

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

Namecheap, Inc. (Namecheap))

)

4600 East Washington Street, Suite 305)

Phoenix, AZ 85034)

)

Claimant)

)

v.) **ICDR Case No. _____**

)

Internet Corporation For)

Assigned Names and Numbers)

(ICANN))

)

12025 Waterfront Drive, Suite 300)

Los Angeles, CA 90094-2536)

)

Respondent)

)

**REQUEST FOR INDEPENDENT REVIEW PROCESS
BY NAMECHEAP**

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The Claimant, Namecheap, submits this request for independent review ('IRP Request') pursuant to Article IV(3) of the ICANN Bylaws ('Bylaws'), the International Arbitration Rules of the International Centre for Dispute Resolution ('ICDR Rules'), and ICANN's Interim Supplementary Procedures for Independent Review Process. Namecheap has suffered direct harm as a result of ICANN's breaches of its Articles of Incorporation ('AoI', **RM¹ 1**) and Bylaws (**RM 2**).

1. This Independent Review Process ('IRP') arises out of ICANN's breaches of its AoI and Bylaws by the ICANN Board and staff in its failure to remedy the breaches that have been established in the IRP Declaration of 23 December 2023 in ICDR case No. 01-20-0000-6787 between Namecheap and ICANN (the 'IRP Declaration'). The IRP Panel determined in a final and binding decision that 'ICANN's action with respect to the Price Cap Decision was inconsistent with Sections 1.2(a), 1.2(b), 2.1, 3.1, 3.4, 3.5, and 3.6(a) of the Bylaws and Article III of the Articles of Incorporation'. The IRP Panel also made recommendations as to how ICANN could remedy these violations and ordered that ICANN reimburse Namecheap the sum of \$58,750.00.

2. While ICANN did reimburse Namecheap and acknowledged the IRP Panel's declaration that ICANN violated its AoI and Bylaws, ICANN never sought to remedy these violations. Namecheap has been addressing these issues with ICANN and has offered ICANN to resolve the dispute without the need for adversarial proceedings. However, ICANN has never engaged in good faith discussions with Namecheap, resulting in yet another violation of its AoI and Bylaws. Namecheap reserves the right to amend and complete the present Notice of Arbitration.

¹ Reference Material

I. THE PARTIES

A. Claimant

3. Namecheap, is an ICANN-accredited domain registrar and technology company founded in 2000 by CEO Richard Kirkendall. It is one of the fastest-growing American companies according to the 2018 Inc. 5000 (**Annex 1**). Celebrating nearly two decades of providing unparalleled levels of service, security, and support, Namecheap has been steadfast in customer satisfaction. With over 20 million domains under management (gTLD and ccTLD combined), the Namecheap family (Namecheap and Spaceship) is among the top domain registrars and web hosting providers in the world. Full contact details of the Claimant are provided as **Annex 1**.

4. Claimants are represented in these proceedings by:

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B. Respondent

5. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN is a non-profit public benefit corporation, incorporated under the laws of California. ICANN functions as the global regulator of the Internet's addressing system (the domain name system or 'DNS').² Although a private organisation in form, ICANN has extraordinary powers and regulatory responsibilities which are important for its stakeholders throughout the world.

² **RM 3**, paras. 1-2, 10; **RM 4**, para. 125.

II. ICANN'S FUNDAMENTAL OBLIGATIONS

6. Its mission and the limits of its authority are defined in ICANN's AoI, Bylaws and agreements. Pursuant to Article III AoI, ICANN '*shall operate in a manner consistent with these Articles and its Bylaws **for the benefit of the Internet community as a whole**, carrying out its activities **in conformity with relevant principles of international law** and international conventions and applicable local law and **through open and transparent processes** that enable competition and open entry in Internet-related markets'* (emphasis added). This commitment is reiterated in Article I(2)(a) Bylaws. Pursuant to Article I(2) Bylaws, ICANN must '*act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values.*' ICANN's Commitments and Core Values include the obligation to '*employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from **the public, for whose benefit ICANN in all events shall act**, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process.*' Article I(2)(v) and (vi) Bylaws mandate ICANN to '*make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment*' and to '*remain accountable to the Internet community*'.

7. A cornerstone for ICANN's decision-making process that is essential to comply with its commitment to remain accountable, is ICANN's obligation to operate in an open, transparent and fair manner. Article III(1) Bylaws provide that ICANN and its constituent bodies '*shall operate **to the maximum extent feasible** in an **open and transparent** manner and consistent with procedures designed to ensure fairness*' (emphasis added). ICANN is subject

to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Article II(3) Bylaws provides:

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

8. The abovementioned fundamental obligations of transparency and non-discrimination exist since ICANN’s incorporation in 1998 and were never changed (**RM 5**, Article III(1) and Article IV(1)(c)).

III. SUMMARY OF RELEVANT FACTS

A. Background to the IRP Declaration

1. Creation of ICANN

A key driver leading to the creation of ICANN was to promote competition and consumer choice, as they *‘should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction’*. Pressure of competition should *‘discourage registries from acting monopolistically’*.³ It was also required for ICANN’s processes to be *‘fair, open and pro-competitive’* and *‘sound and transparent’* to protect the Internet user community *‘against capture by a self-interested faction’*.⁴

9. Before ICANN’s formation in 1998, the gTLD name space contained only three gTLDs which operated upon a first-come, first-served basis: .com, .net and .org (these gTLDs are referred to as ‘original gTLDs’). These original gTLDs were all managed by Network Solutions, Inc. (NSI). In the mid-nineties, NSI’s monopoly over domain name registrations gave rise to criticism and there was a growing dissatisfaction concerning the absence of

³ NTIA, Management of Internet Names and Addresses: statement of policy, https://www.ntia.doc.gov/files/ntia/publications/6_5_98dns.pdf, (White Paper) (**RM 6**).

⁴ **RM 6**, p. 31750.

competition and the dominance of NSI (**RM 7**). It is thus not surprising that, in the U.S. Government's White Paper that led to the appointment of ICANN as the custodian of the DNS, the U.S. Government made clear that the creation of a competitive environment was one of the key tasks for the new custodian.

2. Attempts to break NSI's monopoly and the reassignment of .org

10. During the first years of its existence, ICANN tried to break the monopoly of NSI, while preserving the interests of the Internet users. It did so by (i) separating the registry business⁵ from the registrar business⁶, (ii) requiring NSI to develop a Shared Registration System interface for its .com, .net and .org TLDs, which should ensure that competitive registrars could use the registry on the same terms as NSI's registrar branch, (iii) imposing maximum prices for original gTLDs, and (iv) reassigning the .org gTLD to a new registry operator, Public Interest Registry ('PIR'), a non-profit created under the auspices of the Internet Society (ISOC).⁷

11. The reassignment of .org to PIR was done following a policy development process to assist in the orderly selection of a successor entity to operate .org. In accordance with the policy developed by the DNSO (**RM 10**), ICANN organized a request for proposals ('RFP') and created evaluation criteria for selecting a new registry operator from the proposals that were submitted (**RM 11**).

12. ICANN received 11 proposals and ultimately selected ISOC/PIR (**RM 12-14**). To obtain the reassignment of .org, PIR had made important commitments to comply with the RFP's criteria and the policy requirements (**RM 14-15**). PIR committed to maintain maximum prices to comply with the requirement for the .org registry fee charged to accredited registrars

⁵ I.e., the technical operation of the gTLD.

⁶ I.e., the business of registering domain names in TLDs for customers.

⁷ See **RM 8; RM 9**.

to be as low as feasible consistent with the maintenance of good quality service. PIR also recognized the unique public-interest-focused nature of .org. and committed 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 (**RM14-15**).

13. On 2 December 2002, ICANN and PIR entered into a registry agreement ('RA') for the operation of the .org TLD (**RM 16**). The RA was subsequently renewed on 8 December 2006 and 22 August 2013 (**RM 17-18**). To comply with the requirement that the .org registry fee charged to accredited registrars be as low as feasible consistent with the maintenance of good quality service, these RAs contained maximum prices that PIR could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another (**RM 17-18**).

3. The careful expansion of the gTLD name space⁸

14. In mid-April 2000, ICANN's policy-making body⁹ recommended that the ICANN Board adopt a policy for the introduction of new gTLDs in a measured and responsible manner. It was suggested that only a limited number of new gTLDs be introduced as a 'proof of concept' for possible future introductions.¹⁰ The ICANN Board eventually selected seven new gTLD proposals to enter into contract negotiations.¹¹ These seven proposals contained applications for both sponsored and unsponsored gTLDs. Sponsored gTLDs (such as .aero and .museum) aimed at serving a defined community rather than obtaining high volumes in domain name

⁸ For a critical appraisal of ICANN's efforts in expanding the gTLD name space, see Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International, pp. 25-38, 45-61, 89-132. With this book, the authors 'have exhaustively canvassed the historical, political and technical processes that made ICANN so central to the administration of the DNS, as well as the administrative, arbitral and other accountability processes that have developed within the ICANN system.' David H. BERNSTEIN, Foreword.

⁹ The DNSO, i.e., the predecessor of the GNSO.

¹⁰ ICANN, *ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains*, 13 June 2000 <https://archive.icann.org/en/meetings/yokohama/new-tld-topic.htm> (**RM 19**).

¹¹ ICANN, *Resolution 00.89 – Minutes of Second Annual Meeting (in Marina Del Rey)*, 16 November 2000, <https://www.icann.org/resources/board-material/minutes-annual-meeting-2000-11-16-en> (**RM 20**)

registration. Because of the community-purpose, ICANN saw no need to impose maximum prices for the registration and renewal of domain names. In contrast, unsponsored gTLDs such as .info and .biz aimed at higher registration volumes. For those gTLDs, ICANN considered it necessary to impose maximum prices for the registration, renewal and transfer of domain names. As only a small number gTLDs were awarded by ICANN, these new gTLD registry operators obtained a degree of market power, that was somehow constrained by the imposition price caps. Without those constraints, the .org, .biz and .info gTLD registry operators likely could profitably charge even higher fees.¹²

15. After the 2000 proof-of-concept round, ICANN organized a limited round for introducing new gTLDs that was reserved to sponsored TLDs only.¹³ ICANN continued working on the policy development and implementation for a larger expansion of the gTLD name space. This third round for introducing new gTLDs became known as the New gTLD Program and was approved by the ICANN Board on 20 June 2011.¹⁴

16. ICANN decided not to impose maximum prices for the registration, renewal and transfer of domain names in gTLDs delegated in accordance with the New gTLD Program ('New gTLDs'). Price caps for New gTLDs were not deemed necessary according to a report/opinion by Dennis Carlton that commissioned by ICANN. As a matter of fact, the

¹² See, Letter from Deborah A. Garza, Acting Assistant Attorney General (U.S. Department of Justice) to Meredith A. Baker, Acting Assistant Secretary for Communications and Information (NTIA), 3 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf> (**RM 21**); This letter is attached to a letter from the NTIA to ICANN, requiring that ICANN involve the Internet community in decision on pricing of gTLDs (**RM 21**).

¹³ Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International, pp. 51-53.

¹⁴ Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International, pp. 53-61; ICANN, *Approved Board Resolution 2011.06.20.01*, 20 June 2011, <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en> (**RM 22**).

existence of price caps in major legacy¹⁵ gTLDs (such as .com, .org, .biz and .info) was an important factor in Carlton's opinion that no price caps are necessary for new gTLDs:

'[T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.' (**RM 23**, para. 73)

'THERE IS NO BASIS FOR DR. KENDE'S CONCERNS THAT ICANN'S PROPOSAL WILL LEAD TO THE REPEAL OF EXISTING PRICE CAPS

As noted above, Dr. Kende suggests that the absence of price caps for new TLDs could result in the elimination of price caps for .com, .net, .org, .info, .biz and others as a result of the "equitable treatment" clause in ICANN agreements.²¹ We understand from ICANN that there is no basis for this concern. The language in this clause does not require identical treatment among all registries and recognizes that differences across ICANN contracts with different registries can be "justified by substantial and reasonable cause." ICANN's contracts with existing TLDs recognize that different practices may be appropriate for different registries and allow ICANN latitude to implement different procedures. I am aware of no statement either by ICANN or the Commerce Department favoring the elimination of price caps specified in existing registry contracts.' (**RM 24**, para. 22)

17. As from 14 July 2013, ICANN started contracting with New gTLD operators who accepted the terms of ICANN's base RA for New gTLDs (**RM 25-26**). On 22 August 2013, ICANN also renewed the RAs with the operators of .org, .info and .biz (**RM 18, 27-28**). The RAs for the operation of these legacy gTLDs were substantially different from the base RA for New gTLD, as the legacy RAs continued to contain maximum prices that legacy operators could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another.¹⁶ Both ICANN and the Internet community understood the substantially different nature of these legacy gTLDs compared to new gTLDs.

4. The sudden removal of price caps

18. On 18 March 2019, ICANN announced that it planned to renew the .org and .info RAs,

¹⁵ Namecheap refers to legacy TLDs when referring to the original gTLDs and those gTLD that have been delegated in accordance with the Proof-of Concept round or the 2004 Sponsored TLD round. Non-legacy TLDs are those gTLDs that were delegated in accordance with the New gTLD Program.

¹⁶ Compare **RM 26** to **RM 18, 27-28**.

making it more similar to the terms of the base registry agreement that ICANN used for new gTLDs that were introduced from 14 July 2013 onwards. The newly proposed .org and .info RAs no longer contained maximum prices that PIR could charge to ICANN-accredited registrars. ICANN gave the following explanation for this radical change:

‘In alignment with the base registry agreement, the price cap provisions in the current .org agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .org renewal agreement. Protections for existing registrants will remain in place, in line with the base registry agreement. This change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.’
(Annexes 2 and 3)¹⁷

19. The proposed removal of price caps in .org, .and info and .org was not well received within the Internet community. By 29 April 2019, ICANN had received over 3,500 comments rejecting the proposed change. Comments came from small non-profits, international organizations, government agencies, members of government, individuals, families, businesses, entrepreneurs, and people from lesser developed regions. An analysis of the data shows that comments came from a varied cross-section of Internet users and that about 20% of all comments were submitted by Namecheap customers.

20. ICANN rejected all of the comments against removing the price caps with a conclusory statement that is devoid of any supporting evidence. ICANN stated:

‘There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price cap provisions in the .org Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org 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.’ **(Annexes 5-7)**

¹⁷ ICANN provided the same explanation for .biz (**Annex 4**).

21. ICANN then went on to state that any price increases would require 6 months advance notice and that registrants could renew for 10 years at that point. These generalisations in ICANN's analysis ignore significant information that is contrary to ICANN's conclusions and turn a blind eye to the impact on budget planning for registrars and their customers. For a more detailed explanation, see **Annex 8**, pp. 5-10 and **Annex 9**, p. 5

22. On 30 June 2019, ICANN renewed the .org, .info and .biz RAs without maintaining the historic price caps, despite universal widespread public comment supporting that the price caps be maintained (**RM 18, 27-28**).

5. Namecheap strongly opposed the removal of price caps

23. On 12 July 2019, Namecheap asked the ICANN Board to reconsider ICANN's decision to remove the price cap requirement in the .org, .info and .biz RAs.¹⁸ Namecheap's request is known as 'Reconsideration Request 19-2' (**Annex 8**). Within the framework of Reconsideration Request 19-2, Namecheap pointed out that the decision was made in disregard of ICANN's fundamental rules and obligations and on the basis of an incomplete and non-transparent record (**Annexes 8 and 10**).

6. Namecheap enters in fruitless discussions with ICANN

24. In an attempt to resolve the issues related to the removal of the price caps, Namecheap entered into a cooperative engagement process ('CEP') with ICANN on 18 November 2019 (**Annexes 13 and 14**). ICANN remained non-transparent about its evaluation of and decisions on price caps and the proposed change of control.

25. As ICANN failed to address Namecheap's concerns in a timely fashion, Namecheap had no choice but to initiate arbitration proceedings. On 5 February 2020, Namecheap initiated an IRP Request, challenging ICANN's decision to remove the provisions according to which

¹⁸ The IRP Panel determined that the request with .biz did not form part of Namecheap's initial request and that the request regarding .biz was time barred.

the operators of .org, .info and .biz were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another. At the same time, Namecheap invited ICANN to recognize its breaches and remedy the situation *proprio motu* without the need for an order by an IRP Panel.

B. The IRP proceedings and the IRP Declaration

26. Following document production and after having dealt with ICANN's procedural defences, an oral hearing was conducted via videoconference from 28 March to 1 April 2022. After submitting post-hearing briefs, the parties presented oral closing arguments at a videoconference hearing on 29 June 2022.

27. On 22 December 2022, the IRP Panel issued a one hundred seventy-one (171) page IRP Declaration (**Annex 25**). The IRP Panel found in favour of Namecheap and declared that ICANN's approval of the 2019 Registry Agreements for .org and .info without price caps violated ICANN's AoI and Bylaws.¹⁹

28. To remedy these violations, the IRP Panel also issued a list of recommendations regarding the steps ICANN should take in view of its violations.

C. ICANN's accepted the IRP Declaration, but failed to address the violations

29. On 5 January 2023, ICANN publicly announced in a blogpost that the ICANN Board would consider the IRP Declaration as soon as feasible (**Annex 26**). On 18 January 2023, Namecheap shared its concerns about the language in the blogpost and urged the ICANN Board to comply with the IRP Panel's recommendations and to remedy the clearly identified violations of the AoI and Bylaws (**Annex 27**).

¹⁹ The IRP Panel considered that Namecheap's claims with respect to .biz were time barred and did not render a decision in this respect.

30. On 21 January 2023, the ICANN Board adopted resolutions 2023.01.21.06 – 2023.01.21.09 (the ‘January Resolutions’, **Annex 28**). In these resolutions, the Board acknowledged that the IRP Panel declared the following: (i) Namecheap prevailed on certain of its claims in the Namecheap, Inc. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and/or Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Namecheap the sum of US\$58,750. The Board directed the Interim President and CEO, or her designee(s), to take all steps necessary to reimburse Namecheap in the amount of US\$58,750. Finally, the Board resolved that further consideration is needed on the recommendations in the IRP Declaration and asked the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel’s Final Declaration and recommendations, and to provide the Board with its recommendation(s) regarding next steps for the Board to consider.

31. Hence, the ICANN Board considered the *declarations* of the IRP Declaration, but, to date, ICANN never considered the IRP Panel’s *recommendations*.

32. On 6 February 2023, Namecheap informed ICANN that it took note of the Board’s findings and shared its observations as to an apparent lack of due diligence and certain inaccuracies in the Board’s rationale for the January Resolutions (**Annex 29**).

33. On 17 February 2023, ICANN posted the Board Briefing Materials and Minutes relating to the January Resolutions, which confirmed the lack of diligence (**Annex 30-31**). On 22 February 2023, ICANN replied to Namecheap’s letter of 6 February 2023, but failed to address any of Namecheap’s concerns (**Annex 32**).

34. With the purpose of avoiding misunderstandings and differences and with a view to resolving the issue in a cooperative and non-litigious manner, Namecheap invoked the Cooperative Engagement Process (CEP) on 3 March 2023 (**Annex 33**).

35. An initial CEP conference took place on 30 March 2023. Redacted - Confidential Information

36. Redacted - Confidential Information

37. Redacted - Confidential Information

38. On 11 June 2023, the ICANN Board, issued resolution 2023.06.11.07 (the ‘June Resolution’), accepting a recommendation, made by the BAMC on 2 June 2023, to retain, as an initial step, an economist to provide input regarding the current domain name system marketplace with respect to the market power of .info and .org (**Annexes 38 and 39**).²⁰

Redacted - Confidential Information

²⁰ The Board’s preliminary report, meeting minutes, and briefing material are attached as **Annexes 40, 41 and 42**.

39. On 31 January 2024, Namecheap filed a petition with the Superior Court of the State of California, County of Los Angeles to confirm the IRP Declaration seeking confirmation of the arbitration award and to issue a mandatory injunction ('Namecheap's Petition to Confirm', **Annex 44**).

40. On 5 March 2024, the BAMC's Chair communicated an economic expert opinion, apparently prepared on 14 February 2024 by Gregory K. Leonard for ICANN from Charles River Associates (the 'Leonard Opinion', **Annex 45**). ICANN invited Namecheap to comment on the report by 15 April 2024 (**Annex 46**).

41. On 15 April 2024, Namecheap explained that there are several reasons why ICANN should not rely on the Leonard Opinion in its decision-making, as the Leonard Opinion (i) does not comply with the IRP Panel's recommendation, (ii) lacks transparency, (iii) is biased and not analytical, (iv) does not use appropriate methodology to reach an informed decision, (v) ignores important market developments, (vi) ignores likely reasons why registry operators for .org and .info seem to have refrained temporarily from exercising their market power, (vii) downplays future risks, (viii) was made without a duty of care, and (ix) contrary to previous reports commissioned with Charles River Associates, is not sanctioned by Charles River Associates (**Annex 47**).

42. ICANN never addressed any of these issues. ICANN simply requested on 8 May 2024 that Namecheap resend its letter of 15 April 2024 with a different subject-line, so ICANN felt comfortable to publish the letter (**Annex 48**). On 9 May 2024, Namecheap resent the letter with a different subject line, as per ICANN's request (**Annex 49**). ICANN never reacted since.

43. On 15 May 2024, ICANN filed a notice of demurrer in response to Namecheap's Petition to Confirm with the Superior Court of the State of California, County of Los Angeles (Annex 50).

44. On 26 June 2024, ICANN unilaterally decided to terminate the CEP (Annex 51).

45. On 3 July 2024, Namecheap objected to ICANN's unilateral decision and put ICANN on notice for not having conducted the CEP in good faith (Annex 52).

46. Once more, ICANN ignored Namecheap's objection and imposed that a request for IRP be filed by 16 September 2024 (Annex 53).

47. On 11 September 2024, Namecheap filed its opposition to ICANN's demurrer to Namecheap's Petition to Confirm with the Superior Court of the State of California, County of Los Angeles (Annex 54). A hearing is scheduled to take place on 24 September 2024.

IV. APPLICABLE LAW

48. In accordance with Article IV(3) Bylaws, an IRP Panel must determine whether the contested ICANN's actions and inactions are consistent with applicable rules. The set of rules against which ICANN's actions and inactions Board must be assessed includes: (i) ICANN's AoI and Bylaws – both of which require compliance with *inter alia* international law²¹ and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the DNSO and GNSO policies and commitments ICANN made to the benefit of the Internet community as a whole. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.

²¹ In particular, Article III AoI charges ICANN 'with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law' (RM 3, Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08, para. 140).

49. ICANN's obligations also include the obligation to make reparation for illegal acts. According to settled case law, 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.²²

50. Equally, it is a general principle of international law that the actor responsible for the wrongful act must make full reparation for the injury caused. Reparation in kind or *restitutio in integrum* is intended to place the injured party in the same position as it would have been in, had the breach not occurred. The principle was laid down by the Permanent Court of Justice in the *Chorzow Factory* case, stating:

'The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'²³

51. As the principle of *restitutio in integrum* has been applied consistently in international law²⁴, it has the status of a general principle of international law that ICANN must apply.²⁵ Part of the restitution may be abolishing the consequences of the unlawful act, requiring the injuring party to cease the extant unlawful effects, as was done in the *Martini case* and the *Arrest Warrant case*.²⁶ Not only the initial act is wrongful, but also its consequences. These consequences constitute actual threat, so long as they exist. Therefore, as an injuring party that

²² PCIJ, *Chorzow Factory Case* (Germany v. Poland), 13 September 1928, *PCIJ Rep. Series A*, No. 17, 29 (**RM 33**); See also ICJ, *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 14 February 2002, *ICJ Rep.* 2002, 3, §§ 73-76 (**RM 34**).

²³ PCIJ, *Chorzow Factory Case* (Germany v. Poland), 13 September 1928, *PCIJ Rep. Series A*, No. 17, 47 (**RM 33**).

²⁴ See ICJ, *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Merits, *Judgment of 15 June 1962*, ICJ Reports 1962, p. 6, at 36-37 (**RM 35**); CACJ, *El Salvador v. Nicaragua*, 9 March 1917, 11 Am. J. Int'l L. 674 (1917) (**RM 36**); Martini case, UNRIAA, vol II (Sales No 1949 V 1), p 975 (**RM 37**); ICJ, *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 14 February 2002, *ICJ Rep.* 2002, 3, §76 (**RM 34**).

²⁵ Article III AoI; Article I(2)(a) Bylaws.

²⁶ Martini case, UNRIAA, vol II (Sales No 1949 V 1), p. 975 (**RM 37**); ICJ, *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 14 February 2002, *ICJ Rep.* 2002, 3, §76 (**RM 34**).

committed itself to act in accordance with principles of international law, ICANN is obliged to cease the continuing consequences of its wrongful acts.

V. SUMMARY OF ICANN'S BREACHES

A. Failure to remedy breaches

52. ICANN has failed to remedy the violations of its AoI and Bylaws, as established in the IRP Declaration. ICANN's actions and inactions resulting in this failure are contrary to its AoI and Bylaws.

53. Principles of accountability, adherence by a corporation to its AoI and Bylaws, and general principles of international law require that, when a legal actor is found to have violated certain rules or regulations, it is not enough to merely acknowledge the violation. The injuring party must take concrete steps to remedy the violation to ensure compliance with its AoI and Bylaws and to prevent further harm. Failure to do so can be seen as a continuation of the original violation, as it demonstrates a lack of commitment to rectifying the wrongdoing and upholding the principles that were breached.

54. In the case at hand, the IRP Panel determined that ICANN's actions were inconsistent with its Articles of Incorporation and Bylaws. The Panel made recommendations on how ICANN could remedy these violations. However, ICANN failed to take the necessary steps to address the violations

55. This failure to remedy the initial violation can be seen as a violation in itself, as it undermines the integrity of the regulatory framework and the trust placed in ICANN to act in accordance with its mission and its established rules and principles. It also perpetuates the harm caused by the original violation, as the underlying issues remain unresolved.

56. Hence, ICANN's failure to remedy a violation constitutes a further violation of its AoI and Bylaws. It demonstrates a disregard for accountability and adherence to established rules,

perpetuates the harm caused by the original violation, and undermines the integrity of the regulatory framework.

B. Failure to act in good faith

57. ICANN's failure to provide adequate remedy is contrary to the principle of good faith.

58. In addition, ICANN did not act in good faith in the context of the CEP initiated by Namecheap. ICANN violated its AoI and Bylaws *inter alia* by (i) not being transparent, (ii) not being cooperative, (iii) not adhering to the process it established itself, (iv) not seeking resolution, (v) not responding to Namecheap's legitimate questions and concerns, (vi) unilaterally terminating the CEP. All of this is in violation with the principle of international law, which requires ICANN to act in good faith.

VI. PROCEDURAL MATTERS

59. Pursuant to Article IV(3)(k)(ii) Bylaws, Claimant hereby requests that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.

60. It does not appear that ICANN has established the standing panel described in Article IV(3)(j) Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, Claimants suggest that the parties agree to the following method for appointing the IRP Panel: each party shall appoint one panelist, after which the two panelists so appointed shall jointly select, in consultation with the parties, the third panelist, who shall serve as the Chairman of the Panel.

61. Claimants propose that both Claimants and ICANN simultaneously make their panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of the confirmation by ICDR of the appointment of the respective panelists. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date

on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

VII. RELIEF REQUESTED

62. Based on the foregoing, and reserving all rights, including but not limited to the right (i) to amend the relief requested below, *inter alia*, to reflect document production and further evidence, and (ii) to rebut ICANN's response in further briefs and during a hearing, Claimants respectfully request that the Panel, in a binding Declaration:

- Declare that ICANN's failure to annul its Price Cap Decision removing price caps in .org and .info registry agreements is inconsistent with Sections 1.2(a), 1.2(b), 2.1, 3.1, 3.4, and 3.6(a) of the Bylaws and Article III of the Articles of Incorporation;
- Declare that ICANN's failure to provide a remedy for the violations found in the IRP Declaration of 23 December 2022 in ICDR Case No. 01-20-0000-6787 constitutes a violation of ICANN's Bylaws and Articles of Incorporation;
- Order that ICANN annul its Price Cap Decision removing price caps in .org and .info registry agreements;
- Order that ICANN implement the recommendations set forth in Section XIII.D.2 of the IRP Declaration of 23 December 2022 in ICDR Case No. 01-20-0000-6787 within 90 days from the Panel's order;
- Declare Namecheap the prevailing party in this IRP;
- Award Namecheap its costs in this proceeding and its costs during the cooperative engagement process; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

Respectfully submitted,
13 September 2024


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