions expiring on 31 August 2013. Registry agreements

normally provide for presumptive renewal. The proposed renewal agreements for .INFO, .ORG, and .BIZ have been extensively negotiated with the registries, and posted for public comment. The comments received have been summarized and submitted to the Board along with the briefing materials on this issue. Akram noted that NeuStar, as a public company, has already expressed their concerns about further extensions.

Akram also reported that ICANN received a letter from Steve Metalitz after the close of the public comment period reiterating the same comments that were raised during the public comment period regarding the incorporation of the Uniform Rapid Suspension System ("URS") and requirements to use registrars under the 2013 Registrar Accreditation Agreement in the renewal Agreements. ICANN also received a letter from Phil Corwin in response to Steve Metalitz's comments regarding the URS. Akram reported that both issues were discussed at length with the registries in negotiating the renewals.

With respect to the URS, Akram reported that it was staff's recommendation that the URS not be incorporated into the renewal Agreements.. Though the URS has been approved in the context of the new gTLDs, it will not be tested until the new gTLDs reach delegation. It is therefore premature to push it on the millions of existing domain names under the renewal Agreements until it has been proven. Further, the extension of the URS to existing gTLDs should be subject of community policy discussion.

With respect to the provision on the 2013 RAA, Akram noted that each of the three registries agreed to include a provision on when they will require the use of registrars under the 2013 RAA, and the concession reached on that point is the best ICANN could achieve in the negotiations.

Mike Silber asked why the letters from Steve Metalitz

and Phil Corwin were not included in the submitted Board papers. Akram explained the letters were received by ICANN after the Board papers were submitted. The items raised within the letters were also raised within the public comment forum, and therefore are included in the summaries of the public comments, which were provided to the Board, and are publicly available online.

Bill Graham stated that the point of keeping the level playing field regarding existing registries should be addressed more fully forward in Board papers, particularly since Phil Corwin is calling for a public policy process to resolve the issue of the URS.

Akram pointed out that the issues raised by the Corwin and Metalitz letters are separate from the issues that are currently before the Board for review, which are the renewal of the agreements as a whole. Akram suggested incorporating a discussion of these items into the rationale of the pending resolutions as a response to the letters, rather than revising the resolution to address the letters.

The Chair suggested that the rationales be expanded to generally address the issues raised in the letters, along with a discussion about the public comment summaries and the way the contracts have been structured.

Olga Madruga-Forti stated that there should be homogenous contracts to the greatest extent possible. Recognizing that there may be some issues that are not ripe for action at the point of contracting, Olga suggested that language be included in the contracts referencing that certain issues were discussed and that the parties agree in good faith that the issues will be discussed again at a later date. Olga inquired whether alternative stances were discussed during the negotiations on such issues and if not, can we re-open the door as quickly as possible for further negotiation.

Judith Vasquez noted that it is critical for ICANN to maintain the spirit of a level playing field.

George Sadowsky expressed his concerns about making a decision under the time pressure of the agreements expiring, when the community has different opinions and when there may be a better outcome if there were more time. He indicated that he would abstain from voting on each of the renewal Agreements.

Chris Disspain addressed George's comment by pointing out that the agreements with the registries were previously extended for the purposes of negotiating the terms of the new contract and receipt of comment, and therefore the deadlines faced today are not unexpected.

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.

Jonne Soininen asked whether the comments raised by Steve Metalitz and Phil Corwin were already addressed in the comments period.

Akram reported that Steve Metalitz was one of the commenters in the public comment, and that his letter is a reiteration of the points that were raised by him in the public comment period. Phil Corwin replied and asked for ICANN to not do what Steve Metalitz requested in relation to the URS.

Olga stated that she is not motivated by concern that further extensions may affect these companies' bottom line because they should have been motivated to negotiate with the best faith of moving this forward.

Mike Silber stated that he agreed with the advice from



staff on how to proceed with the renewals because the renewals have been well ventilated in the community. Steve Metalitz's letter is repeating the comments raised during the public comment period and Phil Corwin chose to reply by responding directly to Steve's letter instead of using the reply comment process. These issues have been fully addressed and just need to be better documented. Mike encouraged George not to abstain because the renewals have been extensively debated and there are good and cogent reasons for the staff recommendations.

Ray Plzak and Bertrand de La Chappelle agreed with Mike. Bertrand commented that there are good reasons for the positions that Staff has taken and suggested that these reasons be explained in the responses to the letters from Steve Metalitz and Phil Corwin. Bertrand suggested that Staff explain to Messrs. Metalitz and Corwin that their comments were taken into account as part of the public comment summary.

Cherine Chalaby moved and Ray Plzak seconded the resolution.

The Board then took the following action:

Whereas, ICANN conducted a public comment period from 3 June 2013 to 15 July 2013 <<http://www.icann.org/en/news/public-comment/info-renewal-03jun13-en.htm> ([/en/news/public-comment/info-renewal-03jun13-en.htm](http://www.icann.org/en/news/public-comment/info-renewal-03jun13-en.htm))> on a proposed agreement for renewal of the 2006 .INFO Registry Agreement <<http://www.icann.org/en/about/agreements/registries/info> ([/en/about/agreements/registries/info](http://www.icann.org/en/about/agreements/registries/info))>.

Whereas, the proposed renewal .INFO Registry Agreement includes modified provisions to bring the .INFO Registry Agreement into line with other comparable agreements as well as

additional provisions of the New gTLD Registry Agreement.

Whereas, the public comment forum on the proposed renewal .INFO Registry Agreement closed on 15 July 2013 with ICANN receiving two comments. A summary and analysis of the comments was provided to the Board.

Whereas, the Board has determined that no revisions to the proposed .INFO renewal Registry Agreement are necessary after taking the comments into account.

Whereas, the proposed renewal .INFO Registry Agreement includes significant improvements as compared to the current .INFO Registry Agreement.

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.

**Twelve members of the Board approved Resolution 2013.08.22.10. Bruce Tonkin, Ram Mohan, and George Sadowsky abstained. Erika Mann was unavailable to vote. The Resolution carried.**

George noted that in addition to the reasons stated above, he is also abstaining because he agreed with Olga's point that there should be homogenous contracting.

## Rationale for Resolution 2013.08.22.10

**Why the Board is addressing the issue now?**

The current .INFO Registry Agreement expires on 31 August 2013. The proposed renewal agreement was posted for public comment between 3 June 2013 and 15 July 2013. The Board is being asked to approve the renewal registry agreement prior to the expiration of the current agreement.

### **What is the proposal being considered?**

The changes to the .INFO Registry Agreement and the Appendices fall within several broad categories: (1) changes to promote consistency across registries; (2) changes to include similar provisions from the New gTLD Registry Agreement approved by the New gTLD Program Committee of the ICANN Board, (3) changes to update the agreement to reflect changes that have occurred since the current .INFO Registry Agreement was signed (including updating references, technical changes and other updates); and (4) changes to allow Afilias to better serve the Internet community (including to allow Afilias to more quickly address certain imminent threats to the security and stability of the TLD or the Internet).

### **Which stakeholders or others were consulted?**

ICANN conducted a public comment period on the proposed renewal .INFO Registry Agreement from 3 June 2013 through 15 July 2013, following which time the comments were summarized and analyzed.

### **What concerns or issues were raised by the community?**

Two members of the community participated in the public comment period. Members in the community raised comments regarding dispute

resolution mechanisms, access to registry services and change in control.

There was a specific community concern raised, and subsequent letters provided to the Board, regarding the inclusion of a requirement for the Uniform Rapid Suspension (URS) to be included in the renewed agreement, as well as requiring the Registry Operator to use only Registrars contracted under the 2013 RAA. In taking this decision, the Board considered the concern that extending the requirement to use the URS to existing gTLDs (which currently is only a requirement for Registry Operators approved through the New gTLD Program) would possibly be a matter for policy development. In addition, requiring the imposition of the URS today to millions of domain names may be premature given the implementation schedule for the URS processes. With regard to the use of Registrars, the renewal agreement includes a term for transition to the exclusive use of Registrars contracted under the 2013 RAA, if certain conditions occur, including if Registrars representing two-thirds of the registrations in the TLD sign the 2013 RAA. In addition, the Board considered the concerns that requiring this long-operating Registry Operator to immediately transition to the use of Registrars contracted under the 2013 RAA could place the Registry Operator at a disadvantage to other existing gTLD operators that do not have this requirement nor a transitional clause written into their registry agreements. These issues were also considered with the Registry Operator as part of the development of the renewal agreement.

### **What significant materials did the Board review?**

The Board reviewed the proposed .INFO Renewal Registry Agreement and its Appendices

<<http://www.icann.org/en/news/public-comment/info-renewal-03jun13-en.htm>  
([/en/news/public-comment/info-renewal-03jun13-en.htm](http://www.icann.org/en/news/public-comment/info-renewal-03jun13-en.htm))>

The Board also reviewed the summary and analysis of public comments.

### **What factors the Board found to be significant?**

The Board carefully considered the public comments and Staff recommendation with respect to those comments. The Board considered ICANN's contractual obligations with respect to the current .INFO Registry Agreement in reaching this decision, specifically that the agreement must be renewed absent certain uncured breaches by the registry operator and that certain terms of the renewal are required to conform to existing comparable gTLD registry agreements.

### **Are there positive or negative community impacts?**

As part of the renewal process, ICANN conducted a review of Afilias's recent performance under the current .INFO Registry Agreement. The compliance review covered areas including: Timeliness and Content of Monthly Reports; Add Grace Period Limits Policy; Bulk Zone File Requirements; and Payment of Required Fees. Afilias was found to have substantially met its contractual requirements (see

<http://www.icann.org/en/news/public-comment/info-renewal-03jun13-en.htm>  
([/en/news/public-comment/info-renewal-](http://www.icann.org/en/news/public-comment/info-renewal-03jun13-en.htm)

[03jun13-en.htm](#)). Evidence indicates that the community can expect such good performance to continue.

**Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There is no significant fiscal impact expected if ICANN approves the proposed renewal .INFO Registry Agreement. The provisions regarding registry-level fees and pricing constraints are for the most part consistent with the New gTLD Registry Agreement and the current comparable gTLDs.

**Are there any security, stability or resiliency issues relating to the DNS?**

There are no expected security, stability, or resiliency issues related to the DNS if ICANN approves the proposed renewal .INFO Registry Agreement. The proposed renewal Registry Agreement in fact includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS.

This is an Organizational Administrative Function for which ICANN received public comment.

c. **Renewal of .ORG Registry Agreement**

During the consolidated discussion of the renewal .INFO, .ORG and .BIZ Registry Agreements, Bertrand de La Chappelle noted that he was abstaining from discussion and voting on this Registry Agreement. The Board took the following action:

Whereas, ICANN conducted a public comment period from 21 June 2013 to 12 August 2013

<<http://www.icann.org/en/news/public-comment/org-renewal-21jun13-en.htm>  
([/en/news/public-comment/org-renewal-21jun13-en.htm](http://www.icann.org/en/news/public-comment/org-renewal-21jun13-en.htm))> on a proposed agreement for renewal of the 2006 .ORG Registry Agreement <  
<http://www.icann.org/en/about/agreements/registries/org>  
([/en/about/agreements/registries/org](http://www.icann.org/en/about/agreements/registries/org))>.

Whereas, the proposed renewal .ORG Registry Agreement includes modified provisions to bring the .ORG Registry Agreement into line with other comparable agreements as well as additional provisions of the New gTLD Registry Agreement.

Whereas, the public comment forum on the proposed renewal .ORG Registry Agreement closed on 12 August 2013 with ICANN receiving one comment. A summary and analysis of this comment was provided to the Board.

Whereas, the Board has determined that no revisions to the proposed renewal .ORG renewal Registry Agreement are necessary after taking the comments into account.

Whereas, the proposed renewal .ORG Registry Agreement includes significant improvements as compared to the current .ORG Registry 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.

**Eleven members of the Board approved Resolution 2013.08.22.11. Bruce Tonkin, Ram Mohan, George**

**Sadowsky, and Bertrand de La Chappelle abstained. Erika Mann was unavailable to vote. The Resolution carried.**

## Rationale for Resolution 2013.08.22.11

### **Why the Board is addressing the issue now?**

The current .ORG Registry Agreement expires on 31 August 2013. The proposed renewal .ORG Registry Agreement was posted for public comment between 21 June 2013 to 12 August 2013. The Board is being asked to approve the renewal .ORG registry Agreement prior to the expiration of the current .ORG Registry Agreement.

### **What is the proposal being considered?**

The changes to the .ORG Registry Agreement and the Appendices fall within several broad categories: (1) changes to promote consistency across registries; (2) changes to include similar provisions from the New gTLD Registry Agreement approved by the New gTLD Program Committee of the ICANN Board; (3) changes to update the agreement to reflect changes that have occurred since the current .ORG Registry Agreement was signed (including updating references, technical changes and other updates); and (4) changes to allow PIR to better serve the internet community (including to allow PIR to more quickly address certain imminent threats to the security and stability of the TLD or the Internet).

### **Which stakeholders or others were consulted?**

ICANN conducted a public comment period on



the proposed renewal .ORG Registry Agreement from 21 June 2013 to 12 August 2013, following which time the comment was summarized and analyzed.

### **What concerns or issues were raised by the community?**

One member of the community participated in the public comment period and raised comments regarding Whois requirements, access to registry services and rights protection mechanisms.

There was a specific community concern raised, and subsequent letters provided to the Board, regarding the inclusion of a requirement for the Uniform Rapid Suspension (URS) to be included in the renewed agreement, as well as requiring the Registry Operator to use only Registrars contracted under the 2013 RAA. In taking this decision, the Board considered the concern that extending the requirement to use the URS to existing gTLDs (which currently is only a requirement for Registry Operators approved through the New gTLD Program) would possibly be a matter for policy development. In addition, requiring the imposition of the URS today to millions of domain names may be premature given the implementation schedule for the URS processes. With regard to the use of Registrars, the renewal agreement includes a term for transition to the exclusive use of Registrars contracted under the 2013 RAA, if certain conditions occur, including if Registrars representing two-thirds of the registrations in the TLD sign the 2013 RAA. In addition, the Board considered the concerns that requiring this long-operating Registry Operator to immediately transition to the use of Registrars

contracted under the 2013 RAA could place the Registry Operator at a disadvantage to other existing gTLD operators that do not have this requirement nor a transitional clause written into their registry agreements. These issues were also considered with the Registry Operator as part of the development of the renewal agreement.

### **What significant materials did the Board review?**

The Board reviewed the proposed .ORG Renewal Registry Agreement and its Appendices <<http://www.icann.org/en/news/public-comment/org-renewal-21jun13-en.htm> (<[/en/news/public-comment/org-renewal-21jun13-en.htm](http://www.icann.org/en/news/public-comment/org-renewal-21jun13-en.htm))>. The Board also reviewed the summary and analysis of public comments.

### **What factors the Board found to be significant?**

The Board carefully considered the public comments and the Staff recommendation with respect to those comments. The Board considered ICANN's contractual obligations with respect to the current .ORG Registry Agreement in reaching this decision, specifically that the agreement must be renewed absent certain uncured breaches by the registry operator and that certain terms of the renewal are required to conform to existing comparable gTLD registry agreements.

### **Are there positive or negative community impacts?**

As part of the renewal process, ICANN conducted a review of PIR's recent performance under the current .ORG Registry

Agreement. The compliance review covered areas including: Timeliness and Content of Monthly Reports; Add Grace Period Limits Policy; Bulk Zone File Requirements; and Payment of Required Fees. PIR was found to have substantially met its contractual requirements (see <http://www.icann.org/en/news/public-comment/org-renewal-21jun13-en.htm> ([/en/news/public-comment/org-renewal-21jun13-en.htm](http://www.icann.org/en/news/public-comment/org-renewal-21jun13-en.htm))). Evidence indicates that the community can expect such good performance to continue.

**Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There is no significant fiscal impact expected if ICANN approves the proposed renewal .ORG Registry Agreement. The provisions regarding registry-level fees and pricing constraints are for the most part consistent with the New gTLD Registry Agreement and the current comparable gTLDs.

**Are there any security, stability or resiliency issues relating to the DNS?**

There are no expected security, stability, or resiliency issues related to the DNS if ICANN approves the proposed renewal .ORG Registry Agreement. The proposed renewal .ORG Registry Agreement in fact includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS.

This is an Organizational Administrative Function for which ICANN received public comment.

## d. Renewal of .BIZ Registry Agreement

The Board took the following action:

Whereas, ICANN conducted a public comment period from 3 June 2013 to 15 July 2013 <<http://www.icann.org/en/news/public-comment/biz-renewal-03jun13-en.htm> ([/en/news/public-comment/biz-renewal-03jun13-en.htm](http://www.icann.org/en/news/public-comment/biz-renewal-03jun13-en.htm))> on a proposed agreement for renewal of the 2006 .BIZ Registry Agreement <<http://www.icann.org/en/about/agreements/registries/biz> ([/en/about/agreements/registries/biz](http://www.icann.org/en/about/agreements/registries/biz))>.

Whereas, the proposed renewal .BIZ Registry Agreement includes modified provisions to bring the .BIZ Registry Agreement into line with other comparable agreements as well as additional provisions of the New gTLD Registry Agreement.

Whereas, the public comment forum on the proposed renewal .BIZ Registry Agreement closed on 15 July 2013, with ICANN receiving three comments. A summary and analysis of the comments was provided to the Board.

Whereas, the Board has determined that no revisions to the proposed renewal .BIZ Registry Agreement are necessary after taking the comments into account.

Whereas, the proposed renewal .BIZ Registry Agreement includes significant improvements as compared to the current .BIZ 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.

**Twelve members of the Board approved Resolution 2013.08.22.12. Bruce Tonkin, Ram Mohan, and George Sadowsky abstained. Erika Mann was unavailable to vote. The Resolution carried.**

## Rationale for Resolution 2013.08.22.12

### Why the Board is addressing the issue now?

The current .BIZ Registry Agreement expires on 31 August 2013. The proposed renewal .BIZ Registry Agreement was posted for public comment between 3 June 2013 and 15 July 2013. The Board is being asked to approve the renewal .BIZ Registry Agreement prior to the expiration of the current .BIZ Registry Agreement.

### What is the proposal being considered?

The changes to the .BIZ Registry Agreement and the Appendices fall within several broad categories: (1) changes to promote consistency across registries; (2) changes to include similar provisions from the New gTLD Registry Agreement approved by the New gTLD Program Committee of the ICANN Board, (3) changes to update the agreement to reflect changes that have occurred since the current .BIZ Registry Agreement was signed (including updating references, technical changes and other updates); and (4) changes to allow Neustar to better serve the Internet community (including to allow Neustar to more quickly address certain imminent threats to the security and stability of the TLD or the Internet).

## **Which stakeholders or others were consulted?**

ICANN conducted a public comment period on the proposed .BIZ renewal Registry Agreement from 3 June 2013 through 15 July 2013, following which time the comments were summarized and analyzed.

What concerns or issues were raised by the community?

Three members of the community participated in the public comment period. Members in the community raised comments regarding Whois requirements, dispute resolution mechanisms, access to registry services and rights protection mechanisms.

There was a specific community concern raised, and subsequent letters provided to the Board, regarding the inclusion of a requirement for the Uniform Rapid Suspension (URS) to be included in the renewed agreement, as well as requiring the Registry Operator to use only Registrars contracted under the 2013 RAA. In taking this decision, the Board considered the concern that extending the requirement to use the URS to existing gTLDs (which currently is only a requirement for Registry Operators approved through the New gTLD Program) would possibly be a matter for policy development. In addition, requiring the imposition of the URS today to millions of domain names may be premature given the implementation schedule for the URS processes. With regard to the use of Registrars, the renewal agreement includes a term for transition to the exclusive use of Registrars contracted under the 2013 RAA, if certain conditions occur, including if Registrars representing two-thirds of the registrations in

the TLD sign the 2013 RAA. In addition, the Board considered the concerns that requiring this long-operating Registry Operator to immediately transition to the use of Registrars contracted under the 2013 RAA could place the Registry Operator at a disadvantage to other existing gTLD operators that do not have this requirement nor a transitional clause written into their registry agreements. These issues were also considered with the Registry Operator as part of the development of the renewal agreement.

### **What significant materials did the Board review?**

The Board reviewed the proposed .BIZ Renewal Registry Agreement and its Appendices <<https://www.icann.org/en/news/public-comment/biz-renewal-03jun13-en.htm> ([/en/news/public-comment/biz-renewal-03jun13-en.htm](https://www.icann.org/en/news/public-comment/biz-renewal-03jun13-en.htm))>. The Board also reviewed the summary and analysis of public comments.

### **What factors the Board found to be significant?**

The Board carefully considered the public comments and Staff recommendation with respect to those comments. The Board considered ICANN's contractual obligations with respect to the current .BIZ Registry Agreement in reaching this decision, specifically that the agreement must be renewed absent certain uncured breaches by the registry operator and that certain terms of the renewal are required to conform to existing comparable gTLD registry agreements.

### **Are there positive or negative community impacts?**

As part of the renewal process, ICANN conducted a review of Neustar's recent performance under the current .BIZ Registry Agreement. The compliance review covered areas including: Timeliness and Content of Monthly Reports; Add Grace Period Limits Policy; Bulk Zone File Requirements; and Payment of Required Fees. Neustar was found to have substantially met its contractual requirements (see <http://www.icann.org/en/news/public-comment/biz-renewal-03jun13-en.htm> ([/en/news/public-comment/biz-renewal-03jun13-en.htm](http://www.icann.org/en/news/public-comment/biz-renewal-03jun13-en.htm))). Evidence indicates that the community can expect such good performance to continue.

**Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There is no significant fiscal impact expected if ICANN approves the proposed renewal .BIZ renewal Registry Agreement. The provisions regarding registry-level fees and pricing constraints are for the most part consistent with the New gTLD Registry Agreement and the current comparable gTLDs.

**Are there any security, stability or resiliency issues relating to the DNS?**

There are no expected security, stability, or resiliency issues related to the DNS if ICANN approves the proposed renewal .BIZ Registry Agreement. The proposed renewal .BIZ Registry Agreement in fact includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS.

This is an Organizational Administrative



Function for which ICANN received public comment.

The Chair then called the meeting to a close.

Published on 30 September 2013

*Petillon*

# **Annex 109**

**Redacted – Confidential Information**

*Petillon*

# **Annex 110**

**Redacted – Confidential Information**

*Petillon*

# **Annex 111**



April 29, 2019

ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094  
Attn: Russ Weinstein, Global Domains Division

To the ICANN Staff and Board:

The undersigned non-profit organizations write to express our opposition to the removal of price caps in the .org Registry Agreement (the ".org Agreement").

We agree with the current .org registry operator, the Public Interest Registry, that the .org gTLD "has assumed the reputation as the domain of choice for organisations dedicated to serving the public interest."<sup>1</sup> 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 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.

We therefore are disappointed and concerned that ICANN has proposed removing price caps from the .org Agreement. The reasonable expectation of .org registrants was, and continues to be, that prices would remain capped to ensure stable and reasonable domain name pricing for the millions of nonprofit organizations that have invested in a .org web presence. These organizations put their trust in ICANN as caretaker of the public interest in the .org name space.

If the existing price caps are removed, there will be no limits on the prices the Public Interest Registry can charge, and any wholesale cost increases imposed by the registry likely will be passed on to .org registrants such as the organizations we represent. This will accordingly introduce new budgetary uncertainty to the class of organizations that can least afford such uncertainty. Every additional dollar earmarked for domain name registrations is a dollar that is not available to advance the public interest purpose of nonprofit registrants that use the .org name space. While it is possible the Public Interest Registry may choose not to raise prices, despite the removal of the caps, the .org registry is too important to leave this decision to the registry's discretion.

ICANN has articulated no compelling policy basis for this proposed change. 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. Moreover, the Public Interest Registry is a nonprofit organization itself, and there is no evidence that it needs to somehow compete with for-profit registries, or that it needs unlimited additional funds to continue to operate as it has.

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<sup>1</sup> <https://pir.org/about-us/history/>

The .org gTLD is in a unique position as the presumed domain space for public interest organizations – a domain space that was created to benefit the public. ICANN has an obligation to ensure that the name space and the governing .org Agreement continue to reflect the public interest objectives of its constituency.

We hope that ICANN will reconsider this proposal and ensure that price caps are retained in the final agreement.

Sincerely,

**NPR**



Briana E. Thibeau, Deputy General Counsel

**YMCA OF THE USA**

Karyn Boston, Executive Vice President and Chief Legal Officer

**C-SPAN**

Bruce D. Collins, Corp. VP & General Counsel

**National Geographic Society**

Angelo M. Grima, EVP, General Counsel & Secretary

**AARP**

Leslie Nettleford, Associate General Counsel

**The Conservation Fund**

Holly Cannon, Executive Vice President and General Counsel

**Oceana**

Eric A. Bilsky, Assistant General Counsel

**National Trust for Historic Preservation**

Paul W. Edmondson, Interim President and CEO



# [Comments-org-renewal-18mar19] Proposed Renewal of .org Registry Agreement

Chris Vest [Cvest at asaecenter.org](mailto:Cvest@asaecenter.org).

Thu Apr 25 16:38:34 UTC 2019

- Previous message: [\[Comments-org-renewal-18mar19\] Proposed Renewal of .org Registry Agreement](#)
  - Next message: [\[Comments-org-renewal-18mar19\] Proposed Renewal of .org Registry Agreement](#)
  - Messages sorted by: [\[date\]](#) [\[thread\]](#) [\[subject\]](#) [\[author\]](#)
- 

ASAE, which is the largest organization in the world representing the interests of trade and professional associations, is firmly opposed to ICANN's proposal to remove price caps on the .org top-level domain (TLD) used by most associations and other tax-exempt organizations. Doing so would subject millions of associations and nonprofit organizations to what would most likely be an unstable pricing environment, forcing them to divert valuable resources from their exempt purpose in order to protect their online brand.

ASAE represents more than 44,000 association professionals and industry partners. Our members manage leading trade associations, individual membership societies and voluntary organizations across the United States and in nearly 50 countries around the world.

There are more than 10 million .org domain names registered. Legacy gTLDs like .com, .org and .net were created through the U.S. government and entrusted to ICANN to manage. ICANN then contracted with various service providers to operate legacy gTLDs - not to own them.

In its attempt to justify this current proposal, ICANN is pushing the misguided rationale that registry operators of legacy gTLDs should effectively be treated as owners entitled to whatever fees they deem appropriate even though they did not create the legacy domain names they currently manage. As ICANN reasons in its proposal, "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 utilizing the base registry agreement." 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.

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.

ICANN's mission is in part to preserve the operational stability of the Internet. Eliminating price caps and endangering the online credibility of the global nonprofit community is not consistent with ICANN's mission.

Sincerely,

John H. Graham  
President & CEO  
ASAE

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  - Next message: [[Comments-org-renewal-18mar19](#)] [Proposed Renewal of .org Registry Agreement](#)
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[More information about the Comments-org-renewal-18mar19 mailing list](#)

*Petillon*

# **Annex 113**

**Redacted – Confidential Information**

*Petillon*

# **Annex 114**

**Redacted – Confidential Information**

*Petillon*

# **Annex 115**

# Minutes | Special Meeting of the ICANN Board

This page is available in:

English |

العربية (<http://www.icann.org/resources/board-material/minutes-2019-11-21-ar>) |

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中文 (<http://www.icann.org/resources/board-material/minutes-2019-11-21-zh>).

21 Nov 2019

**A Special Meeting of the ICANN Board of Directors was held telephonically on 21 November 2019 at 16:00 UTC.**

**Maarten Botterman, Chair, promptly called the meeting to order.**

**In addition to the Chair, the following Directors participated in all or part of the meeting: Becky Burr, Ron da Silva, Chris Disspain, Avri Doria, Rafael Lito Ibarra, Danko Jevtović, Akinori Maemura, Göran Marby (President and CEO), Mandla Msimang, Ihab Osman, Nigel Roberts, León Sánchez (Vice Chair), Matthew Shears, and Tripti Sinha.**

**The following Director sent their apologies: Sarah Deutsch.**

**The following Board Liaisons participated in all or part of the meeting: Harald Alvestrand (IETF Liaison), Manal Ismail (GAC Liaison), Merike Kão (SSAC Liaison), and Kaveh Ranjbar (RSSAC Liaison).**

**Secretary: John Jeffrey (General Counsel and Secretary).**

**The following ICANN Executives and Staff participated in all or part of the meeting: Susanna Bennett (SVP, Chief Operations Officer), Franco Carrasco (Board Operations Specialist), Mandy**



**Carver (VP for Government Engagement – Global Coordination), James Caulfield (VP, Risk Management), Sally Newell Cohen (SVP, Global Communications), Sally Costerton (Sr Advisor to President & SVP, Global Stakeholder Engagement), Daniel Halloran (Deputy General Counsel & Chief Data Protection Officer), John Jeffrey (General Counsel and Secretary), Aaron Jimenez (Board Operations Specialist), Elizabeth Le (Associate General Counsel), Cyrus Namazi (Senior Vice President, Global Domains Division), David Olive (Senior Vice President, Policy Development Support), Erika Randall (Associate General Counsel), Ashwin Rangan (SVP, Engineering & Chief Information Officer), Lisa Saulino (Board Operations Specialist), Amy Stathos (Deputy General Counsel), and Gina Villavicencio (SVP, Global Human Resources).**

1. **Main Agenda:**

- a. **Consideration of Reconsideration Request 19-2: .ORG and .INFO renewal**

*Rationale for Resolution 2019.11.21.01*

1. Main Agenda:

- a. **Consideration of Reconsideration Request 19-2: .ORG and .INFO renewal**

The Chair opened the meeting and León Sánchez provided an overview of Reconsideration Request 19-2. He explained that at its previous meeting the Board adopted a proposed determination for the reconsideration request. The action before the Board is to consider the proposed final determination, taking into account the rebuttal submitted by the requestor and all other relevant materials. The Chair asked for expressions of conflicts of interest. Becky Burr and Nigel Roberts noted potential conflicts of interest and indicated they would recuse themselves from the matter to avoid the appearance of potential conflicts of interest.

Amy Stathos briefed the Board about the background

history of Reconsideration Request 19-2, which included a discussion of the arguments raised in the Reconsideration Request. In addition, Amy outlined the points raised by the Requestor in the rebuttal submitted to the Board after the Board issued its Proposed Determination on the Reconsideration Request. Among other things, the Requestor asserted that the Board should not have relied on an expert economist 2009 assessment on the propriety of price caps in new gTLDs, and the recent acquisition of .ORG by a for-profit entity merits additional scrutiny.

Board members asked questions about the arguments raised in the Reconsideration Request and the rebuttal. Avri Doria asked whether there is a policy basis for migrating legacy gTLDs to the form of the new gTLD registry agreement, and Cyrus Namazi provided an overview of the registry agreement renewal process. He made note of the presumptive right of renewal in the registry agreements if the registry is in good standing, and outlined some of the enhanced safeguards in the new gTLD registry agreement. He also explained that the prevailing policy is that all new gTLD registry operators must adopt the new form of registry agreement, but there is no consensus policy that prohibits a legacy registry operator from adopting the new form of the agreement.

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. It was also noted that the recently announced acquisition of Public Interest Registry, the current .ORG registry, and the results of that transaction is something that ICANN org would be evaluating as part of its normal process in such circumstances.

After discussion, some Board members suggested that additional points raised during the meeting be included in the rationale to the Board's resolution to provide additional context for the Board's action. Ron da Silva moved for the adoption of the proposed Board resolution, and León Sánchez seconded. The Board took the following action:

Whereas, Namecheap Inc. (Requestor) filed a reconsideration request (Request 19-2) challenging ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afiliás Limited (Afiliás) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (collectively, .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.<sup>1</sup>

Whereas, the Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."<sup>2</sup> The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.<sup>3</sup>

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 19-2 is sufficiently stated and sent Request 19-2 to the Ombudsman for consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board," and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."<sup>4</sup>

Whereas, the Board previously issued a **Proposed Determination** (</en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf>) denying reconsideration because ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements. (See <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a> (</resources/board-material/resolutions-2019-11-03-en#1.a>)).) The Board's action was taken in lieu of the BAMC's substantive evaluation on Request 19-2 pursuant to Article 4, Section 4.2(e) of the Bylaws because the BAMC did not have a quorum to consider Request 19-2.

Whereas, the Board has carefully considered the merits of Request 19-2 and all relevant materials, including the Requestor's rebuttal, and the Board reaffirms its conclusions in the **Proposed Determination** (</en/system/files/files/reconsideration-19-2->

[namecheap-board-proposed-determination-03nov19-en.pdf](#)) that ICANN org's execution of the .ORG/.INFO 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 Agreements. The Board further concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2019.11.21.01), the Board adopts the **Final Determination on Reconsideration Request 19-2** ([/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf](#)).

**Thirteen members of the Board voted in favor of Resolution 2019.11.21.01. Becky Burr and Nigel Roberts abstained from voting on the Resolution. Sarah Deutsch was unavailable to vote on the Resolution. The Resolution carried.**

### *Rationale for Resolution 2019.11.21.01*

#### 1. **Brief Summary and Recommendation**

The full factual background is set forth in the **Proposed Determination on Request 19-2** ([/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf](#)) (Proposed Determination), which is incorporated here.

On 3 November 2019, the Board evaluated Request 19-2 and all relevant materials, and issued a **Proposed Determination**

(/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf), denying reconsideration because ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements. (See <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a> (/resources/board-material/resolutions-2019-11-03-en#1.a.) The Board's action was taken in lieu of the BAMC's substantive evaluation on Request 19-2 pursuant to Article 4, Section 4.2(e) of the Bylaws because the BAMC did not have a quorum to consider Request 19-2.

On 18 November 2019, the Requestor submitted a rebuttal to the Proposed Determination (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. The Requestor claims that (1) the Board should not have relied on an expert economist's prior assessment of the need for price caps in new gTLD Registry Agreements; (2) the Base RA's development process does not support migration of .ORG and .INFO to the Base RA; (3) ICANN Staff disregarded "essentially unanimous public comments in support of price caps"; (4) that it has sufficiently alleged harm, and (5) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed "requires that ICANN [org] review this purchase in detail and take the necessary steps to ensure that .org

domains are not used [as] a source of revenue" for certain purposes.<sup>5</sup>

The Board has carefully considered Request 19-2 and all relevant materials, including the Requestor's rebuttal, and, for the reasons set forth in detail in the [Final Determination \(/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf\)](#), the Board reaffirms its conclusions in the [Proposed Determination \(/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf\)](#) and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

## 2. **Analysis and Rationale**

- A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.

There is no evidence to support the Requestor's conclusory assertion that ICANN org did not act for the public benefit when it omitted the price caps from the .ORG/.INFO Renewed RAs. As discussed in further detail in the [Final Determination \(/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf\)](#), which is incorporated herein, on the contrary, the evidence demonstrates that ICANN org sought community consultation regarding the proposed changes

to the .ORG and .INFO RAs through a public comment process. ICANN org reviewed and considered all 3,700 comments received.<sup>6</sup> ICANN Staff presented and discussed the key issues raised in the public comment process and correspondence, including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.<sup>7</sup>

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a "sham" or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff's careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,<sup>8</sup> demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff's belief that it was acting for the public benefit by "promot[ing] competition in the registration of domain names," providing the same "protections to existing registrants" afforded to registrants of other TLDs, and treating "the Registry Operator equitably with registry operators of new gTLDs



and other legacy gTLDs utilizing the Base [RA]."<sup>9</sup> 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."<sup>10</sup> ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically 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.<sup>11</sup>

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.

The Board finds that there is no evidence to support the Requestor's assertion that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy

development process is used to ascertain the global public interest and that those processes are accountable and transparent.<sup>12</sup>

As discussed in further detail in the [Final Determination \(/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf\)](#), which is incorporated herein, contrary to the Requestor's argument, ICANN.org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. Moreover, ICANN.org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. ICANN.org ultimately determined that ICANN's Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same "protections to existing registrants" that are afforded to registrants of other TLDs, and treat registry operators equitably.<sup>13</sup> Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, "was developed through the bottom-up multi-stakeholder process

including multiple rounds of public comment."<sup>14</sup>

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org's Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Board finds that there is not support for the Requestor's assertion that omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org's statement on the public comment proceeding that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."<sup>15</sup> As discussed in further detail in the **Final Determination (/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf)**, which is incorporated herein, ICANN org's decision not to include price caps in the .ORG/.INFO Renewed RAs does

not mean that ICANN org failed to "obtain community input" or "use[]" the public comment "to guide implementation work" of ICANN org.<sup>16</sup> To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board's support, to pursue, the global public interest. Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).<sup>17</sup> ICANN org's general description of the purpose of the public comment process is not a Commitment, Core Value, established policy, nor part of ICANN org's Mission. Accordingly, reconsideration is not supported.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

As discussed in further detail in the [Final Determination \(/en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf\)](#), which is incorporated herein, there is no evidence to support the Requestor's claim that ICANN org's analysis of the proposed removal of price caps was taken

without material information.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. The Requestor asserts that it has been adversely affected by the challenged conduct because, "[a]s a domain name registrar, removal of price caps for legacy TLDs will negatively impact [the Requestor's] domain name registration business," insofar as the .ORG/.INFO Renewed RAs create an "uncertainty of price increases."<sup>18</sup> The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to determine whether" the removal of price caps in the .ORG RA "can result in uncompetitive practices."<sup>19</sup> This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton's expert report—indicates that such

harm is not expected. As noted in the **Final Determination** (</en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf>), in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.<sup>20</sup> Professor Carlton explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,], making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."<sup>21</sup> For these reasons, reconsideration is not warranted.

F. The Rebuttal Does Not Raise Arguments or Facts that Support Reconsideration.

The Requestor makes five arguments in its Rebuttal. None support reconsideration. As discussed in further detail in the **Final Determination** (</en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf>), the Requestor's Rebuttal reiterates arguments that the Board addressed in the Proposed Determination. Essentially, the Rebuttal makes clear that the

Requester relies on the assumption that legacy gTLDs should be treated differently than new gTLDs and should not migrate to the Base RA; Requestor still offers no evidence supporting this argument, and is incorrect, as demonstrated by the legacy gTLDs that have migrated to the Base RA over the past several years.

Each of the points raised in the Requestor's Rebuttal is addressed in the **Final Determination** (</en/system/files/files/reconsideration-19-2-namecheap-final-determination-21nov19-en.pdf>), which is incorporated herein. But we wanted specifically to discuss here whether there was a past understanding that legacy gTLD registry agreements would be renewed in the form of the new form of agreement used by new gTLDs. All registry agreements include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the agreement at its expiration provided the registry operator is in good standing (e.g., the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.

In the course of engaging with a legacy registry operator on renewing its agreement, ICANN

org prefers to and proposes that the registry operator adopts the new form of registry agreement that is used by new gTLDs as the starting point for the negotiations. This new form includes several enhancements that benefit the domain name ecosystem such as better safeguards in dealing with domain name infrastructure abuse, emergency backend support, as well as adoption of new bilaterally negotiated provisions that ICANN org and the gTLD Registries Stakeholder Group conduct from time to time for updates to the form agreement, and adoption of new services (e.g., RDAP) and procedures.

Although ICANN org proposes the new form of registry agreement as a starting place for the renewal, because of the registry operator's presumptive right of renewal ICANN org is not in a position to mandate the new form as a condition of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position, and has done so in at least one such instance.

While the prevailing policy is that all new gTLD registry operators must adopt the new form of registry agreement, there is no consensus policy that prohibits a



legacy registry operator from adopting the new form of the agreement.

Notwithstanding that we are denying Request 19-2, the Board acknowledges (and the Requestor points out in its Rebuttal) the recently announced acquisition of PIR, the current .ORG registry, and the results of that transaction is something that ICANN organization will be evaluating as part of its normal process in such circumstances.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

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

The Chair called the meeting to a close.

Published on 27 January 2020

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<sup>1</sup> Request 19-2, § 3, at Pg. 2.

<sup>2</sup> *Id.* at § 3.

<sup>3</sup> *Id.*

<sup>4</sup> <https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf> (</en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en.pdf>).

<sup>5</sup> Rebuttal in Support of Request 19-2, <https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en> (</resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en>).

<sup>6</sup> Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.

<sup>7</sup> 26 July 2019 Letter, at Pg. 2.

<sup>8</sup> 26 July 2019 Letter, at Pg. 2.

<sup>9</sup> Report of Public Comments, .ORG, at Pg. 8.

<sup>10</sup> Request 19-2, § 8, at Pg. 12.

<sup>11</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf> (<https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>).

<sup>12</sup> Request 19-2, § 8, at Pg. 4.

<sup>13</sup> Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

<sup>14</sup> 26 July 2019 Letter, at Pg. 1.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*

<sup>17</sup> Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

<sup>18</sup> Request 19-2, § 6, at Pg. 2; *see also id.* § 10, at Pg. 13.

<sup>19</sup> Request 19-2, § 8, at Pg. 10.

<sup>20</sup> Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf> (<https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>).

<sup>21</sup> *Id.*

*Petillon*

# **Annex 116**

# Minutes | Special Meeting of the Board of Directors

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21 Apr 2011

**A Special Meeting of the ICANN Board of Directors was held on 21 April 2011 03:00 UTC.**

**Chairman Peter Dengate Thrush promptly called the meeting to order.**

**In addition to Chairman Peter Dengate Thrush the following Directors participated in all or part of the meeting: Rod Beckstrom (President and CEO), Steve Crocker (Vice Chairman), Cherine Chalaby, Rita Rodin Johnston, Gonzalo Navarro, Raymond A. Plzak, Rajasekhar Ramaraj, George Sadowsky, Mike Silber, Bruce Tonkin, Katim Touray, and Kuo-Wei Wu.**

**The following Board Liaisons participated in all or part of the meeting: Heather Dryden, GAC Liaison; Thomas Narten, IETF Liaison; Reinhard Scholl, TLG Liaison; and Suzanne Woolf, RSSAC Liaison.**

**Sébastien Bachollet, Bertrand de la Chapelle, Erika Mann and Ram Mohan, SSAC Liaison, sent apologies.**

## Confidential Personnel Matter: Approval of Recommendations re Ombudsman

### 1. Compensation – Executive Session

### 2. Consent Agenda

2.1. Approval of Minutes of 18 March 2011 ICANN Board Meeting

2.2. From the BGC – Organizational Meeting to Fill Leadership Vacancies

RATIONALE FOR RESOLUTION 2011.04.21.04:

2.3. From the BGC – Revised Code of Conduct

RATIONALE FOR RESOLUTION 2011.04.21.05:

2.4. From the BGC – Input on Academia Representation on NomCom

RATIONALE FOR RESOLUTION 2011.04.21.06:

2.5. From the BGC – Approval of Members of Board Technical Relations Working Group

RATIONALE FOR RESOLUTIONS 2011.04.21.07:

2.6. From the SIC – Approval of ccNSO Review Implementation Actions

RATIONALE FOR RESOLUTION 2011.04.21.08:

2.7. From the BFC - Formalization of Planning Committee for existing employee retirement savings accounts (401K)

RATIONALE FOR RESOLUTION 2011.04.21.09:

2.8. Approval of Redlegation of .KP (Korea, Democratic People's Republic)

RATIONALE FOR RESOLUTION 2011.04.21.10:

2.9. Approval of Tracking of Global Policy for Post Exhaustion IPv4 Allocation Mechanisms by IANA

RATIONALE FOR RESOLUTION 2011.04.21.11:

## Main Agenda

3. **From the BFC – Approval of Increase Of The Registrar Accreditation Application Fee**  
Rationale for Resolutions 2011.04.21.13
4. **From the SIC – Approval of Charter for Board Technical Relations Working Group**  
Rationale for Resolution 2011.04.21.14:
5. **CEO's Report**
6. **New gTLDs**
  - 6.1. Review of Vertical Integration for Existing gTLD Registry Operators  
RATIONALE FOR RESOLUTION 2011.04.21.15
7. **ATRT**
  - 7.1. Board Management of ATRT Recommendations  
RATIONALE FOR RESOLUTION 2011.04.21.16:
  - 7.2. Estimated Budget Implications of ATRT Recommendations for FY2012 Budget  
RATIONALE FOR RESOLUTION 2011.04.21.17
8. **.NET AGREEMENT RENEWAL**
9. **IDN ccTLD DELEGATIONS**
  - 9.1. Delegation of الجزائر ("Al Jazair") representing Algeria in Arabic  
RATIONALE FOR RESOLUTION 2011.04.21.18
  - 9.2. Delegation of المغرب ("al-Maghrib") representing Morocco in Arabic  
RATIONALE FOR RESOLUTION 2011.04.21.19
  - 9.3. Delegation of the .cpб ("srb") domain representing Serbia in Cyrillic  
RATIONALE FOR RESOLUTION 2011.04.21.20
10. **UPDATE ON NOTICE OF INQUIRY REGARDING THE IANA FUNCTIONS CONTRACT**

## 11. **ANY OTHER BUSINESS**

### 1. Confidential Personnel Matter: Approval of Recommendations re Ombudsman Compensation – Executive Session

The Board conducted an executive session, in confidence.

In Executive Session, the Board passed two related resolutions (2011.04.21.C01, 2011.04.21.C02) that shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article III, section 5.2 of the ICANN Bylaws.

**All Board members present unanimously approved of Resolutions 2011.04.21.C01 and 2011.04.21.C02.**

### 2. Consent Agenda

The Chair of the Board noted the Board's congratulations to Ram Mohan and his wife on the birth of their daughter.

The Chair of the Board inquired as to whether any member of the Board would like an item removed from the Consent Agenda. Two items were moved to the Main Agenda for consideration prior to the CEO's report.

The Chair then moved and George Sadowsky seconded the following resolution:

***RESOLVED***, *the following resolutions in this Consent Agenda are hereby approved:*

#### 2.1 Approval of Minutes of 18 March 2011 ICANN Board Meeting

***RESOLVED*** (2011.04.21.03), *the Board hereby approves the minutes of the 18 March 2011 ICANN Board Meeting.*

#### 2.2 From the BGC – Organizational Meeting to Fill Leadership Vacancies



Whereas, upon the conclusion of the June 2011 Mid-year Meeting in Singapore, there will be a vacancy in the position of the Chair of the Board due to the transition in Seat 11 on the ICANN Board of Directors.

Whereas, the Board Governance Committee has identified that it is preferable for the Board to immediately fill a vacancy in the ICANN Board Chair position, as well as immediately address any necessary changes in composition of Board Committees and leadership due to the transition of Board members, and is prepared make recommendations to the Board on these items.

Whereas, an Organizational Meeting of the Board is required as soon as possible after the conclusion of the June 2011 Mid-year Meeting for the Board to take action to elect a Chair (and Vice-Chair, if necessary), as well as appointing Board committee members as needed.

**RESOLVED** (2011.04.21.04), the Secretary is directed to notice an Organizational Meeting of the Board of Directors to occur immediately after the conclusion of the June 2011 Mid-year Meeting.

## RATIONALE FOR RESOLUTION 2011.04.21.04:

This administrative resolution assures that the Board will continue with a full composition of leadership upon transition of Board membership. There is no anticipated fiscal impact from this decision, as the Organizational Meeting will occur in the same location as the 2011 Mid-year Meeting. There will be no impact on the security, stability and resiliency of the domain name system as a result of this action.

### 2.3 From the BGC – Revised Code of Conduct

Whereas, the Board Governance Committee (BGC) is charged with oversight of the Board's compliance with the organization's Code of Conduct, approved in 2008.

Whereas, the BGC has identified that Code of Conduct Guidelines would provide guidance and assistance in maintaining compliance with the Code of Conduct.

Whereas, non-substantive revisions to the Code of Conduct are necessary to incorporate references to the Code of Conduct Guidelines, and the BGC has approved those proposed revisions.

**RESOLVED** (2011.04.21.05), the Board approves the Revised Code of Conduct and directs staff to post the Revised Code of Conduct on the ICANN website.

## RATIONALE FOR RESOLUTION 2011.04.21.05:

The Board's adherence to a Code of Conduct is an essential part of maintaining accountability and transparency in ICANN's decision-making process. The Code of Conduct approved in 2008 was a result of community input, and the changes approved today do not substantively alter the community-vetted provisions. The Revised Code of Conduct will assist the Board in maintaining adherence with the Code of Conduct, through the incorporation of Guidelines that more clearly identify processes for handling potential breaches of the Code. There is no anticipated fiscal impact from this decision, and there will be no impact on the security, stability and resiliency of the domain name system as a result of this action.

### 2.4 From the BGC – Input on Academia Representation on NomCom

Whereas, Article VII, Section 2.8.c ([/en/general/bylaws.htm#VII-2](#)) of the ICANN Bylaws requires the NomCom to include a voting member selected by "an entity designated by the Board to represent academic and similar organizations" (Selecting Entity).

Whereas, despite attempts to identify a Selecting Entity, the

Board has not succeeded, and instead has made direct recommendations of delegates to represent academia on the NomCom. In addition to the Board-selected delegate, there have consistently been multiple delegates on each NomCom from academia.

Whereas, in 2010, the Board directed the BGC to create a process for identifying a Selecting Entity, and the BGC has raised concerns relating to the identification and evaluation of the Selecting Entity.

Whereas, the BGC has determined that the community may provide guidance on an appropriate Selecting Entity or metrics to help in identification or evaluation of the Selecting Entity.

Whereas, in the event that that the community comment does not inform the identification or approval of an appropriate Selecting Entity, the BGC is prepared to recommend that Article VII, Section 2.8.c be removed from the Bylaws. If, in the future the academic sector becomes under-represented on the NomCom, the creation of a mechanism should be considered to assure that academia has a voice in the selection of ICANN leadership.

***RESOLVED*** (2011.04.21.06), the Board approves the initiation of a 30-day period of public comment to obtain community input to inform the BGC's future work on the identification of an entity to make appointments to the NomCom as called for in ***Article VII, Section 2.8.c*** ([\*\(/en/general/bylaws.htm#VII-2\)\*](#)) of the Bylaws. The public comment will also address the potential proposed Bylaws amendments regarding the removal of this Bylaws provision in the event that the community comment process does not result in the identification of an appropriate entity.

## **RATIONALE FOR RESOLUTION 2011.04.21.06:**

Since the 2002 introduction of the current form of the ICANN Bylaws, there has been a provision for the

NomCom to include a voting delegate appointed by "an entity designated by the Board to represent academic and similar organizations" (Selecting Entity). The Board has not been successful in identifying such a Selecting Entity; despite [a 2003 identification of a Selecting Entity \(/en/minutes/prelim-report-12mar03.htm\)](#), by 2005, no designees had been identified and the Board Governance Committee (BGC) has been making a direct recommendation of a voting NomCom delegate after soliciting nominees. In 2007, the Chair noted that the [BGC had not been successful in identifying a Selecting Entity \(/en/minutes/minutes-13mar07.htm\)](#), and in 2010, the [Board directed \(/en/minutes/resolutions-25jun10-en.htm#13\)](#) that a process for choosing the Selecting Entity be created through the BGC and proposed to the Board.

Despite the limitations faced by the Board in identifying the Selecting Entity, there has been consistent representation of the academic sector on each NomCom, in addition to those persons directly recommended by the BGC. Historically, in addition to the designated academia delegate, each recent NomCom has had at least two members affiliated with academic institutions.

The NomCom – and the method of selection of delegates serving on the NomCom – are important components to ICANN's leadership and governance, and providing any entity with the responsibility of selecting a voting NomCom delegate will have lasting effects on the organization. When the BGC undertook work to create a process to identify a Selecting Entity, the BGC discussed the difficulty of identifying criteria to choose an entity, particularly how to evaluate and select the successful entity if more than one is suggested or nominated. The BGC also identified a more fundamental question: because of the history of academic voices being present on the NomCom, does it remain necessary to identify that a specific delegate

remain a part of the NomCom composition?

The BGC therefore recommends that the community have a voice in reviewing this decision point. The BGC seeks community guidance on: What entities could or should serve as the entity to designate a member of an academic or similar organization to the NomCom? What metrics could be used to evaluate competing entities? What would an appropriate selection and evaluation process be? Would the community be better served by removing the Bylaws provision calling for such an entity to select a delegate?

It should be noted that the Board directed that the BGC *not* to identify a delegate for the current (2010-2011) NomCom to fill this role. To date, ICANN is not aware of any complaints that the absence of the specific academia representative delegate has impeded the work of the NomCom.

In the event that the community consultation cannot identify an appropriate selection or evaluation process, or an appropriate entity, the BGC will recommend the removal of this provision from the Bylaws. If the provision is removed, the future composition of the NomCom will have to be reviewed to confirm that the academic sector remains represented. If the academic sector is under-represented in the future, a review of how best to assure academic representation on the NomCom will be initiated.

Seeking community input on this item will assist the Board in evaluating the impact of any changes to the NomCom composition. There will be no impact on the security, stability and resiliency of the domain name system as a result of this action.

## 2.5 From the BGC Approval of Members of Board Technical Relations Working Group

Whereas, on 18 March 2011 (</en/minutes/resolutions->

[18mar11-en.htm#7](#) the Board established the Board Technical Relations Working Group "to consider measures to enhance the coordination and cooperation between ICANN and other members of the Internet technical community with the intent of, among other things, dissolving the TLG by the 2011 Annual Meeting; and asks the Working Group to engage the ICANN community in a fully consultative process on the coordination and cooperation between ICANN and other members of the Internet technical community."

Whereas, the Board directed the Board Governance Committee to recommend five members for the Board Technical Relations Working Group, for consideration by the Board at this meeting.

Whereas, at its 12 April 2011 meeting, the BGC reviewed the potential composition of the Board Technical Relations Working Group and formed a recommendation to the Board, identifying the following proposed members of the group:

- (i) Gonzalo Navarro, Chair;
- (ii) Thomas Narten;
- (iii) Thomas Roessler;
- (iv) Reinhard Scholl; and
- (v) Jonne Soininen.

**RESOLVED** (2011.04.21.07), the Board approves the recommended membership of the Board Technical Relations Working Group and requests the members to complete the tasks as set forth in the Board's 18 March 2011 resolution, as reflected in the Working Group's charter.

## RATIONALE FOR RESOLUTIONS 2011.04.21.07:

The Board Governance Committee's recommendation is in fulfillment of the Board's 18 March 2011 resolution.

The TLG review work to date has been the subject of community comment, and the Working Group is expected to perform its work in a consultative process with the ICANN community. A small fiscal impact is anticipated due to the composition of the Working Group, including staffing resources and potential costs incurred to facilitate the work of the Working Group. There will be no impact on the security, stability and resiliency of the domain name system as a result of this action.

## 2.6 From the SIC Approval of ccNSO Review Implementation Actions

Whereas, on 18 March 2011, the Board resolved to receive the Final Report of the ccNSO review Working Group, and directed the Structural Improvements Committee (SIC) to "present a set of suggested actions for approval at the 24 June 2011 Board meeting, so as to address the conclusions and recommendations formulated in the final report of this Working Group", at <http://www.icann.org/en/minutes/resolutions-05aug10-en.htm#2.f> ([/en/minutes/resolutions-05aug10-en.htm#2.f](http://www.icann.org/en/minutes/resolutions-05aug10-en.htm#2.f)).

Whereas, ICANN staff members supporting the organizational reviews and the ccNSO identified a set of measures in a document "ccNSO review WG final report: implementation steps", dated April 2011, to address the recommendations and conclusions from the Working Group and provided those to the SIC.

Whereas, the SIC finds the measures included in this document adequate and proposes to have staff in coordination with SIC finalize an implementation plan, including estimated costs, based upon this document, and to provide this final plan to the Board for receipt and consideration.

***RESOLVED*** (2011.04.21.08), the Board approves the document put forward by the SIC and instructs the SIC, in coordination with staff, to provide the Board with a final

*implementation plan, including estimated costs, to conform with the measures recommended by the SIC to address the conclusions and recommendations in the final report of the ccNSO review Working Group.*

## **RATIONALE FOR RESOLUTION**

### **2011.04.21.08:**

The proposed action is in direct response to a request from the Board and serves to advance the implementation of the ccNSO review outcomes. The task to develop a detailed implementation plan is essential to prepare the implementation in a timely manner. There is no reason to delay this action as it, per se, would have no budgetary consequences. The detailed implementation planning should cover scoping and resource estimates, to be considered and decided by the Board once the detailed planning task has been accomplished and a detailed plan put forward.

### 2.7 From the BFC - Formalization of Planning Committee for existing employee retirement savings accounts (401K).

Whereas, the ICANN Retirement Savings Plan (Plan) was introduced in 2000 for United States based staff.

Whereas, in light of the increasing number of participants and resulting assets of the Plan, best practices suggest that a plan committee be formed to manage plan administration, choosing plan vendors, identifying investment options from which employees can select, and other fiduciary responsibilities.

Whereas, the BFC has recommended that the Board approve the formalization of the 401(k) Plan Committee and authorize the CEO to staff and oversee the Plan Committee activities.

***RESOLVED*** (2011.04.21.09), *the Board approves the formalization of the 401(k) Plan Committee and authorizes the*



*CEO to staff and oversee the Plan Committee activities.*

## RATIONALE FOR RESOLUTION 2011.04.21.09:

Employees in the United States participate in the ICANN Retirement Savings Plan (also known as the 401(k) Plan) (the "Plan") in which the Company makes contributions to the Plan on behalf of employees, and employees may make contributions, on a tax deferred basis, to the Plan on their own behalf. Until recently, the Plan has been relatively small and did not call for a formal Plan Committee. Recently, however, the Plan has grown to over 100 active participants and to an asset level for which best practices indicate that a plan committee be formed to oversee various aspects of the Plan.

### 2.8 Approval of Redelegation of .KP (Korea, Democratic People's Republic)

Whereas, KP is the ISO 3166-1 two-letter country-code designated for the Democratic People's Republic of Korea.

Whereas, ICANN has received a request for redelegation of .KP to Star Joint Venture Company;

Whereas, ICANN has reviewed the request, and has determined that the proposed redelegation would be in the interests of the local and global Internet communities.

***RESOLVED*** (2011.04.21.10), *the proposed redelegation of the .KP domain to Star Joint Venture Company is approved.*

## RATIONALE FOR RESOLUTION 2011.04.21.10:

### **Why the Board is addressing the issue now?**

Staff present delegation and redelegation requests for country-code domains to the Board for decision, once

staff are satisfied the applicant has provided a sufficiently complete application that has a reasonable prospect of a positive Board decision. In line with ICANN's commitments to perform timely processing of requests relating to the IANA function, and the DNS root zone in particular, the ICANN Board seeks to evaluate such requests at its next scheduled Special Meeting.

### **What is the proposal being considered?**

The proposal is to approve a request to IANA to change or designate the sponsoring organisation (also known as the manager or trustee) of a country-code top-level domain. In line with established practice, the ICANN Board is involved in making the decision to proceed with such requests as one step of this multi-step process.

### **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, ICANN staff consults with the applicant, the current operator (if applicable), and other directly connected parties. In line with ICANN's practice of keeping incomplete root zone change requests in confidence, ICANN has not performed open consultation on this matter.

### **What concerns or issues were raised by the community?**

Any concerns or issues are raised within the public report that will be published in conjunction with this action. This report will be published on the IANA website at <http://www.iana.org/> should the root zone change request have successfully completed final processing, usually 1-2 months after the Board's decision.

### **What significant materials did the Board review?**

The Board is involved in assessing requests against a variety of public interest criteria. This criteria includes establishing the country-code is eligible (e.g. listed in the ISO 3166-1 standard); establishing the proposed manager is supported by the local Internet community; establishing the proposed operator is operationally and technically competent; establishing the proposed manager is based locally and bound under local law; establishing the proposed manager operates fairly and equitably; establishing that in cases there is a transfer of operations that an appropriate plan is in place to preserve ongoing stability of the domain; and establishing that the action is compatible with any applicable local laws and regulations. During the staff compilation process, the applicant is asked to provide a variety of materials in support of these various aspects. Pertinent information from these supplied materials and other staff research is provided to the Board, and published in a public report at the end of implementing an approved request.

### **What factors the Board found to be significant?**

The Board considers factors described in the public report, in relation to the basic principles of country-code domain delegation described earlier.

### **Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, and the local communities to which country-code top-level domains are designated to serve.

### **Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant

variance on pre-planned expenditure. It is not the role of ICANN to assess the fiscal impact of the internal operations of country-code top-level domains within a country, other than ensuring the operator is based in country and has the appropriate mechanisms to allow the local Internet community to properly oversee the domain's ongoing operation.

### **Are there any security, stability or resiliency issues relating to the DNS?**

For country-code top-level domain delegations, ICANN seeks to approve only such requests where reasonable concerns have been satisfactorily addressed, and the proposed new manager has demonstrated a sufficient level of operational and technical competency where such concerns should be minimal.

## 2.9 Approval of Tracking of Global Policy for Post Exhaustion IPv4 Allocation Mechanisms by IANA

Whereas, the [Board's Review Procedures for Global Internet Number Resource Policies Forwarded for Ratification by the ASO Address Council in Accordance with the ASO MoU \(/en/general/review-procedures-pgp.html\)](#), states that "When, in accordance with step 1 in the Global Policy Development Process of the ASO MoU (Attachment A, article 1), ICANN staff liaising with the addressing community becomes aware of a global policy development within the scope of the ASO MoU, ICANN staff informs the ICANN Board of this development. The Board decides, as and when appropriate, that this development should be followed by ICANN staff and instructs the ICANN CEO to assign staff for this purpose. ICANN staff so assigned shall inform all ICANN Supporting Organizations and Advisory Committees, shall establish an ICANN web page to be kept up to date and shall compile a background report to be kept up to date on this global policy development. This background report shall be provided to the Board as requested."

Whereas, ICANN staff has informed the Board that a policy proposal entitled "Global Policy for Post Exhaustion IPv4 Allocation Mechanisms by IANA" is in development and that this Proposal has entered the first adoption steps within the individual RIRs as well as being recognized by the ASO Address Council as a valid Global Policy Proposal.

Whereas, the Proposal is identified as a global policy development within the scope of the Memorandum of Understanding between ICANN and the ASO.

**RESOLVED** (2011.04.21.11), the Board requests that the development of the policy proposal entitled "Global Policy for Post Exhaustion IPv4 Allocation Mechanisms by IANA" be followed by ICANN staff in line with the Board's Review Procedures for such policy proposals and instructs the ICANN CEO to assign staff for this purpose.

## RATIONALE FOR RESOLUTION 2011.04.21.01.11:

The Global Policy Proposal has reached the discussion stage in all Regional Internet Registries and the time is ripe to start producing and posting Background Reports on the Proposal's status. Directing staff to conduct the required tracking work is in furtherance of ICANN's obligations under the MoU with the ASO and the Board's [Review Procedures for Global Internet Number Resource Policies \(/en/general/review-procedures-pgp.html\)](/en/general/review-procedures-pgp.html).

There will be a nominal budgetary impact when directing staff to track the Proposal, as ICANN staff is already allocated to the ASO, and the tracking of proposals at this stage require limited staff effort. If approved, future implementation may pose additional impacts on the budget, public and security/stability related issues, but those are not ripe for assessment at this time. Requiring staff tracking at this stage will also allow for advance preparation of a future request from the ASO for ratification of the Proposal.

**Resolutions 2011.04.21.01, 2011.04.21.02, 2011.04.21.03, 2011.04.21.04, 2011.04.21.05, 2011.04.21.06, 2011.04.21.07, 2011.04.21.08, 2011.04.21.09, 2011.04.21.10, and 2011.04.21.11 were approved in a single vote approving the consent agenda items. All Board members present unanimously approved these resolutions. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to vote on these resolutions.**

George Sadowsky inquired of the need to direct staff to follow the development of the Global Policy Proposal raised in item 2.9.

Ray Plzak described the process that the Board agreed to with the Address Supporting Organization about seven years ago, that requires the Board to pass a resolution directing staff to follow a global policy proposal that's been introduced inside the five RIRs. Ray noted his agreed with George that if staff is already performing this work, there is no need for the Board to direct the staff action and this could be cleaned up in the process.

The Chair noted that the process was carefully created with the address community, though if there was a Board sense that it's time to look at this process, the Board could undertake this issue.

Ray noted that he would follow through on this matter to see if this step could be removed from the process.

## Main Agenda

### 3. From the BFC - Approval of Increase Of The Registrar Accreditation Application Fee

**Potential Conflicts of Interest (as identified by the General Counsel):**

*Bruce Tonkin* for details, see posted Summary of Statements

of Interest - <http://www.icann.org/en/board/summary-soi-16mar11-en.htm> (</en/board/summary-soi-16mar11-en.htm>).

After identification of Bruce Tonkin's conflict of interest, the Chair called for additional discussion on the resolution. Hearing none, Ray Plzak moved and George Sadowsky seconded the following Resolution:

Whereas, in resolution 01.65 the Board approved the charging of an accreditation application fee of USD 2500, without regard to the number of top-level domains for which accreditation is sought, for applications submitted on or after 1 July 2001;

Whereas, since July 2001 no change has been made in that application fee amount;

Whereas, on 22 November 2010 ICANN posted on its website a proposal to complete additional due diligence checks and to increase the accreditation application fee, with a description of the proposed due diligence checks and the reason for increasing the application fee;

Whereas, an online public comment period for the community to submit comments on the proposal, was held;

Whereas, the public comment received was supportive of the proposed enhancements;

**RESOLVED** (2011.04.21.12), the application fee to be accredited by ICANN as a registrar shall be USD 3,500 for applications submitted on or after 1 July 2011.

**RESOLVED** (2011.04.21.13) that the Board directs staff to conduct a review of the costs associated with the registrar accreditation application process to determine whether current fees cover those costs.

**Twelve Board members voted in favor of Resolutions 2011.04.21.12 and 201.04.21.13. Bruce Tonkin abstained from voting on the Resolutions. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to**

**vote. The Resolutions carried.****Rationale for Resolutions 2011.04.21.12-13****Why the Board is addressing the issue now?**

This has been a topic of discussion in the community as a means to improve security without the need for full policy development or contract amendments. It has been reviewed by the Finance Committee, and is ripe for decision prior to commencing the next fiscal year.

**What are the proposals being considered?**

The Board is considering whether or not to approve increase in Registrar Accreditation Application Fee from USD 2,500 to USD 3,500; the first fee increase in 10 years. The Board is also directing staff to do a full review of the costs associated with processing accreditation applications to assure fees and costs are aligned.

**What Stakeholders or others were consulted?**

The proposed enhancements to the registrar application process and increase in fees were subject to public comment from 22 November 2010 through 21 January 2011; four comments were received, one of them did not fully understand the proposal and the other three expressed full support. The proposed changes to the accreditation process and application fees were presented to the Registrar Stakeholder Group during the ICANN meeting in Cartagena without negative feedback.

**What concerns or issues were raised by the community?**

The only negative concern raised about the fee increase came from a registrar that incorrectly understood it to mean that this would be an increase in the annual fees paid by registrars. No other concerns about the application fee were raised.



## **What significant materials did Board review?**

A Board paper detailing the proposal and an Annex that spelled out the rationale for the amount of the fee increase relative to the costs of pursuing background checks through a third party provider.

## **What factors the Board found to be significant?**

The community recommendations that enhanced due diligence be undertaken in the registrar application review process. The Board Finance Committee reviewed and approved of the financial rationale for the increase and that it was revenue neutral. The BFC further recommended the additional resolution that a study be conducted about the overall application processing costs so that we can determine how costs align with fees. Finally, there was no stated opposition during the public comment forum.

## **Are there Positive or Negative Community Impacts?**

The enhanced due diligent reviews made possible by this fee increase will enhance the review process, especially at a time where it is expected that there will be an increase in interest in registrar accreditations with the introduction of new gTLDs.

## **Are there fiscal impacts/ramifications on ICANN (Strategic Plan, Operating Plan, Budget); the community; and/or the public?**

The fee increase is designed to be revenue neutral while additional background checks will be added to the application review process.

## **Are there any Security, Stability or Resiliency issues relating to the DNS?**

The proposed due diligence checks have been introduced as a response to security concerns raised by the ICANN community and a desire that the process

followed to accredit new registrars be enhanced with such due diligence checks in a revenue neutral fashion.

#### 4. From the SIC – Approval of Charter for Board Technical Relations Working Group

The Chair introduced this agenda item for discussion.

Steve Crocker raised the broader issue of what is the correct process and timing for consideration of reports generated through working groups or outside contractors, and the need for the Board (through a committee or as otherwise appropriate) to review the work to confirm that there aren't incorrect assumptions or faulty conclusions within that report before it's released for public consumption or comment. The concern is that there is a perception of approval of the report, which may not have been subjected to any internal review cycle or critique to determine if the work of the group is completed.

Ray Plzak confirmed that for this report, the Structural Improvements Committee would be performing such a review over the working group's report. In order to achieve that review cycle, the timeline within the proposed charter would have to be slightly modified to allow for that review to occur.

Steve noted his agreement with this approach.

Reinhard Scholl proposed some additional language for the timeline.

The Chair suggested that, instead of modifying the Charter at the meeting, the language of the resolution be modified to allow for final adjustment of the timetable to account for this further reporting review cycle.

Ray noted his agreement with the Chair's suggestion.

The Chair then moved the Resolution as amended, to allow for a final adjustment of the timetable. Ray Plzak seconded the amended resolution.

The Board then took the following action:

Whereas, on 18 March 2011, the Board resolved to receive the Final Report of the TLG Review and to establish a Board Technical Relations WG, while directing the Structural Improvements Committee (SIC) to develop a Charter for this WG "based upon the report of the TLG review, comments to that review and any other available information, for consideration at the Board meeting of 21 April 2011", at <http://www.icann.org/en/minutes/resolutions-18mar11-en.htm#7> ([/en/minutes/resolutions-18mar11-en.htm#7](http://www.icann.org/en/minutes/resolutions-18mar11-en.htm#7)).

Whereas, the SIC has developed a proposed Charter for the BTR WG.

Whereas, the SIC, at its 11 April 2011 meeting, unanimously agreed to recommending the proposed BTR WG Charter for adoption by the Board.

**RESOLVED** (2011.04.21.14), the Board approves the BTR WG Charter proposed by the SIC subject to final adjustment of the Charter to include a step for further review and instructs the SIC, in coordination with staff, to support and follow the work of the WG.

**All Board members present unanimously approved of Resolution 2011.04.21.14. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to vote on the Resolution. The Resolution carried.**

### Rationale for Resolution 2011.04.21.14:

The proposed action is in direct response to a request from the Board and serves to advance the handling of the TLG review outcome in line with the direction set forth by the Board. While community input was not sought nor necessary for the drafting of this Charter, the WG is expected to consult with the community as it reaches its recommendations. The functioning of the BTR WG will require some support from existing staff and certain limited expenditures. There is no reason to delay this

action as it would have very marginal budgetary consequences. This action will not have any input on the security or stability of the DNS.

## 5. CEO's Report

The Chair noted that the CEO's report is treated as read, and invited the CEO to provide any additional updates.

The CEO noted that he is pleased with the ongoing collaboration among Internet organization leaders following the February meeting in Miami, including regular calls.

## 6. New gTLDs

The Chair identified Directors and Liaisons present at the meeting who have declared conflicts of interests, including Thomas Narten, Bruce Tonkin and Suzanne Woolf, and the Board agreed the identified persons could remain present for the discussion.

The Chair thanked Kurt Pritz, Karen Lentz and the other members of Kurt's team who had the Applicant Guidebook materials out by the stated deadline.

The CEO noted his thanks to the extraordinary efforts of the team that drafted the 26 documents posted on 15 April 2011, as well as his thanks to the Board members that served as topic leaders.

Kurt provided an update to the Board regarding the progress against the timeline passed at the Silicon Valley/San Francisco, and noted that the 15 April 2011 Applicant Guidebook is currently out for public comment. In addition, there is a call planned with the GAC during the Board of Director's retreat in May, in preparation for a 30 May 2011 publication of the Applicant Guidebook.

Kurt provided a brief discussion of additional inputs received, including community discussion on the scope of the IP

protections included in the 15 April 2011 Applicant Guidebook, as well as indication of potential issues regarding the scope of the GAC objection procedure. Kurt discussed the possibility of providing a letter to the GAC providing clarification regarding the continued discussions between the Board and the GAC on a few remaining topics, including trademark protection, objection procedures, and post-delegation disputes. Kurt also advised the Board that he was invited to testify at a hearing before the US House of Representatives Subcommittee on Intellectual Property regarding ICANN's new gTLD program.

The Chair invited Heather Dryden to comment on the usefulness of the letter suggested by Kurt.

Heather noted that a letter detailing the next steps for the Board and the GAC would be helpful. Heather noted that the GAC is currently reviewing the 15 April 2011 Applicant Guidebook posting, and after that review, the GAC will be in a better position to engage in phone calls and to clarify matters.

Bruce Tonkin inquired about the timeframe needed by the GAC to continue the review of the recent posting.

Heather noted that at least a week, possibly longer, was required.

The Chair explained that potential calls to discuss issues prior to the GAC/Board consultation in May were being offered in the event they would be helpful to the GAC, while there is likely to be a two-way benefit from the call.

Heather confirmed that if either the GAC or the Board signal that there would be a benefit to the calls, further consideration would be given at that time.

Bruce offered that an earlier briefing call may have a benefit of providing some explanation of the materials, while later calls could address specific question. Bruce suggested that providing an opportunity to take people through the key issues and identify key points for discussion could be useful.

The Chair thanked staff for the update and noted that work

would continue.

## 6.1 Review of Vertical Integration for Existing gTLD Registry Operators

Kurt Pritz provided an update regarding existing gTLD Registry Operator requests to obtain approval to vertically integrate its registry operations with a registrar business, to meet the integrated business model approved in the new gTLD program. Kurt noted that staff provided a letter to an existing Registry Operator indicating that this issue will be resolved and they can hold themselves out in this fashion. NeuStar has now requested that formalization of the ability to vertically integrate be expedited, and staff is therefore recommending that a process be developed to allow this to happen.

The Chair noted this understanding that this issue is not expressly linked to new gTLDs. Based upon the work performed on this issue, the changes to the registry/registrar market should still move forward. There has been an extensive debate around this issue. While it will certainly happen in the new gTLD program, there also has to be an allowance to migrate to the process for the legacy gTLDs once the migration issues have been worked out.

The General Counsel advised that the prior Board resolutions regarding cross-ownership indicated that existing registry operators would have the opportunity to migrate to the new form of registry agreement, noting that additional conditions may be necessary and appropriate to address the particular circumstances of existing registries. Because of this directive, there was not an ability to move forward net there was clarity on the terms of the registry agreement for use in the new gTLD program, as well as the corresponding code of conduct and identification of specifications that could apply to both existing and future registry operators. Therefore, a new version of the registry agreement has to be approved; the aspects of that agreement that should be adopted by existing registry operators should be identified; and issues related to market power have to be addressed. Staff's recommendation is that the Board authorize staff to draft a process that can be published to

the community, as the existing registry agreements would be changed in a manner that would impact others. It is therefore appropriate to take the public comment on the change to the registry agreements.

The CEO confirmed his support of the approach laid out by the General Counsel, and noted that it is important to have community input on this issue.

The Chair noted his concern that there is difficulty presented here because this is not simply about creating the new rules for new TLDs and moving the existing operators towards this rule. Instead, this situation is addressing an existing registry operator looking to adopt the new rules more quickly, while some serious concerns are not yet completed.

Bruce Tonkin advised that it is important to be careful here, and not simply move the existing registry operators to new rules by allowing the addition of a clause permitting cross ownership to the registry agreement while leaving the other terms unchanged. Bruce noted his preference that if the registry operators want the benefit of cross-ownership, there should be an obligation to take on additional elements of the new registry agreement, such as a code of conduct. There has to be a balance.

The Chair agreed with Bruce, and questioned whether the entire process needed to be predicated on the Board approval of the form of registry agreement.

Bruce responded that the new form of registry agreement approved as part of the new gTLD program did not have to necessarily tie to new gTLDs only, but could apply to existing registries as well.

Rita Rodin Johnston noted the concerns of existing registries, that they would like to be able to become registrars now because of the planning and deals being made in preparation for the new gTLD program. There should quickly be a process for existing registries to become registrar. Rita stated that she does not see the link with the new registry agreements, and she does not think it would be proper to require amendment to the

current agreement if a registry operator wants to become a registrar, as Bruce was suggesting. The registry operator should be able to be a registrar pursuant to the Board's earlier decision, and when their current agreements expire, they can sign onto the new form of the registry agreement.

The Chair noted his agreement with Rita, and reiterated that as only one term of the existing registry agreements would need to change, that doesn't seem to require a shifting to the new agreement.

The General Counsel noted that allowing a change of the single clause could be "cherry-picking", and there's a concern that registry operators would not take on the same responsibilities that would exist in the new form of registry agreement. In addition, the 5 November 2010 resolution only permits the existing registry operators to transition to the new form of registry agreement, which is not yet approved.

The Chair noted that Board resolutions aren't perfect, and the Board was likely thinking that while the existing registries would be allowed to transition to the new form of agreement, he is not sure that there was the intention that the cross ownership issue be linked to the registry agreement.

The General Counsel summarized that there is a need for a process in order to allow the existing registries to be allowed to serve as registrars, but that process needs to be clear, transparent, published and have public comment on it before ICANN acts on that process.

Rita noted her agreement with that statement. However, part of the reason she understood for the Board's vertical integration decision was that there not be an unintended tying of current registries' hands, and that they should have the ability to compete on equal terms to start planning for new gTLDs. While there has to be a proposal to finalize the registry agreement, Rita noted that she does not see how that impacts the decision to say that existing registries can be registrars with the need applicants.

The General Counsel agreed with Rita's position, and noted that



the letter previously provided set that idea out as the intent. In addition, there have been reports that other registries are moving forward in planning and making deals on the basis of serving as a registrar. Therefore, it's unclear why a current registry operation would believe this restriction is currently harming them.

The Chair reiterated that he believes there's a mistake in the resolution to which the General Counsel is referring. The point was not to transition to the registry agreement, but rather to allow the existing registry operators the benefits of the vertical integration decision. That intent is not properly expressed when it's limited to adhering to the new registry agreement. The Chair noted that he does not think that the Board agreed or intended that the legacy TLDs would have to sign up to all the new conditions with their legacy TLDs. At the current time, there is a prohibition on owning more than 15% of a registrar, and the Board has agreed to do away with that. In relation to the legacy agreements, how do we transition the legacy registry operators to that intent? The Chair noted his belief that that transition was not intended to bring all existing registry operators over to the new registry contract for the operation of the legacy TLD, but to have the new contract if they have a new TLD. The Chair does not think staff should regard itself as straight jacketed by that resolution. There needs to be a transition process to allow the current registries and registrars, as appropriate, to move from the vertical separation rule.

The General Counsel noted that the Board's discussion in advance of the 5 November 2010 vote on vertical integration was specifically about the code of conduct and other issues introduced in the proposed registry agreement that were relevant to the cross-ownership issue. The Board discussion included dialogue about how in the new agreement, certain things would be acceptable, though they wouldn't be allowed under the existing agreements. There was specific discussion about the need to transition to a new agreement. No one knew at that time that it would take several months to reach a decision on the form of the new registry agreement. However, in light of those Board discussions, it is appropriate to go back and develop a formalized process that could be vetted by the public

about how to address this. It would be premature to just offer a change solely to the cross-ownership provision of the agreement.

Rita commented that she still does not think that the vertical integration decision had anything with saying that an existing registrar would have to cancel their current agreement and sign onto a new one for existing TLDs. Rita requested that the conversation continue offline.

The CEO noted that from an operational standpoint, it's beneficial to ICANN to have as consistent of contracts as possible, and the extent that this provides an appropriate and fair opportunity to migrate to more consistent contracts across all registries, that will have long-term benefits for ICANN and the community in terms of clarity, enforceability and knowledge.

The Chair noted his agreement with the CEO's statement, however questioned making this process contingent on the approval of the new gTLD program. The Chair inquired whether there's any way to get this done faster for those who say they are being prejudiced in the market? The Chair stated that he is in agreement with all other parts; there has to be a process for transitioning, and public comment is necessary. Does that have to wait until the Board approves the program?

The General Counsel noted that placing a process for public comment would bring a decision close to the date of the next official Board meeting. He also offered that staff could return to the existing registry operator to see if there's anything additional that will help set out that they will be able to have cross ownership in new TLDs. There are really two issues here. One is can their business compete. The second is how do we address our contracts fairly. That second issue is too important to rush and risk getting wrong. However, staff can certainly go back and offer additional accommodations, through statements or otherwise, that will help them clearly offer the ability to compete.

The Chair noted that on the condition that that staff will continue working with the community and other existing registry operators on this, the General Counsel's proposal sounds fair.

Rajasekhar Ramaraj then moved and the Ray Plzak seconded the following Resolution:

Whereas, the Board Resolved on 5 November 2010 that ICANN will not restrict cross-ownership between registries and registrars for new gTLDs, and that "ICANN will permit existing registry operators to transition to the new form of registry agreement, except that additional conditions may be necessary and appropriate to address particular circumstances of established registries."

Whereas, current gTLD Registry Agreements include cross-ownership restrictions.

Whereas, ICANN has received inquiries from several Operators about the process to remove the cross-ownership restrictions from their Registry Agreement and/or their ability to apply to become an ICANN-accredited Registrar.

Whereas, the removal of the cross-ownership restrictions for Operators is predicated on first, the Board's approval of the new gTLD Program, and second, the Board's approval of a process for Operators to transition to the new form of Registry Agreement or to request an amendment to their existing registry agreements.

Whereas, the Board anticipates that it will consider the new gTLD Program and the launch of new gTLDs at its meeting in Singapore in June 2011;

***RESOLVED*** (2011.04.21.15), the Board directs the CEO to develop a process for existing gTLD registry operators to transition to the new form of Registry Agreement or to request amendments to their registry agreements to remove the cross-ownership restrictions. This process would be available to existing operators upon Board approval of the new gTLD Program.

**Eleven members of the Board approved of Resolution 2011.04.21.15. Rita Rodin Johnston voted in opposition to the Resolution. Peter Dengate Thrush abstained from voting. Sébastien Bachollet, Bertrand de la Chapelle, and**

## **Erika Mann were unavailable to vote on the Resolution. The Resolution carried.**

### **RATIONALE FOR RESOLUTION 2011.04.21.15**

#### **Why the Board is addressing the issue now?**

The Board is addressing this now since they are scheduled to consider the new gTLD Applicant Guidebook on 20 June 2011. On 4 November 2010, ICANN Board Resolved that there should be a means for existing gTLD Registry Operators ("Operators") to transition to the new form of registry agreement, including the removal of restrictions on ownership of registries by registrars and vice-versa. The Operators argue that they need their current restrictions on cross-ownership to be removed on a timely basis in order to be able to compete on a level playing field with registrars that are planning to apply to operate new gTLDs. Approving a process for the existing Operators to pursue removal of their cross-ownership restrictions on a timely basis in conjunction with the Board's approval of the new gTLD Program would cause ICANN to appear to be responsive to the Operators' requests.

#### **What concerns or issues were raised by the community?**

The Operators argue that they need their current restrictions on cross-ownership to be removed on a timely basis in order to be able to compete with registrars that are planning to apply to operate new gTLDs. There are no current restrictions that prevent registrars from applying to operate new gTLD Registry Operators.

#### **Are there Positive or Negative Community Impacts?**

There are positive community impacts as existing gTLD Registry Operators would be in a position to have their cross-ownership restrictions removed and that would put them on a level playing field with new gTLD Registry

Operators.

Are there fiscal impacts/ramifications on ICANN (Strategic Plan, Operating Plan, Budget); the community; and/or the public?

There are no foreseen fiscal impacts/ramifications associated with approval of this Resolution on the Strategic Plan, the Operating Plan and/or the Budget. There is no information available at this time of the fiscal impacts/ramifications on the community or the public.

**Are there any security, stability or resiliency issues relating to the DNS?**

There are no known issues relating to the security, stability or resiliency of the DNS at this time.

## 7. ATRT

### 7.1 Board Management of ATRT Recommendations

Denise Michel provided an update for the Board on the implementation of the Accountability and Transparency Review Team recommendations. Denise discussed a proposed recommendation for the delegation of oversight of the implementation work among existing Board committees, as well as the potential to consider appointing a temporary ATRT implementation group of Board and GAC members to oversee the implementation work for the GAC-related recommendations.

The Chair inquired as to whether there had been any discussions with the GAC about their inclusion in this process, and the creation of a temporary working group to look at the implementation of the ATRT recommendations.

Denise confirmed that there had not been extensive discussions with this GAC on this item.

Jamie Hedlund offered that he and the chair of the GAC had

some informal discussions about this, and while Heather Dryden was not speaking on behalf of the GAC, there seemed to be some openness to the idea of setting up a group separate from the ongoing Joint Board/GAC Working group and open to the entire GAC for participation.

Heather confirmed that there has been limited discussion. Heather mentioned that as there's currently a Board/GAC Joint Working Group on the review of the role of the GAC, she was not prepared to see a resolution on this topic. Heather noted that she has questions about how the temporary group would relate to the existing group, including its mandates and timing. Would the temporary group be convened only after the current efforts are concluded? Would they be consecutive? Heather asked for clarification on the staff recommendation.

The Chair noted that the current Joint Working Group has its own charter, timetable and set of responsibilities. The anticipated for the temporary group is narrower and more specific. This would be a dedicated focus group to deal with a particular set of issues, with a new timetable and its own set of responsibilities. The ATRT and the community are looking for progress and, that could be a basis for having this separate set of responsibilities.

Denise confirmed that the Chair's explanation is part of the rationale for this recommendation. Given that the Joint Working Group was chartered in June 2009, and its charter is broader than what is needed to address the ATRT recommendations, it was thought that in order to come close to the deadlines recommended by the ATRT, a smaller and more focused group could move more quickly in providing guidance and ideas on implementation. Their work, of course, would be coordinated with the outcomes of the Joint Working Group. Denise clarified that this is simply a staff idea of one way to deal with these recommendations.

Ray Plzak noted that there is likely to be a lot of interest from the GAC to participate in such a group, and challenged the suggestion that the temporary group would be a streamlined body. Ray asked Heather if she anticipated that the GAC would operate differently for this group as it has in its participation in

the Joint Working Group.

Heather confirmed that it would be a very similar level of participation. There would likely be the same smaller group within the GAC with more activity on certain topics. Heather noted that the work of the Joint Working Group is very linked to the ATRT recommendations, though that work may be more detailed and include recommendations beyond those captured in the ATRT report. Heather commented that if the current Joint Working Group finishes its work in June as planned, then it makes sense to consider having a group continue where the Joint Working Group left off. Otherwise, it appears that the same types of issues will be under consideration in both groups, with some of the same people participating.

The Chair asked if Heather was suggesting that the Board wait for the Joint Working Group to issue its report prior to starting the ATRT work.

Heather confirmed that that is more or less her suggestion. If the Board wanted to anticipate the second working group and identify who would participate on it, there may be some work that could be completed before June, but it is not likely that the substantive work would be started until the report of the first Joint Working Group is completed.

The Chair asked Denise how that affects ICANN's obligation under the Affirmation of Commitments, to receive and act on the report in June.

Denise confirmed that the obligation is for the Board to act in June, though the Affirmation of Commitments does not specify what the action needs to be. Staff has prepared a recommended timeline for each of the recommendations, and there's essentially six recommendations that deal with the GAC. Three were presented by the ATRT with proposed timelines of March 2011, and the other three do not specify a timeline.

The Chair asked Denise if there are things that the Board or staff can do to advance the implementation of the GAC-related recommendations prior to GAC involvement.

Denise noted that staff has and can continue to provide suggestions and recommendations for action and changes in processes, and await Board and GAC feedback.

The Chair inquired whether the Board could appoint the Board-side of the temporary working group to do some work while waiting for the Joint Working Group report, or if it is best to put all of this on hold until the report is issued. There is a bit of collision of process here, as there is an ongoing group that is already working on improvements to various aspects of the GAC, and the ATRT report looks at many of those same issues.

Denise noted that it could be valuable if interested Board members had specific ideas of what they wanted to work on in the interim, and then that would could be followed up on after the Joint Working Group report.

The Chair asked for Ray's suggestion on how to proceed, as Ray is the Chair of the Joint Working Group.

Ray noted that he agrees with Heather in terms of timing, and that there are some details that will come out of the Joint Working Group report that will address the ATRT recommendations. Ray stated that he's hesitant to do anything other than start a new working group once the current group is finished, partially because the GAC has a lot on its plate and its meeting time is limited. Any planning for work involving the GAC has to incorporate how the GAC operates. While the Board could certainly form a Board group that could start working on things, however the terms of reference for that group would have to be worked out with the GAC.

Heather commented that the work in the Joint Working Group has been very positive and much of the report is already in place. There's good substance and detail and explanations captured, and the goal is to finalize in June. This is a priority for the GAC, and clearly a priority for the Board as well. There are useful recommendations that will come out of this work.

The Chair asked if the Joint Working Group already looked at or considered the ATRT recommendations and if any of those recommendations had already been incorporated into the



existing work.

Heather and Ray confirmed that the Joint Working Group helped inform the ATRT Recommendations, rather than the ATRT informing the work of the Joint Working Group.

Ray explained that the Joint Working Group met separately with the ATRT, and the takeaways from that meeting appear to help shape the ATRT report.

Bruce Tonkin noted that the Board has to be careful to not keep creating working groups, as it then requires additional staff support as well as further taxing the Board members. Bruce suggested that as there is already a Joint Working Group, could we ask that the Joint Working Group take this new information – the ATRT recommendations and consider that information and provide a brief report? The outcomes of that report could be varied for example it could be agreement, it could be that more time is needed to complete the work, it could be a recommendation new group should be formed.

Denise confirmed that having the Board request that the Joint Working Group address the ATRT recommendations could be helpful.

The Chair noted that the Board could request the Joint Working Group to review the recommendations and needed and provide comments regarding what should be done to address the recommendations within the forthcoming report.

Denise noted that staff could support that effort.

Heather confirmed that this is similar to what the Joint Working Group would be doing anyway.

The Chair then turned to the consideration of the allocation of the remainder of the ATRT recommendations to the committees of the Board, and noted that the allocation seems to be appropriate.

The Chair then moved and Bruce Tonkin seconded the following resolution:

Whereas, the Accountability and Transparency Review Team (ATRT) Report provided 27 recommendations to improve ICANN, and the Affirmation of Commitments obligates ICANN to take action on the Report by 30 June 2011;

Whereas, implementation of these recommendations will require significant Board work, and extensive coordination with key community groups (including the Governmental Advisory Committee) and staff;

**RESOLVED** (2011.04.21.16), the Board tasks the following Board Committees to address the specified ATRT recommendations in the attached document.

**All Board members in attendance unanimously approved of Resolution 2011.04.21.16. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to vote on the Resolution. The Resolution carried.**

## RATIONALE FOR RESOLUTION 2011.04.21.16:

As required by the Affirmation of Commitments, the recommendations resulting from the Accountability and Transparency Review Team (ATRT) were provided to the Board and posted for public comment. Public comments were supportive of the ATRT report and staff's due diligence resulted in advice that ICANN move forward with implementation of the ATRT's recommendations. Staff provided initial, proposed plans that demonstrated ICANN's ability to implement the recommendations and provided estimated resource costs. The Board asked staff to work with affected organizations and develop final implementation plans for Board approval, and notes that ICANN has already made progress on implementation of several operational changes called for by the ATRT.

Implementation of the 27 ATRT recommendations will require significant Board work, and extensive coordination with key community groups (including the Governmental Advisory Committee) and staff. To help ensure implementation moves forward expeditiously, the

Board is delegating recommendation implementation work to relevant Board Committees and the GAC/Board Joint Working Group.

## 7.2 Estimated Budget Implications of ATRT Recommendations for FY2012 Budget

Rajasekhar Ramaraj raised the question of formally assigning the Finance Committee with the responsibility for oversight of budget recommendations to meet the ATRT recommendations. Given the amount of the proposed budget, and the need to address the source of funding, Ramaraj suggested that the Finance Committee is the proper place for this discussion to occur prior to providing recommendations to the Board.

The Chair and Bruce Tonkin, Rita Rodin Johnston, Ray Plzak and Cherine Chalaby each expressed support for Ramaraj's proposal.

The Chair and Ramaraj then discussed the timing of the Finance Committee's consideration of the ATRT implementation funding, at its 10 May 2011 meeting, and the Finance Committee would then report back to the Board.

Akram Atallah noted that the reason that a resolution recommending approval of the ATRT implementation budget was provided to the Board for consideration at this meeting is that ICANN needs to start on the implementation work, following from the Board's resolution in March noting that all of the recommendations are capable of implementation. The longer it takes for the Board to decide on the approval of the budget, the less that staff can do towards implementation.

The Chair confirmed that items that do not have major budgetary implications can proceed toward implementation. The Chair asked Ramaraj whether a delay of Board approval is effectively putting the implementation of the ATRT recommendations on hold.

Ramaraj noted that one of the concerns is the increase in the estimated budget since the last meeting. Though there is an

urgency here, a process of allowing spending and then retroactively approving that spending does not make sense. How is the Board to approve something when it does not know what it is approving? The Board needs to understand the increase.

Akram responded that the last budget that had been presented had US\$965,000 plus four full time employees (FTEs). The four FTEs amount to \$US680,000. There was also an additional US\$1,000,000 added for GAC-related activities. The consideration of the GAC-related funding could be postponed until there's further review, and then staff could proceed with the remainder of the recommendations that do not involve the GAC.

The Chair noted that instead of having the full Board discuss the various allocations and changes, the BFC seems to be the proper place to delve into this topic. An expenditure of this magnitude needs to be reviewed fully, even if it does delay the implementation of some of the recommendations.

Ramaraj then moved and the Chair seconded the following resolution:

Whereas, the Board has found that the Accountability and Transparency Review Team's (ATRT's) recommendations have the potential to advance ICANN's transparency and accountability objectives and may be implemented by ICANN following careful and transparent consideration, and with the necessary support and resources;

Whereas, an estimated US\$2,600,000 will be required to complete ATRT implementation activities in FY2012;

***RESOLVED*** (2011.04.21.17), the Board asks the BFC to consider the FY2012 ATRT implementation funding as detailed by staff and to report back to the Board at its next meeting.

**All Board members present unanimously approved Resolution 2011.04.21.17. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to vote on the Resolution. The Resolution carried.**

## RATIONALE FOR RESOLUTION 2011.04.21.17

The Board noted previously that all 27 of the ATRT recommendations have the potential to advance ICANN's transparency and accountability objectives and may be implemented by ICANN following careful and transparent consideration, and with the necessary support and resources. The Board recently asked staff to work with affected organizations and develop final implementation plans for Board approval, and noted that ICANN has already made progress on implementation of several operational changes called for by the ATRT. The Board is doing due diligence on the implementation of the recommendations and wants to ensure that the fiscal year 2012 budget, which is being finalized, includes appropriate funds for these activities.

The Board has approved inclusion of additional funding in the FY2012 budget for implementation of the ATRT recommendations, and reiterates its commitment to advancing ICANN's accountability and transparency.

### 8. .NET AGREEMENT RENEWAL

Kurt Pritz provided a brief update to the Board on the .NET Agreement Renewal status. On 11 April 2011, the VeriSign-proposed renewal was posted for public comment. Kurt noted that the agreement is essentially the same as the existing agreement, and explained two notable changes. One is that the agreement allows VeriSign to take action to prevent registration of particular domain names to protect the security and the stability of the DNS. For example, in a Conficker-type situation, VeriSign can take action immediately and notify ICANN. The proposed agreement also allows VeriSign to provide special training, technical support, marketing or incentive programs directed to registrars located in underserved geographies. The financial provisions are consistent with the existing agreement. VeriSign will continue to contribute 75 cents per registration to ICANN, and there will be an allowance for price increases. The current agreement is set to expire on 30 June 2011, so the

Board will need to consider the renewal agreement prior to that date.

The Chair noted that no action was required at this time.

## 9. IDN ccTLD DELEGATIONS

Elise Gerich noted that this agenda item was provided with the anticipation that the Board IANA Committee would have finalized a recommendation prior to the Board meeting. However, the IANA Committee decided to continue this discussion. Therefore, this item, regarding the clarification of terminology in delegation and redelegation processes, is withdrawn from the agenda pending further work and recommendation from the IANA Committee.

Kuo-Wei Wu, the Chair of the IANA Committee, confirmed that discussion was still ongoing at the committee level.

Heather Dryden inquired about the potential relationship of the work anticipated under this item to the work in the ccNSO regarding ccTLD delegation/redelegation and retirement. The GAC participates as part of that working group.

Kuo-Wei noted that the GAC will be an important stakeholder within this conversation.

Thomas Narten noted that there is urgency in having a recommendation out of the committee regarding this terminology issue, so that the Board can use this when considering delegations.

The Chair noted the issue appears to be what should the Board do in considering the applications arising out of the Fast Track process while the ccNSO is undertaking the broader work on the fundamental issue of delegations and redelegations.

Elise explained that the ccNSO working group completed its report, and work is ongoing to start a framework for interpretation of that guidance. Until that is complete, there is a day-to-day responsibility to meet the operational work of

processing delegation and redelegation requests. The IANA Committee work will be focused upon providing interim guidance to the Board so that the day-to-day work can proceed while the broader ccNSO work is being finalized. This work will provide some interim guidelines.

Heather noted that she has commented previously on this issue and provided the GAC perspective. Heather suggested that the IANA Committee may wish to explore more formally inviting discussion or consultation with the GAC on that topic. Heather confirmed the GAC would want to respond quickly in light of the challenges faced in processing applications. Heather looks to work with Kuo-Wei on this item.

Kuo-Wei invited Heather to join the next IANA Committee discussion at this topic, to assist in finding a solution on this sensitive topic.

### 9.1 Delegation of الجزائر ("Al Jazair") representing Algeria in Arabic

Ray Plzak moved and Rita Rodin Johnston seconded the Resolution before the Board.

The Chair then called for discussion on the Resolution.

Mike Silber noted that he had a concern with the local community support component reported to the Board, and suggested that this delegation be postponed. Mike noted that he has been consistent in this request over the past 18 months.

The Chair noted that the Board is in a difficult position. There have been a number of delegations approved through the Fast Track process that raise a similar concern. The decision was made that based on the enthusiasm for the Fast Track, the potential of waiting one to two years for the ccNSO work to complete required the Board to move forward in approvals. The Chair noted that he is prepared to continue on that same course.

Ray stated that the Chair's observation was interesting, that the Board keeps moving ahead while the ccNSO work is ongoing.

This could give incentive to slow down the work in the ccNSO as the Board is approving items anyway and setting precedent. Ray questioned whether the Board is co-opting the ccNSO process.

The Chair explained that the special treatment of the Fast Track has been made clear. There are a limited number of approvals, and they are a small portion of the ccTLD space. The Chair did not agree that the Board is accepting precedent that the ccNSO will feel bound by.

Ray inquired where the Board will draw the line.

Bruce Tonkin noted that there are a couple of protections available. First, there is a redelegation process, if the community later felt that the operator was inappropriate. Second, it is within redelegations that Bruce pays more attention to the local community support issue. If there's a request to move from one operator to the next, the Board should expect to see outreach to understand that the move is one that the community using that ccTLD wants. Therefore, there's relatively low risk in accepting the Fast Track delegations.

The Chair noted his agreement with Bruce. Further, the Chair commented that that in many cases, the Fast Track delegation is to the same entity that is managing the ASCII ccTLD for the country or territory, though not always.

Cherine Chalaby noted agreement with the Chair, that there is no rationale for rejecting the delegations at this time. Instead, ICANN should be encouraging the use of IDNs, instead of seeking to discourage use.

The Board then took the following action:

Whereas, Algeria is currently listed in the ISO 3166-1 standard;

Whereas, الجزائر ("al-Jazair"), encoded as "xn--lgbbat1ad8j", is a string that has been deemed to appropriately represent Algeria through the IDN Fast Track process;

Whereas, ICANN has received a request for delegation of الجزائر.



to Centre de Recherche sur l'Information Scientifique et Technique (CERIST);

Whereas, ICANN has reviewed the request, and has determined that the proposed delegation would be in the interests of the local and global Internet communities.

**RESOLVED** (2011.04.21.18), that the proposed delegation of the الجزائر top-level domain to CERIST is approved.

**Eleven Board members approved of Resolution 2011.04.21.18. Mike Silber opposed the Resolution. Ray Plzak abstained from voting on the Resolution. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to vote on the Resolution. The Resolution carried.**

Ray Plzak stated that his abstention is based upon learning that Algeria is not a member of the GAC.

## RATIONALE FOR RESOLUTION 2011.04.21.18

### Why the Board is addressing the issue now?

Staff present delegation and redelegation requests for country-code domains to the Board for decision, once staff are satisfied the applicant has provided a sufficiently complete application that has a reasonable prospect of a positive Board decision. In line with ICANN's commitments to perform timely processing of requests relating to the IANA function, and the DNS root zone in particular, the ICANN Board seeks to evaluate such requests at its next scheduled Special Meeting.

### What is the proposal being considered?

The proposal is to approve a request to IANA to change or designate the sponsoring organisation (also known as the manager or trustee) of a country-code top-level domain. In line with established practice, the ICANN Board is involved in making the decision to proceed with such requests as one step of this multi-step process.

## **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, ICANN staff consults with the applicant, the current operator (if applicable), and other directly connected parties. In line with ICANN's practice of keeping incomplete root zone change requests in confidence, ICANN has not performed open consultation on this matter.

## **What concerns or issues were raised by the community?**

Any concerns or issues are raised within the public report that will be published in conjunction with this action. This report will be published on the IANA website at <http://www.iana.org/> should the root zone change request have successfully completed final processing, usually 1-2 months after the Board's decision.

## **What significant materials did the Board review?**

The Board is involved in assessing requests against a variety of public interest criteria. This criteria includes establishing the country-code is eligible (e.g. listed in the ISO 3166-1 standard); establishing the proposed manager is supported by the local Internet community; establishing the proposed operator is operationally and technically competent; establishing the proposed manager is based locally and bound under local law; establishing the proposed manager operates fairly and equitably; establishing that in cases there is a transfer of operations that an appropriate plan is in place to preserve ongoing stability of the domain; and establishing that the action is compatible with any applicable local laws and regulations. During the staff compilation process, the applicant is asked to provide a variety of materials in support of these various aspects. Pertinent information from these supplied materials and other staff research is provided to the Board, and published in a public report at the end of implementing an approved request.

### **What factors the Board found to be significant?**

The Board considers factors described in the public report, in relation to the basic principles of country-code domain delegation described earlier.

### **Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, and the local communities to which country-code top-level domains are designated to serve.

### **Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the fiscal impact of the internal operations of country-code top-level domains within a country, other than ensuring the operator is based in country and has the appropriate mechanisms to allow the local Internet community to properly oversee the domain's ongoing operation.

### **Are there any security, stability or resiliency issues relating to the DNS?**

For country-code top-level domain delegations, ICANN seeks to approve only such requests where reasonable concerns have been satisfactorily addressed, and the proposed new manager has demonstrated a sufficient level of operational and technical competency where such concerns should be minimal.

## 9.2 Delegation of المغرب ("al-Maghrib") representing Morocco in Arabic

The Chair noted that many of the same concerns raised in consideration of the prior resolution would be applicable here.

Cherine Chalaby moved and George Sadowsky seconded the resolution before the Board.

The Chair called for further discussion, and hearing none, the Board took the following action:

Whereas, المغرب ("al-Maghrib"), encoded as "xn--mgbc0a9azcg" is a string that has been deemed to appropriately represent Morocco through the IDN Fast Track process.

Whereas, ICANN has received a request for delegation of المغرب to the Agence Nationale de Réglementation des Télécommunications.

Whereas, ICANN has reviewed the request, and has determined that the proposed delegation would be in the interests of the local and global Internet communities.

**RESOLVED** (2011.04.21.19), the proposed delegation of the المغرب domain to the Agence Nationale.

**Twelve Board members approved of Resolution 2011.04.21.19. Mike Silber opposed the Resolution. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to vote on the Resolution. The Resolution carried.**

Mike Silber stated that his opposition is based on the same reasons explained in discussion of the prior resolution.

## RATIONALE FOR RESOLUTION 2011.04.21.19

### Why the Board is addressing the issue now?

Staff present delegation and redelegation requests for country-code domains to the Board for decision, once staff are satisfied the applicant has provided a sufficiently complete application that has a reasonable prospect of a positive Board decision. In line with ICANN's

commitments to perform timely processing of requests relating to the IANA function, and the DNS root zone in particular, the ICANN Board seeks to evaluate such requests at its next scheduled Special Meeting.

### **What is the proposal being considered?**

The proposal is to approve a request to IANA to change or designate the sponsoring organisation (also known as the manager or trustee) of a country-code top-level domain. In line with established practice, the ICANN Board is involved in making the decision to proceed with such requests as one step of this multi-step process.

### **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, ICANN staff consults with the applicant, the current operator (if applicable), and other directly connected parties. In line with ICANN's practice of keeping incomplete root zone change requests in confidence, ICANN has not performed open consultation on this matter.

### **What concerns or issues were raised by the community?**

Any concerns or issues are raised within the public report that will be published in conjunction with this action. This report will be published on the IANA website at <http://www.iana.org/> should the root zone change request have successfully completed final processing, usually 1-2 months after the Board's decision.

### **What significant materials did the Board review?**

The Board is involved in assessing requests against a variety of public interest criteria. This criteria includes establishing the country-code is eligible (e.g. listed in the ISO 3166-1 standard); establishing the proposed manager is supported by the local Internet community; establishing the proposed operator is operationally and

technically competent; establishing the proposed manager is based locally and bound under local law; establishing the proposed manager operates fairly and equitably; establishing that in cases there is a transfer of operations that an appropriate plan is in place to preserve ongoing stability of the domain; and establishing that the action is compatible with any applicable local laws and regulations. During the staff compilation process, the applicant is asked to provide a variety of materials in support of these various aspects. Pertinent information from these supplied materials and other staff research is provided to the Board, and published in a public report at the end of implementing an approved request.

### **What factors the Board found to be significant?**

The Board considers factors described in the public report, in relation to the basic principles of country-code domain delegation described earlier.

### **Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, and the local communities to which country-code top-level domains are designated to serve.

### **Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the fiscal impact of the internal operations of country-code top-level domains within a country, other than ensuring the operator is based in country and has the appropriate mechanisms to allow the local Internet community to properly oversee the domain's

ongoing operation.

### **Are there any security, stability or resiliency issues relating to the DNS?**

For country-code top-level domain delegations, ICANN seeks to approve only such requests where reasonable concerns have been satisfactorily addressed, and the proposed new manager has demonstrated a sufficient level of operational and technical competency where such concerns should be minimal.

## 9.3 Delegation of the .cpб ("srb") domain representing Serbia in Cyrillic

Mike Silber moved and George Sadowsky seconded the resolution before the Board.

The Board then took the following action:

Whereas, Serbia is currently listed in the ISO 3166-1 standard;

Whereas, cpб ("srb"), encoded as "xn--90a3ac", is a string that has been deemed to appropriately represent Serbia through the IDN Fast Track process;

Whereas, ICANN has received a request for delegation of .cpб to Serbian National Register of Internet Domain Names (RNIDS);

Whereas, ICANN has reviewed the request, and has determined that the proposed delegation would be in the interests of the local and global Internet communities.

***RESOLVED*** (2011.04.21.20), *the proposed delegation of the .cpб top-level domain to Serbian National Register of Internet Domain Names is approved.*

**All Board members present unanimously approved of Resolution 2011.04.21.20. Sébastien Bachollet, Bertrand de la Chapelle, and Erika Mann were unavailable to vote on the Resolution. The Resolution carried.**

## RATIONALE FOR RESOLUTION 2011.04.21.20

### **Why the Board is addressing the issue now?**

Staff present delegation and redelegation requests for country-code domains to the Board for decision, once staff are satisfied the applicant has provided a sufficiently complete application that has a reasonable prospect of a positive Board decision. In line with ICANN's commitments to perform timely processing of requests relating to the IANA function, and the DNS root zone in particular, the ICANN Board seeks to evaluate such requests at its next scheduled Special Meeting.

### **What is the proposal being considered?**

The proposal is to approve a request to IANA to change or designate the sponsoring organisation (also known as the manager or trustee) of a country-code top-level domain. In line with established practice, the ICANN Board is involved in making the decision to proceed with such requests as one step of this multi-step process.

### **Which stakeholders or others were consulted?**

In the course of evaluating a delegation application, ICANN staff consults with the applicant, the current operator (if applicable), and other directly connected parties. In line with ICANN's practice of keeping incomplete root zone change requests in confidence, ICANN has not performed open consultation on this matter.

### **What concerns or issues were raised by the community?**

Any concerns or issues are raised within the public report that will be published in conjunction with this action. This report will be published on the IANA website at <http://www.iana.org/> should the root zone change request have successfully completed final processing, usually 1-2 months after the Board's decision.



## **What significant materials did the Board review?**

The Board is involved in assessing requests against a variety of public interest criteria. This criteria includes establishing the country-code is eligible (e.g. listed in the ISO 3166-1 standard); establishing the proposed manager is supported by the local Internet community; establishing the proposed operator is operationally and technically competent; establishing the proposed manager is based locally and bound under local law; establishing the proposed manager operates fairly and equitably; establishing that in cases there is a transfer of operations that an appropriate plan is in place to preserve ongoing stability of the domain; and establishing that the action is compatible with any applicable local laws and regulations. During the staff compilation process, the applicant is asked to provide a variety of materials in support of these various aspects. Pertinent information from these supplied materials and other staff research is provided to the Board, and published in a public report at the end of implementing an approved request.

## **What factors the Board found to be significant?**

The Board considers factors described in the public report, in relation to the basic principles of country-code domain delegation described earlier.

## **Are there positive or negative community impacts?**

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN's overall mission, and the local communities to which country-code top-level domains are designated to serve.

## **Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

The administration of country-code delegations in the DNS root zone is part of the IANA functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN to assess the fiscal impact of the internal operations of country-code top-level domains within a country, other than ensuring the operator is based in country and has the appropriate mechanisms to allow the local Internet community to properly oversee the domain's ongoing operation.

**Are there any security, stability or resiliency issues relating to the DNS?**

For country-code top-level domain delegations, ICANN seeks to approve only such requests where reasonable concerns have been satisfactorily addressed, and the proposed new manager has demonstrated a sufficient level of operational and technical competency where such concerns should be minimal.

**10. UPDATE ON NOTICE OF INQUIRY REGARDING THE IANA FUNCTIONS CONTRACT**

Jamie Hedlund provided a brief summary to the Board on the scope of community participation in the NOI, noting that more than 85% of the comments were supportive of ICANN, and that many of the comments focused on providing greater transparency surrounding the root zone processing.

**11. ANY OTHER BUSINESS**

Steve Crocker noted his dissatisfaction with the preparation for the discussion on cross-ownership, and his expectation that the issues should have been better laid out so that the Board was not engaged in fresh problem solving in the middle of a meeting. It consumed a significant amount of Board time.

The Chair noted that issues such as this one do not go through

a committee process, where that type of analysis would take place.

Ray Plzak confirmed the Chair's statement, that there will always be discussions that don't fall within the purview of one of the Board committees. For this topic, it happened to be the first time the Board could discuss this issue. If there is a better way to have these discussions, that's fine, but given the issues involved, even if there had been committee work on this issue, the conversation would likely have turned out the same way.

The Chair confirmed that the Board could consider how this can be improved in the future, though there will always be issues requiring significant Board discussion.

The Chair then called the meeting to a close.

*Petillon*

# **Annex 117**

13 February 2020

Gonzalo Camarillo  
Chair, ISOC Board of Trustees

Dear Gonzalo,

I write to you in my role as Chair of the ICANN Board of Directors.

Since ISOC's 13 November 2019 announcement of the proposed sale of PIR to Ethos Capital, both of our organizations have been subject to significant scrutiny regarding the impact that the proposed transaction could have on the registrants and community served by the .ORG TLD.

I appreciate that this has been a challenging time for both of our organizations. ICANN is committed to giving PIR's "Notice of Indirect Change of Control and Entity Conversion" (referred to here as the "Request") the measured and appropriate level of review and due diligence required for such a proposed transaction. It is not often that such a contractual issue raises up to a Board-level concern, but as you might appreciate, PIR's request is one of the most unique that ICANN has received. Both the circumstances of how ISOC came to be responsible for the .ORG TLD, as well as the transaction as proposed by ISOC, have brought the spotlight to how ICANN considers PIR's request for change of control.

As you are likely aware, the circumstances and facts surrounding ISOC's arrangement with Ethos Capital have even brought a governmental inquiry on ICANN. As public interest driven organizations in the Internet ecosystem, ICANN needs ISOC's continued leadership in making sure that there are complete, truthful, clear facts available for those looking at the broader impacts of ISOC's proposed sale. It is in furtherance of our organizations' longstanding relationship that I reach out and seek additional information.

ICANN is repeatedly asked for information regarding the intent behind the proposed transaction and how the new ownership structure of PIR will continue to ensure and serve the unique purposes of the .ORG TLD. These questions include how ISOC will uphold the commitments it made in 2002 to operate .ORG that arose in part from the community-adopted selection criteria. These are the types of questions that we look to ISOC to help answer, as we at ICANN know that we cannot speak on your behalf. ISOC's answers will facilitate ICANN's review, as well as further the .ORG community's assessment of the impact of the proposed transaction on their organizations. ICANN is particularly interested in what

steps you took to ensure that the community that you serve in the public interest would be protected.

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. ICANN has also heard concerns raised that the .ORG community was not consulted by ISOC as part of the ISOC's consideration of the proposed transaction.

To that end, we have worked to identify a set of questions, set forth below, that would give us a better understanding of certain fundamental issues related to the proposed structure. Your responses can help us to evaluate the request and bring additional transparency to this issue. Some of these questions are related to items that ICANN org posed to PIR as part of the change of control process; however, we believe that ISOC, acting in its public service role, is the appropriate party to respond. My request to you, for the benefit of the ICANN Community, is to provide answers that can be shared publicly and bring clarity to the circumstances surrounding ISOC's decision to sell PIR.

1. Since the .ORG TLD was awarded to ISOC in 2002, ISOC has appeared to support PIR's operation of the .ORG TLD in line with ISOC's 2002 commitments to the Internet community on how it would, among other things, differentiate the .ORG TLD, ensure responsiveness to the non-commercial community, and foster support from .ORG registrants (the "2002 Commitments"). Is it ISOC's view that these commitments will continue to be maintained with this new structure, and what, if anything, have you done to ensure that? Please explain, and reference supporting documentation where available. (See <https://archive.icann.org/en/tlds/org/applications/isoc/>)
2. There have been public statements that ISOC received multiple bids for the sale of PIR. Did ISOC solicit any responses from bidders as to how each would continue to uphold any/all of the 2002 Commitments?
  - If no, why not?

- If yes, what did ISOC request, and how were the responses evaluated and taken into account when entering into the proposed transaction with Ethos Capital?
3. What, if any, restrictions or conditions limit ISOC's ability to sell PIR? Are there any conditions or restrictions imposed by Pennsylvania law or other external sources that you are aware of, or that you have considered? Are there requirements for how the funds received from the sale of the non-profit entity of PIR must be reinvested?
  4. What has Ethos Capital committed to do in regard to the 2002 Commitments? And are such commitments included in any of the transaction documents, organization documents or elsewhere in a manner that insures they will be sustained and enforceable by .ORG registrants or others in the future?
  5. What assurances has Ethos Capital made that it will invest in differentiation of the .ORG TLD space, remain responsive to the needs, concerns, and views of the noncommercial Internet user community, and support open, transparent, and participatory process by which .org operating policies are initiated, reviewed, and revised in a manner that reflects the interests of .org domain name holders? How will these assurances be enforceable by .ORG registrants or others?
  6. What public interest commitments has Ethos Capital made and are such commitments included in any of the transaction documents, organizational documents or elsewhere in a manner that ensures they will be sustained and enforceable by .ORG registrants or others in the future?
  7. Did ISOC seek any inputs or comments from the registrants of .ORG or other interested stakeholders prior to engaging in a process to sell PIR, considering the terms of bids or evaluating bids for the sale of PIR? If so, please describe how this input was solicited and the outcomes.
  8. Did ISOC consult with the .ORG Advisory Council prior to engaging in a process to sell PIR? If so, please describe how this input was solicited and the outcomes.

9. We understand that ISOC might have consulted with the .ORG Advisory Council either as part of the consideration of terms of bids for the sale or PIR or for the evaluation of the proposed sale to Ethos Capital. Can you confirm if this happened, how the input was solicited, and the outcomes of that consultation? If ISOC proceeded counter to any .ORG Advisory Council recommendations, please provide the rationale for such action.
  
10. We understand that ISOC received a written proposal from Ethos Capital in September 2019. Were any prior proposals made or prior discussions had with Ethos Capital or any of their representatives or advisors? If yes, when did those discussions occur?
  
11. How is the proposed transaction with Ethos Capital intended to maximize the chances that .ORG serves registrants and the community now and in the future and ensure that .ORG is able to maintain and grow as a differentiated TLD?
  
12. Does ISOC believe the proposed sale to Ethos Capital (a for profit entity) is in the public interest and benefits registrants/.ORG community? If so, please describe how.
  
13. How will the .ORG registrants/community be served through the proposed endowment that ISOC will receive? Please describe how, in deciding to sell PIR to Ethos Capital, ISOC balanced the interests of the .ORG community with ISOC's interest in achieving a sizeable endowment to support ISOC's future operations separate from PIR and .ORG?
  
14. Did ISOC evaluate the financial structure of the proposed transaction in order to ensure that PIR will have the ability to operate the registry in a stable manner in the years to come and continue to support the interests of the .ORG community? To this end, has ISOC required any commitments from Ethos Capital to ensure that the level of debt service or anticipated capital distributions will not adversely impact the operation of the registry?
  
15. PIR has informed ICANN that the Connected Giving Foundation will be using the funds received in this proposed transaction "in furtherance of its mission to support an open, globally-connected, secure, and trust-worthy Internet". Can you confirm this statement from PIR? Can you also confirm that none of the



funds have been earmarked or are intended to be distributed to enrich any individual or entity (other than fees and expenses of advisors to the proposed transaction)?

16. Given the public reaction to the announced sale of PIR, will ISOC commit to completing any additional engagement with the .ORG community prior to consummating the proposed transaction with Ethos Capital?
17. Is there any other information you would like to share about how the sale of PIR to Ethos Capital would protect and serve the interests of the .ORG registrants and community?
18. Should ICANN understand from ISOC's announcement of the proposed transaction with Ethos Capital that, even if this proposed transaction were not to conclude, it remains ISOC's intention to divest itself of PIR and no longer have an ownership interest in a registry operator? In other words, has ISOC made a determination to no longer be involved in the .ORG registry, and if so, where was that decision made and on what basis did you decide to do so? Are there board minutes, a rationale or an economic analysis behind comments that have been made relating to this?

Thank you for your attention and cooperation in providing information and answers to our questions. If at all possible, please respond by 24 February 2020 to give ICANN an opportunity to review your responses in sufficient time to support ICANN's review.

Best regards,



Maarten Botterman  
Chair, ICANN Board of Directors

*Petillon*

# **Annex 118**



State of California  
Office of the Attorney General

XAVIER BECERRA  
ATTORNEY GENERAL

April 15, 2020

*Via Electronic Correspondence*

Maarten Botterman, Board Chair  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Göran Marby, President and CEO  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

RE: Proposed Ethos Capital Takeover of .ORG Registry Agreement

Dear Messrs. Botterman and Marby:

I urge ICANN to reject the transfer of control over the .ORG registry to Ethos Capital. The proposed transfer raises serious concerns that cannot be overlooked.

My office has “responsibility for supervising charitable trusts in California, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations...” (Gov. Code, § 12598.) My office is tasked with the authority to “investigate transactions and relationships of corporations and trustees...for the purpose of ascertaining whether or not the purposes of the corporation or trust are being carried out in accordance with the terms and provisions of the articles of incorporation or other instrument.” (Gov. Code, § 12588). To that end, my office conducted an investigation of ICANN and its role in approving the transfer of the .ORG Registry Agreement from the Public Interest Registry (“PIR”) (the supporting organization to the Internet Society (“ISOC”)) to Ethos Capital. A key component of our review begins with ICANN’s articles of incorporation which states as follows:

[ICANN] is not organized for the private gain of any person...  
recogni[zing] the fact that the Internet is an international network  
of networks, owned by no single nation, individual or  
organization” and as such, ICANN will “pursue the charitable and  
public purposes of lessening the burdens of government and



promoting the global public interest in the operational stability of the Internet.

[ICANN] shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole.

ICANN followed the principles set out in its articles of incorporation and bylaws when it embarked on its search for a new .ORG registry operator in 2002. At that time, ICANN recognized that the .ORG domain required unique protections. For example, it noted that “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.”<sup>1</sup>

Nearly two decades later, ICANN reaffirmed its view of the unique nature of the .ORG registry:

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 [top level domain]. 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.<sup>2</sup>

ICANN selected PIR as the registry operator for the .ORG top level domain because of PIR’s commitment to “institute mechanisms for promoting the registry’s operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community.”<sup>3</sup> If, as proposed, Ethos Capital is permitted to purchase PIR, it will no longer have the unique characteristics that ICANN valued at the time that it selected PIR as the nonprofit to be responsible for the .ORG registry. In effect, what is at stake is the transfer of the world’s second largest registry to a for-profit private equity firm that, by design, exists to profit from millions of nonprofit and non-commercial organizations.

Since news broke of the proposed sale of PIR and transfer of the .ORG registry agreement to a private equity firm, numerous concerns have been raised from all corners of

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<sup>1</sup> Reassignment of .ORG Top-Level Domain: Criteria for Assessing Proposals, 20 May 2002, *see* <https://archive.icann.org/en/tlds/org/criteria.htm>.

<sup>2</sup> Correspondence from Maarten Botterman, Chair, ICANN Board of Directors to Gonzalo Camarillo, Chair, ISOC Board of Trustees, at p. 2, February 13, 2020, *see* <https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf>.

<sup>3</sup> Correspondence from Jeffery LeVee of Jones Day, Counsel for ICANN to Lauren Boglivi of Proskauer Rose, PIR’s counsel, at p. 2-3, February 13, 2020, *see* <https://www.icann.org/en/system/files/correspondence/levee-to-boglivi-13feb20-en.pdf>.

society, including ICANN's own At-Large Advisory Committee.<sup>4</sup> Soon thereafter, ICANN appropriately raised crucial questions seeking clarity on a range of issues, including information about the entities and individuals involved in the proposed sale. As discussed below, while PIR and Ethos Capital have responded to some of ICANN's inquiries and provided some of the information sought by ICANN, numerous issues remain unresolved. Further, Ethos Capital, ISOC, and PIR have refused to produce responses to many critical questions posted by the public and Internet community. In light of these questions and the objectives stated in ICANN's articles of incorporation and bylaws, as well as its longstanding commitment to and appreciation of the unique role of the .ORG registry, ICANN must exercise its authority to withhold approval.

Little is known about Ethos Capital and its multiple proposed subsidiaries, including PIR LLC, which will be converted from a nonprofit corporation into a for-profit corporation. Even less is known about how these for-profit corporate entities and private investors will operate their businesses. Without such information, it remains unclear how the .ORG registry and community will be impacted. The affected community includes some 1,200 registrars, millions of registrants, and hundreds of millions of persons who rely on and engage with the .ORG domain across the globe every day. Given the lack of transparency regarding Ethos' future plans, approval of the transfer may place at risk the operational stability of the .ORG registry.

PIR and Ethos have failed to respond to ICANN's questions regarding PIR's financial picture after the sale. PIR maintains that its anticipated income will be sufficient to service the \$300 million loan necessary to complete this purchase and maintain its level of operation. Additionally, as a for-profit entity, PIR will now incur tax liabilities, and its loan will be due in five years. It is therefore disturbing that Ethos has failed to identify the new services it contends will generate the necessary revenue to cover those expenses. While PIR currently has sufficient income for its operations, as a nonprofit it pays no taxes and is not saddled with a \$300 million

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<sup>4</sup> See e.g., ICANN's At-Large Advisory Committee, <https://community.icann.org/display/alacpolicydev/At-Large+Workspace%3A+ISOC+Sells+PIR?preview=/120821713/126423106/ALAC%20Advice%20to%20the%20ICANN%20Board%20on%20the%20ISOC%3APIR%20Issue%20-%20FINAL%20310120.pdf>; ISOC Advisory Board's Advice Statement "2020.02.13-01", <https://savedotorg.org/wp-content/uploads/2020/02/Advice-2020.02.13-01--PIR-Sales-to-Ethos-Capital.pdf>; Members of the United States Congress, <https://www.warren.senate.gov/imo/media/doc/2020.01.16%20Letter%20to%20ICANN%20about%20sale%20of%20.ORG%20registry.pdf>; Letter Signed by 824 nonprofits including National Council of Nonprofits, Girl Scouts of America, and American Bible Society, <https://www.eff.org/document/coalition-letter-sale-public-interest-registry>; National Association of State Charities Officials, <https://www.nasconet.org/wp-content/uploads/2020/01/NASCO-ltr-011720.pdf>; United Nations Human Rights Council, Office of the High Commissioner, <https://www.icann.org/en/system/files/correspondence/kaye-voule-to-marby-20dec19-en.pdf>; and Association for Progressive Communications, <https://www.apc.org/en/pubs/apc-statement-proposed-sale-public-interest-registryorg-domain>.

loan and investors who expect a rate of return. The unstable economic climate makes predictions of future revenue even more speculative. If the sale goes through and PIR's business model fails to meet expectations, it may have to make significant cuts in operations. Such cuts would undoubtedly affect the stability of the .ORG registry.

The absence of critical information is troubling given the unique nature of the .ORG community. In the event Ethos Capital—a new company without any track record that appears to have been formed for the purpose of taking control of the .ORG registry—makes any mistake, it will be at the expense of the .ORG community and will impact the broader Internet community. The cost will be felt downstream, affecting registrars, registrants, and the many individual users who make up the global Internet community. ICANN's analysis of the need for the stability of the .ORG registry must take into consideration that some of the .ORG registrants are critical organizations dedicated to assist in times of crisis. The list of such organizations is long, including the World Health Organization, the World Bank, the Red Cross, Doctors Without Borders, and the United Nations. PIR (the nonprofit entity) has dutifully managed the .ORG registry to the benefit of these entities for more than 16 years. Permitting Ethos Capital or any other business to take control of the registry, without clarity about the potential changes, poses meaningful concerns to the nonprofit community.

ISOC purports to support the Internet, yet its actions, from the secretive nature of the transaction, to actively seeking to transfer the .ORG registry to an unknown entity, are contrary to its mission and potentially disruptive to the same system it claims to champion and support. Assuming, *arguendo*, that Ethos Capital possesses ideas to improve PIR's financial health, it is unclear what prevents PIR and ISOC from engaging in improvements now. No response has yet been provided supporting the proposition that as nonprofit corporations, PIR is currently restricted from engaging in new practices that would both improve their financial health while furthering their charitable mission.

There has been too little information provided about the sale process by which the proposed transfer sale was agreed to by ISOC. If ISOC was concerned about diversifying its revenue streams, what did ISOC do, if anything, before deciding to sell the .ORG registry agreement? Why did ISOC not conduct a competitive bid process for a new registry operator if it wanted a change in the registry operator? Did ISOC explore options other than a sale to a private equity firm, given that its nonprofit status was key to PIR becoming the .ORG registrar? What consultation, if any, did ISOC conduct with its stakeholders prior to proceeding with the proposed sale?

With ICANN's unique role in coordinating and managing Internet infrastructure, its global reach cannot be overstated. In furtherance of its mission, ICANN must consider the impact of its decision within the current global context. Just last year, ICANN and PIR renewed the .ORG registry agreement. The new registry agreement removed price caps on .ORG domain names, despite receiving over 3,000 comments in opposition, with only six individuals in

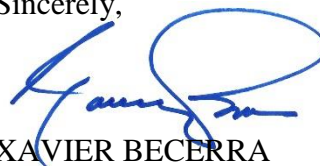
support.<sup>5</sup> There is mounting concern that ICANN is no longer responsive to the needs of its stakeholders. ICANN has an obligation to weigh the impact of approving the proposed transfer of the .ORG registry, in light of the lack of information, compared to information ICANN possessed and the criteria it used when it first awarded ISOC/PIR the privilege to operate the .ORG registry in 2002.

My office is also concerned that the .ORG registry agreement with ICANN contains a presumption in favor of renewing the agreement following its expiration. This automatic renewal provision leaves the nonprofit community that uses the .ORG registry with no protection. While the automatic renewal provision made some sense when the .ORG registry was operated by PIR and ISOC that had solid track records, it makes no sense to extend this provision to operators that have no experience operating a Registry.

My office is committed to protecting California's and the public's interest in a properly functioning and accessible .ORG domain system. ICANN has long recognized the unique nature of the .ORG registry as the Internet's home for noncommercial entities and interests. ISOC and PIR are charitable organizations that are accountable to their community stakeholders and to the public at large. In contrast, a private equity firm is accountable only to its investors. Given the concerns stated above, and based on the information provided, the .ORG registry and the global Internet community – of which innumerable Californians are a part – are better served if ICANN withholds approval of the proposed sale and transfer of PIR and the .ORG registry to the private equity firm Ethos Capital.

This office will continue to evaluate this matter, and will take whatever action necessary to protect Californians and the nonprofit community.

Sincerely,



XAVIER BECERRA  
Attorney General

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<sup>5</sup> See e.g., <https://reviewsignal.com/blog/2019/06/24/the-case-for-regulatory-capture-at-icann/>.

**COMPARISON OF REGISTRY AGREEMENTS**

		COM	NET	ORG	INFO	BIZ	PRO	NAME	MOBI	CAT	TRAVEL	TEL	ASIA
<b>Nature of TLD</b>	original TLD	YES	YES	YES									
	2000 proof of concept TLD				YES	YES	YES	YES					
	2004 sponsored round								YES	YES	YES	YES	YES
<b>Registry (current)</b>		Verisign	Verisign	PIR	Afilias	Neustar	Afilias	Verisign	Afilias	Fundació puntCAT	Dog Beach (Donuts)	Telnames	DotAsia Organisation
<b>Comparability</b>	Recognition of comparability to other TLDs	indirectly	indirectly	YES	YES	YES	NO	YES	NO	NO	NO	NO	NO
	Comparable to	.NET, .ORG, .INFO, .BIZ and .NAME	.COM, .ORG, .INFO, .BIZ, .NAME	.BIZ, .COM, .INFO and .NET	.BIZ, .COM, .NET and .ORG	.COM, .INFO, .NET and .ORG	N/A	.BIZ, .COM, .INFO, RM 140	N/A	N/A	N/A	N/A	N/A
	Recognized in	RM 17, 18, 27, 28, 52, 53, 140	RM 17, 18, 27, 28, 52, 53, 140	RM 17 and RM 18	RM 27 and RM 53	RM 28 and RM 52	N/A						
<b>DUMs</b>	December 2006	59,539,705	8,750,236	5,553,737	3,917,314	1,463,922	4,008	230,471	206,941	19,682	22,135	N/A	N/A
	August 2012	106,804,483	15,142,728	10,098,060	7,932,498	2,325,865	131,248	227,713	1,034,363	54,703	23,689	239,954	202,502
	June 2019	145,758,764	13,933,303	10,539,476	5,039,085	2,085,258	330,798	130,008	452,268	108,589	19,823	73,056	284,168
<b>Base RA</b>	switch to base agreement	NO	only in part	YES, contested	YES, contested	YES, contested	YES	only in part	YES	YES	YES	YES	YES
<b>Price caps</b>	was price capped	YES	YES	YES	YES	YES	YES	YES	NO	NO	NO	NO	NO
	price caps lifted	NO	NO (attempt to remove in 2005 but reviewed following protest)	YES, contested	YES, contested	YES, contested	YES	NO	N/A	N/A	N/A	N/A	N/A