

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

FEGISTRY, LLC RADIX DOMAIN SOLUTIONS) ICDR CASE NO. 01-19-0004-0808
PTE. LTD, AND DOMAIN VENTURES)
PARTNERS PCC LIMITED,)
)
Claimants,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

JOINT SUBMISSION IN RESPONSE TO PROCEDURAL ORDER NO. 10

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Claimants Fegistry, LLC, Radix Domain Solutions Pte. Ltd, and Domain Ventures Partners PCC Limited (“Claimants”) and Respondent the Internet Corporation for Assigned Names and Numbers (“ICANN”) (together, the “Parties”) submit this response to the Panel’s Procedural Order No. 10. This response is submitted jointly, except where the Parties note their respective positions.

THE NATURE OF ICANN’S PROCEDURES

1. The Panel requested that the Parties “explain the nature of the particular procedures (using the appropriate acronyms and their definitions, e.g., CPE, EIU, BAMC, etc.) referred to in their briefs,” including “how they relate to each other and in what sequence they are designed to be invoked.” The Panel further requested an explanation of “the relevance, if any, of the allegations of theft of trade secrets and undue influence” as well as “the invocation of discovery requests (which the IRP believes have already been disposed of).”

I. THE NEW GTLD PROGRAM

2. ICANN launched the New gTLD Program in 2012, through which interested entities could apply for the right to operate new generic top-level domains (“gTLDs”). Only one entity could secure the right to operate a given new gTLD. The evaluation criteria and process for new gTLD applications are set forth in the 338-page Applicant Guidebook (“Guidebook”), which was drafted with significant input from the Internet community over a multi-year process.

3. ICANN received applications for new gTLDs during the Spring of 2012. When new gTLD applicants submitted applications to ICANN, they were able to designate their applications as either standard or community-based. A community-based application is “operated for the benefit of a clearly delineated community,”¹ and thus only members of that

¹ Applicant Guidebook, § 1.2.3.1. For the Panel’s convenience, relevant provisions of the Applicant Guidebook are included in Exhibit 1 to ICANN’s Motion for Summary Adjudication (“MSA”).

delineated community would be able to acquire second-level domain names in that TLD (second-level domain names refer to the portion to the left of the “.” – such as the “example” portion of example.hotel). Submitting a community-based application does not automatically mean that the applicant will, in fact, be awarded the new gTLD: an applicant who has submitted a community-based application must then proceed with a Community Priority Evaluation (“CPE”), during which the application is reviewed by a third-party CPE Provider to determine if the application meets the CPE criteria, as explained below.

4. If an applicant chose to proceed with a CPE, its community-based application was forwarded to the Economist Intelligence Unit (“EIU”), which was the CPE Provider retained by ICANN to conduct the independent CPE analyses. Standard applications, such as the applications filed by Claimants, were not submitted to the EIU and they were not subject to CPE; only community-based applications were submitted to the EIU for CPE. A panel from the CPE Provider (“CPE Panel”) then evaluated the application against four criteria set forth in the Guidebook for community-based applications and issued a report.² If the CPE Panel awarded the application at least 14 out of 16 possible points for the four criteria, the application prevailed in CPE. If an application prevailed in CPE, that application would be given priority over the other standard (meaning, non-community) applications for the same gTLD, none of which would proceed.³

5. Relevant here, ICANN received seven applications for .HOTEL. Only one of the applicants, Hotel Top-Level-Domain S.a.r.l. (“HTLD”), elected to submit its application as community-based on behalf of the “hotel community,” and thus proceeded to a CPE. In June 2014, the CPE Provider issued its report indicating that HTLD’s .HOTEL application had been

² *Id.*, § 4.2.3.

³ *Id.*, § 4.2.2.

awarded 15 points, which was sufficient to prevail in CPE under the Guidebook.⁴ Thus, HTLD's application was given priority over all other .HOTEL applications—including Claimants' .HOTEL applications—and the next step under the Guidebook would have been for ICANN to execute a Registry Agreement with HTLD to operate .HOTEL. Because HTLD's application was given priority, this meant that Claimants' standard applications for .HOTEL would not proceed.

II. ICANN'S ACCOUNTABILITY MECHANISMS

6. To help ensure that ICANN is accountable to the global Internet community, ICANN has established various Accountability Mechanisms that allow aggrieved parties to challenge or seek review of ICANN actions and decisions that the parties believe violate ICANN's Articles of Incorporation ("Articles"), Bylaws, or the Guidebook.⁵ For instance, if a new gTLD applicant elects to challenge the processing of a different new gTLD application, the applicant may institute one or more of ICANN's Accountability Mechanisms, which Claimants have done here relating to the processing of HTLD's .HOTEL application.

7. One such Accountability Mechanism is a Reconsideration Request, through which "any person or entity materially affected by an action or inaction" of ICANN may request review or reconsideration by ICANN of that action or inaction.⁶

8. A committee of the ICANN Board hears, considers, and recommends to the Board whether it should accept or deny a Reconsideration Request.⁷ Today, that committee is the Board Accountability Mechanisms Committee ("BAMC"). Previously, it was the Board

⁴ MSA Ex. 2, HOTEL Top-Level-Domain S.a.r.l. New gTLD Program Community Priority Evaluation Report.

⁵ Ex. R-1 (Bylaws), Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2.

⁶ *Id.*, Art. 4, § 4.2.

⁷ *Id.*

Governance Committee (“BGC”). The current Bylaws provide the BAMC with the specific authority to, *inter alia*:

- (iv) Conduct whatever factual investigation is deemed appropriate;
- (v) Request additional written submissions from the affected party, or from other parties.⁸

And, furthermore:

(m) The Board Accountability Mechanisms Committee may ask ICANN Staff for its views on a Reconsideration Request, which comments shall be made publicly available on the Website.

(o) The Board Accountability Mechanisms Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Accountability Mechanisms Committee, it shall so state in its recommendation. Any information collected by ICANN from third parties shall be provided to the Requestor.⁹

9. Effective 1 October 2016, ICANN’s Bylaws were amended to require that Reconsideration Requests be sent first to ICANN’s Ombudsman for review.¹⁰ The Ombudsman provides to ICANN an evaluation of the Reconsideration Request before ICANN’s BAMC makes a recommendation to the Board.¹¹ The 2016 Bylaws, however, explicitly require that the Ombudsman “shall recuse himself or herself” from matters “for which the Ombudsman has, in advance of filing the Reconsideration Request, taken a position while performing his or her role as the Ombudsman . . . or involving the Ombudsman’s conduct in some way.”¹² In the case of such a recusal, the Bylaws state that the BAMC “shall review the Reconsideration Request

⁸ Ex. R-1, Bylaws, Art. 4, § 4.2(e)(iv), (v). The February 2016 Bylaws are similar in all material respects.

⁹ Bylaws, Art. 4, § 4.2(m), (o).

¹⁰ *Id.*, Art. 4, § 4.2(l). The Ombudsman also has a separate function under ICANN’s Bylaws “to provide an independent internal evaluation of complaints” that ICANN or an ICANN constituent body has acted unfairly. *Id.*, Art. 5, § 5.2. Members of the Internet community can submit complaints to the Ombudsman outside of the Reconsideration Request process.

¹¹ *Id.*

¹² *Id.* Art. 4, § 4.2(l)(iii).

without involvement by the Ombudsman.”¹³ There was no requirement for Ombudsman review of Reconsideration Requests in the pre-October 2016 Bylaws, and therefore, Reconsideration Requests submitted before October 2016 were not evaluated by the Ombudsman.

10. The Bylaws also create the Independent Review Process (“IRP”), under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an “independent third-party” for review.¹⁴ The Bylaws provide as follows regarding the purposes of the IRP, *inter alia*:

The IRP is intended to hear and resolve Disputes for the following purposes (“**Purposes of the IRP**”):

(i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.

(ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).

(iii) Ensure that ICANN is accountable to the global Internet community and Claimants.

...

(vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

¹³ *Id.*

¹⁴ *Id.*, Art. 4, § 4.3.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.¹⁵

11. The Bylaws in effect prior to October 2016, stated as follows:

A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.¹⁶

12. Since 25 October 2018, the Interim Supplementary Procedures have provided:

A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.¹⁷

13. Covered Actions are defined as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”¹⁸

14. A “Dispute” for purposes of an IRP is defined as a claim that “Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

¹⁵ *Id.*, Art. 4, § 4.3(a).

¹⁶ MSA Ex. 3 (Bylaws (as amended 11 Feb. 2016)) Art. IV, § 3.3.

¹⁷ Ex. R-4 (Interim Procedures) Rule 4. The deadlines in the Interim Procedures are subject to change because, as the procedures recognize, “[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.” *Id.* Rule 4, n.3.

¹⁸ Bylaws, Art. 4, § 4.3(b)(ii).

(2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws; [or,]

(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws.”¹⁹

RELEVANCE OF CLAIMANTS’ ALLEGATIONS & DOCUMENT REQUESTS

Issue Number	Claimants’ Position	Respondent’s Position
<p>Paragraph 3(a)(iii) of Procedural Order No. 10 provides as follows: “The Panel advises counsel that in setting forth a comprehensible explanation of the inherently confusing developments that they address in their SAM papers, the IRP does not understand the relevance, if any, of the allegations of theft of trade secrets and undue influence nor of the invocation of discovery requests (which the IRP believes have already been disposed of).”</p>		
1	<p>The Panel has requested an explanation of “the relevance, if any, of the allegations of theft of trade secrets and undue influence” as well as “the invocation of discovery requests (which the IRP believes have already been disposed of).” .</p> <p>Claimants understand that the Panel’s reference to “allegations of theft of trade secrets and undue influence” is a reference to Claimants’ IRP claims A and C as set forth in their IRP Complaint. Claimants understand that those claims are not relevant to ICANN’s SAM because ICANN admits at least that part of Claim A, and all of Claim C, are not time-barred. (SAM, p.6-7).</p> <p>Claimants also note that many of their initial document requests have been denied by ICANN pending disposition of this SAM, and therefore are still at issue in this IRP.</p> <p><u>Claimants’ IRP Claim A</u> states: “Claimants seek review whether ICANN had undue influence over</p>	<p>An IRP is limited to determining whether an action or inaction by ICANN staff or the ICANN Board violated ICANN’s Articles or Bylaws.²² Thus, Claimants can only pursue claims in this IRP for which they can identify a <i>specific</i> Article or Bylaws provision that ICANN allegedly breached. Claimants’ IRP Request and their Opposition and Sur-Reply to ICANN’s Motion for Summary Adjudication contain very few references to ICANN’s Articles or Bylaws and do not identify what specific provisions ICANN supposedly violated with respect to any of the alleged claims.</p> <p>In Procedural Order No. 10, the Panel referenced two particularly vague claims and asked for further explanation from the parties regarding “the relevance, if any, of [these] allegations.” With regard to Claimants’ allegations regarding alleged “theft of trade secrets,” these allegations are irrelevant because not only have Claimants failed to identify any Article or Bylaws provision ICANN</p>

¹⁹ Bylaws, Art. 4, § 4.3(b)(iii).

²² See also *Afilias v. ICANN IRP*, ICDR Case No. 01-18-0004-2702, Corrected Final Declaration (20 May 2021),

¶ 24, available at <https://www.icann.org/en/system/files/files/irp-afili-as-corrected-final-declaration-redacted-15jul21-en.pdf>.

the EIU with respect to its CPE decisions, and over FTI with respect to the CPE Process Review.” In its SAM, ICANN acknowledges at least that “ICANN has not argued that the challenges in Claimants’ Reconsideration Request 18-6 to the CPE Process Review, and the Board’s acceptance thereof, are time-barred.” Thus, ICANN admits that the second part of Claim A is not time-barred.

In the first part of Claim A, Claimants also allege that ICANN had undue influence over the EIU with respect to its CPE decisions. As further discussed in the section below, this claim is not time-barred, because the evidence of ICANN’s undue influence over the EIU did not come to light until the *DotRegistry* Final Declaration and the FTI Reports were published. Claimants could not have been aware of the challenged misconduct until it was revealed in those documents.^{20/21} Claimants’ then timely raised this issue of ICANN’s undue influence over the EIU via RFR 16-11 (pp. 11-14, re the CPE Review) and RFR 18-6 (*seriatim*, re the FTI Reports).

RFR 16-11 was filed on August 25, 2016, within fifteen days of ICANN’s decision to accept the *DotRegistry* Final Declaration. Furthermore, ICANN admits that RFR 18-6 was timely filed as to the FTI Reports. Therefore, no part of Claim A is time-barred.

Claimants’ IRP Claim C states: “Claimants seek review of ICANN’s “Portal Configuration” investigation and refusal to penalize HTLD’s willful accessing of Claimant’s confidential, trade secret information.” In its SAM (p. 7), ICANN admits that “ICANN has not argued that the portions of Claimants’ Reconsideration Request 16-11 that

supposedly breached in deciding not to cancel HTLD’s application following the portal configuration investigation, but there is no evidence of any “theft of trade secrets” or that the portal configuration issue in any way impacted any of the .HOTEL applications.²³ To the extent Claimants belatedly identify some provision ICANN allegedly breached, ICANN argues that this claim lacks merit in all events, as argued in ICANN’s Response to Claimants’ IRP Request and as ICANN will argue at the IRP hearing. ICANN, however, does not argue that this claim is time-barred.

With regard to Claimants’ allegations of supposed “undue influence” over the CPE Provider (i.e., the EIU) related to the .HOTEL gTLD, again, Claimants have not identified what Article or Bylaws provision ICANN allegedly violated and their failure to do so is dispositive of this claim. Independently, any such claim is time-barred because Claimants did not timely assert it. These claims were already litigated in the *Despegar* IRP in 2015 and 2016, where the IRP Panel found in ICANN’s favor (as explained more fully below). The ICANN Board resolved to accept certain findings in the *Despegar* IRP Final Declaration in March 2016, but Claimants did not institute the related Reconsideration Request 16-11 until August 2016. And these claims are in no way dependent on the *Dot Registry* IRP, which concerned three unrelated gTLDs. In addition, Claimants never sought any documents in the *Despegar* IRP, so claiming that documents disclosed in an unrelated IRP somehow renders these claims timely is wrong.

With regard to the “invocation of discovery requests,” ICANN agrees with the Panel that any

²⁰ The ICANN Bylaws, Sec. 4.2(g)(II) provide that the time for reconsideration requests be filed “within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.”

²¹ Claimants had requested such information about ICANN’s interactions with the EIU via a DIDP request prior to the *Despegar* IRP filing, but ICANN refused to provide any responsive information. See DIDP Request 20140804-01 (<https://www.icann.org/resources/pages/20140804-01-2014-09-04-en>). Claimants again requested transparency in this regard via RFR 16-11 (*e.g.*, at p.20).

²³ For reference, the portal configuration investigation refers to the investigation into a misconfiguration of the privacy settings of the New gTLD Applicant Portal through which an authenticated portal user could potentially view data of, or related to, other authenticated Portal users.

specifically challenge the Board resolutions regarding the Portal Configuration, as they relate to .HOTEL, are time-barred.” Therefore, ICANN admits that no part of Claim C is time-barred.

Claimants’ Document Requests remain at issue, as ICANN has refused to produce documents as to many of Claimants’ reasonable requests. ICANN’s IRP Supplementary Rules allow only one form of discovery in an IRP case: reasonable requests for documents. No other discovery methods are allowed. That makes document requests critically important to any IRP claimant, and particularly to Claimants in this case, to fulfill ICANN’s stated “Purposes of the IRP.” Namely, to provide “**meaningful**, affordable and accessible expert review of Covered Actions,” and to “[s]ecure the accessible, **transparent**, efficient, consistent, **coherent, and just** resolution of Disputes.” (Emphasis added.)

Claimants propounded 34 requests for documents to ICANN on January 22, 2022. Upon initially meeting and conferring with ICANN’s counsel, Claimants agreed to *initially* limit their requests to just 12. Claimants made this initial concession solely in effort to focus ICANN’s initial production of documents, and with counsel for both parties agreeing to revisit the remaining requests after Claimants’ review of ICANN’s initial production. Procedural Order No. 8 specifically contemplates such further production, after ICANN’s initial production.

However, to date, ICANN still has not completed its initial production as to those 12 requests. Instead, ICANN has refused to produce documents as to many of those, covering several core issues in this IRP, because ICANN argues that such issues involve time-barred claims. Indeed, ICANN’s SAM acknowledges that it was brought in large part to limit or avoid Claimants’ document requests. For example, the first sentence of the SAM states that ICANN “hereby requests that the Panel dismiss certain claims from this Independent Review Proceeding (“IRP”) and further rule that all

such claims are no longer at issue, given that the document production in this IRP is complete. ICANN filed its Motion for Summary Adjudication before discovery was complete and while discovery issues were still being litigated, but any arguments regarding the scope of discovery (by either Party) are no longer relevant now that discovery is closed.

Claimants appear to argue that they are now reasserting all 34 of their Requests, which is in no way reasonable. The Requests are overbroad, irrelevant, or seek documents regarding time-barred claims. Claimants also argue that ICANN has failed to make any “further production,” but it is unclear to what Claimants are referring. ICANN explicitly set forth the Requests to which it would respond and did so accordingly. ICANN never agreed to produce documents in response to all 34 of Claimants’ overbroad Requests following its “initial production.” ICANN’s production is complete, as the Panel acknowledged in Procedural Order No. 10 when it stated its belief that Claimants’ discovery requests “have already been disposed of.”²⁴ Notably, Claimants have not produced a *single* document to ICANN that is not publicly available on ICANN’s website, yet Claimants feel compelled to cast unwarranted aspersions on ICANN, despite ICANN’s robust production.

²⁴ Procedural Order No. 10 ¶ 3(a)(iii).

discovery targeted to those issues be rejected.” (SAM, p.2). ICANN then further explained (SAM, p.8):

Via this motion, ICANN seeks to remove these time-barred claims from this IRP, and seeks to prevent any discovery associated with these requests as wholly irrelevant so that discovery may be focused on what is actually and properly at issue in this IRP.

ICANN reiterated and emphasized this in its Reply brief on August 5, 2022 (p.14, n.40):

There is no basis to require discovery on untimely claims. Indeed, as stated by the Panel, one of the purposes of this Motion is to narrow and focus the discovery on the remaining viable claims. [Citing to hearing transcript at n.40].

Claimants continue to assert all 34 of their document requests, and to deny that any of their stated IRP claims are time-barred. As requested in their IRP Complaint (p. 29), the Claimants continue to request the Panel to “order appropriate discovery from ICANN.” ICANN has produced some documents, but refuses to produce any further documents while their SAM is pending. Those documents are critical to Claimants’ IRP claims.

ICANN has no basis for stating that “discovery is closed” in this matter. There has been no such order of the Panel, and Procedural Order No. 8 specifically contemplates that ICANN was to complete its initial production by June (which did not happen). It also contemplates further document production upon Claimants’ review of that initial production, if and when it ever does happen.

Claimants maintain that ICANN’s SAM must be denied, and that ICANN must respond fully to all of Claimants’ reasonable document requests -- pursuant to ICANN’s own Bylaws and IRP Supplementary Rules.

RECONSIDERATION REQUESTS 16-11 AND 18-6

15. In Procedural Order 10, the Panel also requested that the parties “provide a clearer explanation as to the relationship between” Reconsideration Requests 16-11 and 18-6, including how they “have a bearing on the statute of limitations”; “[a]s to which claims do they have a bearing”; and how they “fit into the framework of the requirements of an IRP as provided in relevant parts of Article 4, Section 4.3” of ICANN’s Bylaws.

16. The Parties provide the following timeline related to Requests 16-11 and 18-6.

Date	Event
10 March 2016	The ICANN Board resolves to accept certain findings of the <i>Despegar</i> IRP Panel set forth in the Final Declaration, which found in favor of ICANN. ²⁵ That IRP sought review of ICANN’s denial of two prior Reconsideration Requests and ICANN’s response to a Documentary Information Disclosure Policy (“DIDP”) request, relating to the CPE of HTLD’s .HOTEL application, and the award of community priority to HTLD.
9 August 2016	The ICANN Board resolves to accept certain findings of the <i>Dot Registry</i> IRP Panel set forth in the Final Declaration, which found against ICANN. ²⁶ That IRP related to the CPEs of community applications by a third party for .INC, .LLC, and .LLP. Separately, the ICANN Board also resolves not to cancel HTLD’s .HOTEL application following the Portal Configuration investigation.
11 August 2016	The ICANN Board’s 9 August 2016 resolutions were published on ICANN’s website.
25 August 2016	Relevant Claimants submit Reconsideration Request 16-11. ²⁷ Claimants’ requests are copied below in Claimants’ separate section.
17 September 2016	The ICANN Board directs ICANN staff to undertake a review of the process by which ICANN has interacted with the CPE Provider (“CPE Process Review”). ²⁸ FTI is retained by Jones Day to conduct the independent CPE Process Review.

²⁵ Ex. R-17.

²⁶ Claimants’ Ex. H.

²⁷ Claimants’ Ex. J.

²⁸ Ex. R-23. The ICANN Board Governance Committee (“BGC”) determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report; and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process. See Ex. R-28, at p. 14.

Date	Event
1 October 2016	ICANN’s Bylaws are amended to provide that Reconsideration Requests “shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.” The Bylaws provided that the Ombudsman “shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task.” The Bylaws also state that the Ombudsman “shall recuse himself or herself” from matters “for which the Ombudsman has, in advance of filing the Reconsideration Request, taken a position while performing his or her role as the Ombudsman . . . or involving the Ombudsman’s conduct in some way,” in which case the BAMC “shall review the Reconsideration Request without involvement by the Ombudsman.” ²⁹
26 April 2017	ICANN provides an “Update on the Review of the New gTLD Community Priority Evaluation Process” to the Internet community and specifically to relevant Claimants, informing them that consideration of certain Reconsideration Requests (including Request 16-11) is on hold pending the completion of the CPE Process Review by FTI. ³⁰
31 December 2017	ICANN publishes FTI’s three reports regarding the CPE Process Review (“CPE Process Review Reports”).
15 February 2018	<p>ICANN publishes the “Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process that Were Placed on Hold Pending Completion of the CPE Process Review.”³¹</p> <p>The Roadmap states that: “Each of the foregoing requests [including Request 16-11] was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time that the requests were filed. Under the Bylaws that were in effect prior to October 2016, the Board delegated to the BGC with the authority to make a final determination on requests regarding staff action”³²</p>
15 March 2018	The ICANN Board resolves to accept the findings set forth in the CPE Process Review Reports and directs the BAMC to move forward with considering the Reconsideration Requests that were placed on hold pending the CPE Process Review (including Request 16-11). ³³

²⁹ Bylaws, Art. 4, § 4.2(l)(iii).

³⁰ Ex. R-25.

³¹ Claimants’ Annex 5.

³² *Id.*

³³ Ex. R-28.

Date	Event
19 March 2018	ICANN emailed counsel for relevant Claimants informing them of the 15 March 2018 Board resolution and providing a link to the 15 February 2018 Roadmap. ³⁴
14 April 2018	Relevant Claimants filed Request 18-6. Claimants’ substantive claims are set forth below in Claimants’ separate section. Claimants also requested as follows: “For reasons of procedural economy, Requesters propose that this request for reconsideration be handled together with Reconsideration Request 16-11 that was put on hold pending completion of the CPE Process Review.”
23 May 2018	The Ombudsman recused himself from considering Request 18-6 “[p]ursuant to Article 4, Section 4.2(1)(iii).” ³⁵
14 June 2018	The BAMC recommends denial of Request 18-6. ³⁶
18 July 2018	The ICANN Board denies Request 18-6. ³⁷
2 October 2018	Claimants initiate a Cooperative Engagement Process (“CEP”) with ICANN as a precursor to instituting an IRP.
16 November 2018	The BAMC recommends denial of Request 16-11. ³⁸
27 January 2019	The ICANN Board denies Requests 16-11. ³⁹
18 November 2019	The CEP was closed.
16 December 2019	Claimants initiate this IRP.

I. STATUTE OF LIMITATIONS

A. Claims Alleged In Request 16-11

Issue Number	Claimants’ Position	Respondent’s Position
	Paragraph 3(b) of Procedural Order No. 10 provides as follows: “The Parties are to provide a clearer explanation as to the relationship between RFRs 16-11 and 18-6, including the following: (iv) How do the pendency of the RFRs 16-11 and 18-6 have a bearing on the statute of limitations? (v) As to which claim[s] do they have a bearing? (vi) How do RFRs fit into the framework of the requirements for an IRP as provided in relevant parts of Article 4, Section 4.3 of the [ICANN] Bylaws cited above?”	
2	Claimants’ RFR and IRP claims generally allege, <i>inter alia</i> , discriminatory treatment of Claimants, lack of transparency by ICANN, and undue influence of ICANN over the EIU and FTI. Evidence supporting those claims did not begin to	ICANN’s February 2016 Bylaws were the operative Bylaws at the time Claimants submitted Request 16-11. Under those Bylaws, a reconsideration request must be submitted within fifteen (15) days after the date on which

³⁴ MSA Reply Ex. 17.

³⁵ Ex. R-37.

³⁶ Claimants’ Ex. P.

³⁷ Ex. R-30.

³⁸ Claimants’ Ex. O.

³⁹ Ex. R-29.

<p>come to light until after the <i>DotRegistry</i> IRP decision. The ICANN Bylaws, Sec. 4.2(g)(II) provide that the time for reconsideration requests be filed “within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.” Therefore, Claimants’ claims could not have been brought prior to ICANN’s decision to accept that <i>DotRegistry</i> decision.</p> <p>Within fifteen days of ICANN publishing that decision, Claimants’ filed RFR 16-11, with the following argument headings (<i>verbatim</i>):</p> <ul style="list-style-type: none"> I. The ICANN Board disregarded material information <ul style="list-style-type: none"> A. The ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the <i>Dot Registry</i> case B. The ICANN Board failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of competing prospective registry operators II. The ICANN Board relied on false and inaccurate material information III. The ICANN Board failed to take material action <ul style="list-style-type: none"> A. The ICANN Board failed to properly investigate and address illegal actions that are attributable to HTLD B. The ICANN Board failed to remedy the violations of its AoI 	<p>information about the challenged Board action was first published in a resolution.⁴²</p> <p>Claimants have not identified what provision of ICANN’s Articles or Bylaws ICANN supposedly violated in denying Request 16-11 (and Request 18-6 discussed below). In any event, to the extent Request 16-11 challenges the ICANN Board’s decision to accept the <i>Despegar</i> IRP Panel’s Final Declaration, those claims are time-barred. The relevant resolution was published on 11 March 2016, well before Claimants submitted Request 16-11 on 25 August 2016. Further, Claimants’ challenge in Request 16-11 that the <i>Despegar</i> IRP Panel allegedly relied on false or misleading information is likewise time-barred because the Final Declaration in that IRP was issued on 12 February 2016. To the extent that Request 16-11 challenges the ICANN Board’s decision not to cancel HTLD’s .HOTEL application following the portal configuration investigation (and to the extent Claimants can identify which Article or Bylaws provision is at issue), the claim is timely because it was filed within 15 days of 11 August 2016, when the relevant ICANN Board resolution was published.</p> <p>ICANN disputes each of Claimants’ arguments—particularly any argument that ICANN “lied” to Claimants—but ICANN views many of Claimants’ arguments to be beyond the scope of Procedural Order No. 10, and thus ICANN does not respond to each argument. To the extent the Panel requests a response to any of Claimants’ arguments, ICANN is happy to respond.</p>
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⁴² See MSA Ex. 10, 11 February 2016 Bylaws, Art. IV, § 2.5: “All Reconsideration Requests must be submitted within fifteen days after: (a) for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution; (b) for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or (c) for requests challenging Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.”

and Bylaws in the CPE process for Requesters, while the ICANN Board is addressing these issues for other applicants

- IV. The ICANN Board took action in violation of GNSO-created policy and ICANN's AoI, Bylaws and Affirmation of Commitments
- A. The ICANN Board's refusal to cancel HTLD's application for .hotel is unjustified and a violation of ICANN's core obligations
 - B. The ICANN Board discriminated against Requesters by accepting *Dot Registry* IRP Determination and refusing to reconsider its position on the CPE determination re .hotel
 - C. The ICANN Board turned a blind eye to HTLD's misdeeds following the fruitless attempt by one interest holder in HTLD application to evade responsibility for the illegal actions of other interest-holders in the same application

Those RFR allegations remain at the heart of Claimants' IRP Complaint. For example:

Claimants' IRP Claim A states: "Claimants seek review whether ICANN had undue influence over the EIU with respect to its CPE decisions, and over FTI with respect to the CPE Process Review." In its SAM, ICANN acknowledges at least that "ICANN has not argued that the challenges in Claimants' Reconsideration Request 18-6 to the CPE Process Review, and the Board's acceptance thereof, are time-barred." Thus, ICANN admits the second part of Claim A is not time-barred.

In the first part of Claim A, Claimants allege that ICANN had undue influence over the EIU with

respect to its CPE decisions. This claim is not time-barred, because the evidence of ICANN’s undue influence over the EIU did not come to light until the *DotRegistry* Final Declaration and the FTI Reports were published. The ICANN Bylaws, Sec. 4.2(g)(II) provide that the time for reconsideration requests be filed “within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.” Therefore, Claimants’ then timely raised this issue of ICANN’s undue influence over the EIU via RFR 16-11 (pp. 11-14, re the CPE Review) and RFR 18-6 (*seriatim*, re the FTI Reports).

In RFR 16-11, Claimants argued *inter alia* that the ICANN staff was intimately involved in drafting the EIU CPE reports, despite ICANN policy to the contrary. Claimants also argued that the ICANN Board relied upon false and misleading information in accepting the *Despegar* IRP, because material information had been withheld by ICANN’s lawyers not only from Claimants and the *Despegar* IRP panel, but also from the ICANN Board in accepting that panel decision. Claimants also argued that ICANN failed its transparency obligations by refusing to provide that information to Claimants.⁴⁰ They also argued that the Board thereafter acted inconsistently and discriminated against Claimants by accepting the *Despegar* and *DotRegistry* decisions, which each involved the same core claim -- alleging ICANN’s undue influence over the EIU during the CPE.

But in the *Despegar* case, ICANN had misled the Claimants, stating repeatedly that such evidence did not exist and/or could not be disclosed per ICANN policy and/or contract with EIU.⁴¹ Then, in the *DotRegistry* case, the IRP panel forced ICANN to disclose such information, even after ICANN had misled those claimants and that panel about its existence. That panel found that evidence not only material but also dispositive in ruling against ICANN.

⁴⁰ See *supra*, n.21.

⁴¹ *Id.*

	<p>ICANN’s lies about such information, its discriminatory treatment of Claimants, and its undue influence over EIU, did not begin to come to light until the <i>DotRegistry</i> IRP decision was published. Therefore, Claimants could not have asserted any such claims before then.</p> <p>That discriminatory treatment of Claimants and undue influence over the EIU was then further proved by further information revealed in the FTI Reports commissioned by ICANN’s lawyers.</p> <p>RFR 16-11 was filed on August 25, 2016, within fifteen days of ICANN’s publication on August 11, 2016, of its decision to accept the <i>DotRegistry</i> Final Declaration. Furthermore, ICANN admits that RFR 18-6 was timely filed as to the FTI Reports. Therefore, no part of Claim A is time-barred.</p>	
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C. Claims Alleged In Request 18-6

Issue Number	Claimants’ Position	Respondent’s Position
	<p>Paragraph 3(b) of Procedural Order No. 10 provides as follows: “The Parties are to provide a clearer explanation as to the relationship between RFRs 16-11 and 18-6, including the following:</p> <p>(iv) How do the pendency of the RFRs 16-11 and 18-6 have a bearing on the statute of limitations?</p> <p>(v) As to which claim[s] do they have a bearing?</p> <p>(vi) How do RFRs fit into the framework of the requirements for an IRP as provided in relevant parts of Article 4, Section 4.3 of the [ICANN] Bylaws cited above?</p>	
3	<p>Claimants filed RFR 18-6, making the following three requests at page 8 (<i>verbatim</i>):</p> <ol style="list-style-type: none"> 1. ICANN reconsiders the ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 and reverses the decisions in which the ICANN Board (i) accepted the findings set forth in the CPE Process Review Reports, (ii) concluded that no overhaul or change to the CPE process for this current round of the New gTLD 	<p>ICANN’s 22 July 2017 Bylaws were the operative Bylaws at the time relevant Claimants submitted Request 18-6. Under the July 2017 Bylaws, the deadline to submit a reconsideration request challenging Board action was thirty (30) days after the date on which information about the challenged Board action was first published in a resolution.⁴⁴ Accordingly, Claimants’ challenges in Request 18-6 to the ICANN Board’s decision to accept the findings in the CPE Process Review Reports are timely because Claimants submitted</p>

⁴⁴ See MSA Ex. 13, 22 July 2017 Bylaws, Article IV, § 4.2(g)(i). Per Article IV, § 4.2(g), for example, reconsideration requests must be filed within 30 days “after the date on which information about the challenged Board action is first published in a resolution,” or “for requests challenging Staff actions, within 30 days after the date on which the Requestor became aware of, or reasonably should have become aware of, the challenged Staff action.”

Program is necessary, (iii) declared that the CPE Process Review has been completed.

2. ICANN provides full transparency regarding all communications between (i) ICANN, the ICANN Board, ICANN’s counsel and (ii) the CPE Process Reviewer. Requesters ask ICANN to provide full transparency on its consideration of the CPE Process and the CPE Process Review and to list and give access to all material the BAMC and the ICANN Board considered during its meetings on the CPE Process and the CPE Process Reviews.

3. For reasons of procedural economy, Requesters propose that this request for reconsideration be handled together with Reconsideration Request 16-11 that was put on hold pending completion of the CPE Process Review.

That third, ***procedural request***, is relevant to Claimants’ IRP claim that they should have been afforded independent Ombudsman review of both RFRs. ICANN did not consider RFR 16-11 until after the 2017 Bylaws were enacted and the Ombudsman review was *required*. RFR 16-11 covered some of the same subject matter as RFR 18-6 and all issues were intertwined. The 2016 Bylaws also gave the BAMC the authority to engage independent experts, ICANN staff or other sources in evaluating RFRs.

The BAMC should have engaged independent review from the Ombudsman or otherwise as to both RFRs. At least, ICANN was *required* to provide it for RFR 18-6. ICANN skirted that obligation by employing an Ombudsman who recused himself from every single RFR arising from the New gTLD program. This despite the clear Bylaws providing that the Ombudsman could have employed another expert, indeed even

the reconsideration request within the 30-day limitation—however, such claims are not properly before this Panel in this IRP unless and until Claimants are able identify the specific Article or Bylaws provision that ICANN allegedly violated by accepting the CPE Process Review Reports. Thus far, Claimants have been unable to identify any such Article or Bylaws provision.

ICANN disputes each of Claimants’ arguments, but ICANN views many of Claimants’ arguments to be beyond the scope of Procedural Order No. 10, and thus ICANN does not respond to each argument. To the extent the Panel requests a response to any of Claimants’ arguments, ICANN is happy to respond.

another ombudsman, to review RFRs.⁴³ This deprived Claimants, and more than a dozen other IRP claimants, of a critical procedural right afforded it under the Bylaws.

As to the first ***two substantive requests***, Claimants set forth the Bylaws provisions that were breached both in the RFR 18-6 (pages 5-7), and again in their IRP Complaint (pages 12-26). For example:

Claimants' IRP Claim A states: "Claimants seek review whether ICANN had undue influence over the EIU with respect to its CPE decisions, and over FTI with respect to the CPE Process Review." In its SAM, ICANN acknowledges at least that "ICANN has not argued that the challenges in Claimants' Reconsideration Request 18-6 to the CPE Process Review, and the Board's acceptance thereof, are time-barred."

Claimants IRP Claim B states: "Claimants seek review whether they were discriminated against, as ICANN reviewed other CPE results but not .HOTEL, even per RFRs after *DotRegistry*." ICANN's discrimination against Claimant was not evident until the CPE Process Review was complete. In its SAM, ICANN acknowledges at least that "ICANN has not argued that the challenges in Claimants' Reconsideration Request 18-6 to the CPE Process Review, and the Board's acceptance thereof, are time-barred."

Claimants' IRP Claim C states: "Claimants seek review of ICANN's "Portal Configuration" investigation and refusal to penalize HTLD's willful accessing of Claimant's confidential, trade secret information." In its SAM (p. 7), ICANN admits that "ICANN has not argued that the portions of Claimants' Reconsideration Request 16-11 that specifically challenge the Board resolutions regarding the Portal Configuration, as they relate to .HOTEL, are time-barred."

⁴³ See *supra*, n.29.

II. **RELATIONSHIP BETWEEN THE RECONSIDERATION REQUESTS AND THIS IRP**

17. As set forth in Article 4, Section 4.3 of ICANN's Bylaws, an IRP determines whether an action or inaction by ICANN staff or the ICANN Board violated ICANN's Articles or Bylaws. Therefore, the issue for this IRP Panel as it relates to Requests 16-11 and 18-6 is whether the ICANN Board violated any provision of its Articles or Bylaws when it denied those Reconsideration Requests, for those portions of the Requests that are not time-barred.

Dated: 9 November 2022

Respectfully submitted,

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