

**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.)
)
Internet Corporation For)
Assigned Names and Numbers)
(ICANN))
)
12025 Waterfront Drive, Suite 300)
Los Angeles, CA 90094-2536)
)
Respondent)
)
_____)

ICDR Case No. 01-20-0000-6787

CLAIMANT NAMECHEAP'S PRE-HEARING BRIEF ON THE MERITS

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I. EXECUTIVE SUMMARY

1. The Claimant, Namecheap, submits this pre-hearing brief on the merits in accordance with Procedural Order ('P.O.') No. 14.

2. This Independent Review Process ('IRP') arises out of ICANN's breaches of its Articles of Incorporation and Bylaws by *inter alia*, making a non-transparent, discriminatory and unfair application of the rules and policies governing the operation of the .ORG, .INFO and .BIZ generic top-level domains. In particular, the dispute relates to ICANN's decision to remove the provisions according to which the operators of .ORG, .INFO and .BIZ were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another. Namecheap is an ICANN-accredited registrar that is directly impacted by this decision.

3. Namecheap has suffered direct harm as a result of ICANN's breaches of its Articles of Incorporation ('AoI', **RM¹ 1**) and Bylaws (**RM 2**).

4. ICANN's unique argument is that it switched all registry agreements (RAs) to the Base RA that was developed for the purpose of introducing new gTLDs and that contains no price caps.

5. However, ICANN has not switched all RAs to the Base RA (*e.g.*, not for .COM, .NAME and .NET). Prior to the removal of price caps in .ORG, .INFO and .BIZ, ICANN, had removed price caps in a singly, tiny gTLD (.PRO). The situation of .PRO was and is, however, not comparable to .ORG, .INFO and .BIZ, which are major legacy gTLDs with significant power. Once before, in 2005, ICANN attempted to lift price caps in a gTLD comparable to .ORG, .INFO and .BIZ, namely .NET. ICANN's attempt led to protests and discussions.

¹ Reference Material

ICANN ultimately reconsidered its actions. ICANN responded to this protest by reintroducing price caps and amending the .NET RA.

6. ICANN has failed to do the same in the case regarding .ORG, .INFO and .BIZ. ICANN not only took a questionable decision which led to protests and the challenge of the decision in the current IRP. It also acted in the most untransparent way possible and with the clear intent to hide essential information from the Internet community. Even members of ICANN's own Board were misled, possibly with the involvement of the Board's Chair at the time.

7. More than 10 years ago, in the framework of the preparation of the third round of the opening of the TLD market, ICANN commissioned Dennis Carlton, an economic consultant, to analyze the need for price caps in the New TLDs. In 2009, his conclusion was clear: 1) The existence of price caps in major legacy gTLDs (such as .COM, .ORG, .INFO. and .BIZ) was an important factor to conclude that no price caps were necessary for new gTLDs; 2) He was aware of no statement either by ICANN or the Commerce Department favoring the elimination of price caps specified in existing registry contracts.

8. In 2019, in the framework of ICANN's preparation of the challenged decision in the current IRP, Redacted - Confidential Information

In 2019, this initiative was not shared by
ICANN with the Internet Community. Redacted - Confidential Information

All this information was
discovered by Namecheap's counsel when they analyzed the documents and privilege log which ICANN was ordered to produce.

9. In the background of this, the registry operator of .ORG planned a change of control, which would imply a move from a non-profit to a for-profit corporation. ICANN withheld its approval to the change of control for the time being, and only following clear protests from the

Internet community and following an express recommendation by the California Attorney General. However, in view of the terms ICANN used in withholding its approval, it is not excluded that ICANN approves the change of control going forward and that is done in an equally opaque manner as the decisions that led to the removal of price caps in .ORG, .INFO and .BIZ.

10. In 2021, in the current IRP, ICANN claims that Redacted - Confidential Information

At the time of the filing of this brief, the nature of this communication was still under discussion.

11. In essence, ICANN gradually moved from a transparent open discussion on price caps in TLDs to a hidden and concealed preparation of an RA with no price caps in the .ORG, .INFO, and .BIZ TLDs, and a disdain for protest by the Internet Community, whereby ICANN held secret meetings, cloaked documents in privilege, failed to perform the necessary analysis, engaged in arbitrary decision-making, etc.

12. Ironically, ICANN's attitude, trying to escape from its mission of global importance and accountability, can make a panel only but conclude that ICANN has violated an impressive list of its fundamental obligations, commitments, and core values and obligations.

II. KEY PROCEDURAL DOCUMENTS

13. On 25 February 2020, Namecheap filed the Request for Independent Review Process together with RM1 to RM34 and Annexes 1 to 24.

14. On 10 April 2020, ICANN filed its Response together with Exhibits R1 to R8.

15. On 18 August 2020, Namecheap filed a Motion to Compel.

16. On 4 November 2020, ICANN filed a Motion to Compel.

17. On 24 November 2020, Namecheap filed its Response to ICANN's Motion to Compel.

18. On 24 November 2020, ICANN filed its Response to Namecheap's Motion to Compel.

19. On 2 December 2020, the Panel held a Hearing on the Motion to Compel.
20. On 21 December 2020, Namecheap filed its Prima Facie Showing of Standing together with two affidavits and an Expert Report.
21. On 13 January 2021, ICANN filed a Motion to Dismiss together with Exhibits R17 to R18 and Legal Authorities RLA1 to RLA3.
22. On 26 January 2021, Namecheap filed its Response to ICANN's Motion to Dismiss together with RM60 to RM74.
23. On 3 February 2021, the Panel held an Evidentiary Hearing on ICANN's Motion to Dismiss.
24. On 29 September 2021, Namecheap filed a Motion to Compel and Sanctions.
25. On 14 October 2021, ICANN filed a Response to Namecheap's Motion to Compel and Sanctions.
26. On 19 October 2021, the Panel held a Hearing on the Motion to Compel and Sanctions.

III. THE PARTIES

A. Namecheap

27. 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. 5000.² Celebrating nearly two decades of providing unparalleled levels of service, security, and support, Namecheap has been steadfast in customer satisfaction. With over 10 million domains under management, Namecheap is among the top domain registrars and web hosting providers in the world.

² **Annex 1.**

B. ICANN

1. ICANN as an organization

28. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN), 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').³ Although a private organization in form, ICANN has extraordinary powers and regulatory responsibilities which are important for its stakeholders throughout the world.

2. ICANN's structure

a. The ICANN Board

29. As a California non-profit public benefit corporation and pursuant to Section 5210 of the California Corporations Code ('CCC')⁴, ICANN must have a board of directors, conducting ICANN's activities and affairs. Section 5210 of the CCC requires that all corporate powers be exercised by, or under direction of, ICANN's Board.⁵

30. This requirement is confirmed in Article 2(1) ICANN's Bylaws, which provides:

'GENERAL POWERS

*Except as otherwise provided in the Articles of Incorporation or these Bylaws, **the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board** (as defined in Section*

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

⁴ Sections 5110-6990 of the California Corporations Code govern public benefit nonprofit corporations.

⁵ Section 5210 of the California Corporations Code provides: '*Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.*'

ICANN has no 'members'. Article 23 of ICANN's Bylaws provides explicitly:

'ICANN shall not have members, as contemplated by Section 5310 of the CCC, notwithstanding the use of the term "member" in these Bylaws, in any ICANN document, or in any action of the Board or staff. For the avoidance of doubt, the EC is not a member of ICANN.'

Hence, there can be no '*limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033).*'

7.1). *With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors. In all other matters, except as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board. Any references in these Bylaws to a vote of the Board shall mean the vote of only those Directors present at the meeting where a quorum is present unless otherwise specifically provided in these Bylaws by reference to "of all Directors."*

31. Section 7.1 referred to in this Article 2(1) determines the composition of the ICANN Board:

'Section 7.1. COMPOSITION OF THE BOARD

*The ICANN Board of Directors ("**Board**") shall consist of sixteen voting directors ("Directors"). In addition, four non-voting liaisons ("**Liaisons**") shall be appointed for the purposes set forth in Section 7.9. Only Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board.'*

32. Section 3.6(a)-(c) referred to in Article 2(1) provides for a notice and comment period on policy actions:

'Section 3.6. NOTICE AND COMMENT ON POLICY ACTIONS

(a) *With respect to any **policies** that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:*

(i) ***provide public notice** on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;*

(ii) *provide a **reasonable opportunity for parties to comment** on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), **prior to any action by the Board**; and*

(iii) *in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.*

(b) *Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.*

(c) *After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.’*

33. The ICANN Board acts through resolutions. These resolutions are passed during Board meetings. As further explained below⁶, the Board’s resolutions must contain a detailed rationale and be documented in the Board’s meeting minutes.⁷

b. The ICANN Organization

34. The Board is supported by the ICANN organization to conduct its business and affairs. Around the time of the challenged decision in the current IRP, ICANN had about 390 staff members.⁸ ICANN’s staff is regularly instructed by the ICANN Board through resolutions to implement Board decisions.

35. ICANN’s staff has an executive team, managed by ICANN’s President and CEO. Article 15(4) of ICANN’s Bylaws provides that ICANN’s ‘*President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special*

⁶ See e.g., Chapters VII.E and IX.C.3.

⁷ See Article 3(5) of ICANN’s Bylaws.

⁸ As of 31 December 2018, ICANN had 390 active staff members; as of 31 March 2019, ICANN had 385 active staff members; and as of 30 September 2019, ICANN had 390 active staff members (See ICANN, *Board Report – Istanbul Workshop*, April 2019, https://www.icann.org/uploads/board_report/attachment/87/ICANN_Org_Executive_Team_Reports_-_Istanbul_PUBLIC_PDF_.pdf (RM 75); ICANN, *Board Report – Los Angeles Workshop*, August 2019, https://www.icann.org/uploads/board_report/attachment/89/ICANN_Org_Executive_Team_Reports_-_Los_Angeles_Workshop_2019-2_.pdf (RM 76); ICANN, *Board Report – Los Angeles Workshop*, May 2020, https://www.icann.org/uploads/board_report/attachment/93/ICANN_Org_CEO_Report_to_the_Board_-_May_2020_FINAL.pdf (RM 77)); Article 4(2), *in fine* of ICANN’s Bylaws defines ICANN staff to include ‘*employees and individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors directly.*’

meetings of the Board as set forth herein, and shall discharge all other duties as may be required by [ICANN's] Bylaws and from time to time may be assigned by the Board.' ICANN's CEO is thus one of the sixteen voting Board members.

36. In addition to the ICANN staff that supports the organization, ICANN also employs staff to support the multistakeholder community that populates the ICANN environment (*See* Chapter III.B.2.c below). For example, Article 11.4(a) provides that a member of ICANN staff must be assigned to support the GNSO.⁹ There is also a staff position responsible for coordinating public participation in ICANN.¹⁰

c. The ICANN Community

37. ICANN must coordinate the development and implementation of policies for which *'uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS.'*¹¹ These policies must be developed *'through a bottom-up consensus-based multistakeholder process.'*¹² To fulfil this mission, ICANN relies upon a global community of multiple stakeholders who participate in developing policies.

38. In simpler terms: ICANN *'defines policies for how the "names and numbers" of the Internet should run.'* This work moves forward in a style that ICANN describes as the *'bottom-up, consensus-driven, multi-stakeholder model'* and explains as follows:

'Bottom up. At ICANN, rather than the Board of Directors solely declaring what topics ICANN will address, members of sub-groups in ICANN can raise issues at the grassroots level. Then, if the issue is worth addressing and falls within ICANN's remit, it can rise through various Advisory Committees and Supporting Organizations until eventually policy recommendations are passed to the Board for a vote.'

⁹ The Generic Names Supporting Organization, *i.e.*, ICANN's policy-development body responsible for developing and recommending to the Board substantive policies relating to generic top-level domains (Article 11(1) ICANN's Bylaws).

¹⁰ Article 3(3) ICANN Bylaws.

¹¹ Article 1(1) ICANN Bylaws.

¹² Article 1(1) ICANN Bylaws.

***Consensus-driven.** Through its Bylaws, processes, and international meetings, ICANN provides the arena where all advocates can discuss Internet policy issues. Almost anyone can join most of ICANN's volunteer Working Groups, assuring broad representation of the world's perspectives. Hearing all points of view, searching for mutual interests, and working toward consensus take time, but the process resists capture by any single interest— an important consideration when managing a resource as vital as the global Internet.*

***Multistakeholder model.** ICANN's inclusive approach treats the public sector, the private sector, and technical experts as peers. In the ICANN community, you'll find registries, registrars, Internet Service Providers (ISPs), intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from more than 100 governments, and a global array of individual Internet users. All points of view receive consideration on their own merits. ICANN's fundamental belief is that all users of the Internet deserve a say in how it is run.*¹³

39. However, as will be demonstrated below, all too often, ICANN's explanation about how it functions through a bottom-up, consensus-driven, multi-stakeholder model is mere rhetoric.

IV. ICANN'S REASON OF EXISTENCE, ROLE AND FUNCTION

A. ICANN's powers and regulatory responsibilities

40. It is difficult to overstate the importance of the Internet, or how it has become a principal means for global communication and a principal engine of global economic growth. Yet how access to the Internet's critical infrastructure is governed and controlled is less commonly known. Such access is governed and controlled by ICANN. To understand ICANN's importance, how it acquired its extraordinary powers over the DNS, how and why these powers are counterbalanced by strict rules of transparency, fairness, non-discrimination, public benefit and accountability, a brief overview of the Internet's history and of the economic forces at play in the DNS industry is warranted.

¹³ ICANN, *About ICANN*, <https://www.icann.org/resources/pages/welcome-2012-02-25-en> (**RM 78**).

41. Namecheap provides the expert witness testimony by Mr. Jeffrey N. Neuman¹⁴ in a **Regulatory Expert Report**, explaining the history of the DNS and the Internet, ICANN's governance role in it, and the way in which ICANN has regulated competition and prices in the DNS. A summary of ICANN's history is also provided in Chapter V.A below.

42. ICANN controls the keys of the Internet. It manages the Internet's unique identifier systems (names and numbers) through which computers communicate over the Internet. The Internet's namespace is hierarchically structured and became known as the Domain Names System or DNS. An explanation of the DNS' hierarchical structure is provided in Chapter V.A.1 below.

43. ICANN decides who gets access to the Internet by determining the conditions upon which access is granted. It does so through standards, policies, and licensing agreements with technical operators of critical Internet infrastructure. Through registry agreements (RAs), registry operators obtain a license to operate so-called top-level domains (TLDs), which gives them control over entire name spaces on the Internet.

44. ICANN's control of the Internet's key infrastructure has an obvious technical component. In this respect, ICANN has done a remarkable job in maintaining the security and

¹⁴ Jeffrey N. Neuman is a well-respected member of the DNS industry. He has been active in the DNS industry for over 25 years and has been active within the ICANN community since the start. On behalf of the American Intellectual Property Association ('AIPAA'), he assisted in the formation of ICANN in 1998. Between 2000 through 2014, he led all negotiations between Neustar and ICANN for the .BIZ top level domain (TLD). He has previously testified before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the U.S. Judiciary House of Representatives. He fulfills key roles in the ICANN community and has recently been reappointed as the Liaison between the GNSO and the Government Advisory Committee (GAC), *i.e.*, the advisory committee within ICANN that considers and provides advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues (Article 12(2) of ICANN's Bylaws). Jeffrey N. Neuman has been the representative of the registry stakeholder group and their former chair, he was the GNSO Council Vice Chair, participant in various working groups and the co-chair of the GNSO New gTLD Subsequent Procedures PDP Working Group, *i.e.* the group developing the policies and the procedures related to the introduction of additional new gTLDs. A more complete CV is added as Appendix A to the **Regulatory Expert Report**.

stability of the DNS.¹⁵

45. However, ICANN's role and responsibilities also have a huge economic and public interest component.¹⁶ As will be demonstrated throughout this legal brief, in its management of the DNS, ICANN has failed at numerous occasions to adequately address the economic and public interest component.

46. ICANN's economic and public interest mission is recognized extensively throughout ICANN's governance documents, including its Articles of Incorporation and Bylaws. ICANN must act responsibly, in the interest and for the benefit of the Internet community as a whole. It must comply with principles of international law, applicable local law and good governance principles. ICANN must remain accountable to the Internet community, which is why its actions and inactions are subject to independent third-party review by IRP panels.

B. How did ICANN obtain its powers and regulatory responsibilities?

47. 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 competition and the dominance of NSI.¹⁷ The U.S. Government recognized the need for change and to break NSI's monopoly. Therefore, the National Telecommunications and Information

¹⁵ Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International, p. 1.

¹⁶ See e.g., 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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf> (RM 21), p. 6; **Regulatory Expert Report**, para. 107.

¹⁷ **RM 7**, NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, 5 June 1998 ('White Paper'), published in the Federal Register on 10 June 1998, <https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf>, p. 31742.

Administration agency (NTIA)¹⁸ designed an action plan to ensure the creation of a formal and robust management structure that is accountable to the Internet community.¹⁹

48. ICANN was created in response to this plan by the U.S. Government to ‘*privatize the management of Internet names and addresses in a manner that allows for the development of robust competition and facilitates global participation in Internet management*’.²⁰ The risk that top-level domains (TLDs) would serve as natural monopolies, create lock-in and switching costs was ‘*left for further consideration and final action by the new corporation*’ that became ICANN.²¹ Among the key principals for transitioning DNS oversight to ICANN was: ‘*where possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction.*’²²

49. Thus, in contrast to the governmental bodies that enforce antitrust laws, ICANN received an affirmative mandate to promote competition. ICANN is to act to create more competition, where feasible. ICANN’s mandate requires ICANN to intervene where market forces are failing.

50. At several instances, ICANN has reaffirmed its mandate to promote competition, where feasible. On 7 June 2006, former NTIA Associate Administrator Ms. Becky Burr testified that

¹⁸ The NTIA is an agency of the U.S. Government’s Department of Commerce.

¹⁹ **RM 7**, NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, 5 June 1998 (‘White Paper’), published in the Federal Register on 10 June 1998, <https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf>, p. 31742.

²⁰ **RM 79**, NTIA, *Proposal to Improve Technical Management of Internet Names and Addresses*, 30 January 1998, <https://www.ntia.doc.gov/files/ntia/publications/dnsdrft.txt> (‘Green Paper’); **RM 7**, NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, 5 June 1998 (‘White Paper’), published in the Federal Register on 10 June 1998, <https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf>, p. 31742.; **Regulatory Expert Report**, paras. 8-20.

²¹ **RM 7**, NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, 5 June 1998 (‘White Paper’), published in the Federal Register on 10 June 1998, <https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf>.

²² **RM 7**, NTIA, *Statement of Policy on the Management of Internet Names and Addresses*, 5 June 1998 (‘White Paper’), published in the Federal Register on 10 June 1998, <https://www.govinfo.gov/content/pkg/FR-1998-06-10/pdf/98-15392.pdf>; **Regulatory Expert Report**, para. 14.

‘Competition is at the heart of the ICANN mission, and it is a highly complex issue, but the community is clearly not satisfied with the “leave it to the anti-trust authorities to intervene if they don’t like it” approach.’ She considered that, in order to ‘improve the ICANN process and preserve private sector management of the DNS [...], the ICANN community [had to] clarify and articulate ICANN’s responsibilities with respect to competition.’²³

51. On 25 September 2006, the ICANN Board took up this advice, reaffirming ICANN’s *‘commitment to the private sector management of the Internet DNS, by promoting the security and stability of the global Internet, while maintaining and promoting competition through its multi-stakeholder model’.*²⁴ ICANN specifically affirmed and agreed to be guided by the following responsibilities for TLD Management:

*‘ICANN shall maintain and build on processes to **ensure that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions**, including the consideration and implementation of new TLDs and the introduction of IDNs. ICANN will continue to develop its policy development processes, and will further develop processes for **taking into account recommendations from ICANN’s advisory committees and supporting organizations and other relevant expert advisory and organizations.**’²⁵*

52. On 30 September 2009, ICANN affirmed key commitments in an Affirmation of Commitments (‘AoC’) with the U.S. Department of Commerce (DoC). ICANN affirmed *‘key commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and*

²³ Testimony of J. Beckwith Burr, Wilmer Cutler Pickering Hale and Dorr LLP, before the House Committee on Small Business, June 7, 2006, available at

https://www.ntia.doc.gov/legacy/ntiahome/domainname/dnstransition/comments/dnstrans_comment0609.htm (RM 80).

²⁴ ICANN, *Affirmation of Responsibilities for ICANN’s Private Sector Management*, approved by the ICANN Board of Directors, 25 September 2006, <https://www.icann.org/en/system/files/files/jpa-29sep06-en.pdf> (RM 81); ICANN, *Resolution 06.71*, <https://www.icann.org/resources/board-material/minutes-2006-09-25-en> (RM 82).

²⁵ ICANN, *Affirmation of Responsibilities for ICANN’s Private Sector Management*, approved by the ICANN Board of Directors, 25 September 2006, <https://www.icann.org/en/system/files/files/jpa-29sep06-en.pdf> (RM 81); ICANN, *Resolution 06.71*, <https://www.icann.org/resources/board-material/minutes-2006-09-25-en> (RM 82).

*consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.*²⁶ The AoC focused on ICANN’s fundamental obligations to act transparently, make reasoned and thoroughly explained decisions, remain accountable, act as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.

53. With respect to ICANN’s key commitment to promote competition, consumer trust, and consumer choice, Clause 9.3 of the AoC provided that *‘ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation.’*

54. In 2016, the U.S. Government relinquished its oversight role, following an intense process across the ICANN community to enhance ICANN’s accountability towards the Internet community as a whole.²⁷ The key commitments of the AoC were incorporated in ICANN’s Bylaws.²⁸

²⁶ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (‘Affirmation of Commitments’), Clause 3, https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf (RM 83).

²⁷ See ICANN, *Charter Cross Community Working Group (CCWG) on Enhancing ICANN Accountability*, 4 November 2014, <https://community.icann.org/display/acctcrosscomm/Charter> (RM 84).

²⁸ Letter from Dr. Stephen D. Crocker (Chair, ICANN Board of Directors) to Lawrence E. Strickling (NTIA) of 3 January 2017, available at https://www.ntia.doc.gov/files/ntia/publications/ntia-icann_affirmation_of_commitments_01062017.pdf (RM 85).

V. SUMMARY OF RELEVANT FACTS

A. Background

1. The Domain Name System (DNS) and the DNS Industry

a. The technical operation of the DNS

55. Computers on the Internet communicate with each other via numeric IP addresses. The numeric IP addresses are less easily recognizable for humans. Every IP address that was assigned to a network was also assigned to the name of the network.²⁹ In the early stages of the Internet, with a fairly limited number of computers on the network, it was relatively easy to navigate through the directory of names and numbers and to identify the correct computer. But as the network expanded, the directory became difficult to manage; the master file of the directory required constant updating, and all computers on the network needed a copy of the master file, which resulted in errors and slowness caused by the continual need to download the master file.³⁰ A more structured approach, adapted to the growing size of the Internet was required. In 1981, the idea to create a hierarchical namespace and to partition the namespace into different domains was brought forward.³¹ The idea was further developed³², and ultimately resulted in the crystallization of a hierarchical structure, which became known as the Domain Name System (DNS).³³

²⁹ Jon Postel, *Assigned Numbers*, Network Working Group Request for Comments # 790, September 1981 <http://www.ietf.org/rfc/rfc0790.txt> (RM 86).

³⁰ A. Yasuda, T. Thompson, *TELNET Data Entry Terminal Option DODIIS Implementation*, Network Working Group Request for Comments # 1043, February 1988, <http://www.ietf.org/rfc/rfc1043.txt> (RM 87); J. Klensin, *Role of the Domain Name System (DNS)*, Network Working Group Request for Comments # 3467, February 2003, <https://tools.ietf.org/html/rfc3467> (RM 88).

³¹ D. L. Mills, *Internet Name Domains*, Network Working Group Request for Comments # 799, September 1981, <https://tools.ietf.org/html/rfc799> (RM 89).

³² Zaw-Sing Su, Jon Postel, *The Domain Naming Convention for Internet User Applications*, Network Working Group Request For Comments # 819, August 1982, <http://www.ietf.org/rfc/rfc819.txt> (RM 90); Zaw-Sing Su, *A Distributed System for Internet Name Service*, Network Working Group Request For Comments # 830, October 1982, <http://www.ietf.org/rfc/rfc830.txt> (RM 91); J. Klensin, *Role of the Domain Name System (DNS)*, Network Working Group Request For Comments # 3467, February 2003 <https://tools.ietf.org/html/rfc3467> (RM 88).

³³ Paul Mockapetris, *Domain Names – Concepts and Facilities*, Network Working Group Request For Comments # 1034, November 1987, <http://www.ietf.org/rfc/rfc1034.txt> (RM 92); Paul Mockapetris, *Domain Names – Implementation and Specification*, Network Working Group Request For Comments # 1035, November 1987, <http://www.ietf.org/rfc/rfc1035.txt> (RM 93).

56. At the top of the DNS hierarchical structure is a single unique root. The unique root distinguishes the Internet from alternative networks. The root contains the root zone file and thirteen clusters of root name servers.³⁴ The root zone file is the list of top-level domains ('TLDs'), with references to the name servers for each TLD (the TLD name server). TLDs, such as .COM, .ORG, .INFO, .BIZ, appear at the right of the rightmost dot in an Internet address or domain name. The root name servers are specialized computers that provide connections between physical networks;³⁵ they operate as the place where the query for a unique IP address starts. The process is as follows: computers connect to the Internet, using a modem, Ethernet or other communication line. Connections are provided by Internet Service Providers (ISPs). When a computer wants to access a specific computer or server on the Internet (e.g., the server on which Google's search engine is available or the server of ICANN's website), the ISP will initiate a query for the unique IP address. For example, when an Internet user wants to access ICANN's website using *icann.org*, the ISP's name server will start its query at one of the root name servers. The root name server will respond by giving the location of the TLD name server – the .ORG name server in our example – as it appears in the root zone file. The ISP's name server will then query the TLD name server. The TLD name server, in turn, maintains records of all Second Level Domains (SLDs) in a specific TLD. In our example, 'ICANN' is the SLD within the .ORG TLD.

57. The operator of the TLD, named the 'registry' or 'registry operator', is responsible for maintaining accurate records of all SLD name servers, and will provide the ISP's name server with the location of the SLD name server. The SLD name server is generally controlled by the domain name holder (or his service provider), who can use the domain name for, e.g., the exchange of emails, file sharing or, since the invention of the World Wide Web in 1989 and its

³⁴ Milton Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace*, MIT Press 2002, p. 47.

³⁵ Milton Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace*, MIT Press 2002, p. 47.

implementation in 1990,³⁶ the publication of websites. The SLD name server can also operate as a second-level registry and refer to a sub-level domain.

58. The obvious benefit of the DNS hierarchical structure is that it is no longer necessary for each computer to have a full list of addresses for every other computer. Each computer needs only the address of an official root name server.³⁷ Another advantage of the DNS is that multiple IP addresses can be linked to a single domain name, allowing for redundancy and better performance.

b. **The structure of the DNS industry**

59. The unique single root at the top of the DNS hierarchical structure is managed and controlled by ICANN.³⁸ ICANN thus controls the allocation of IP addresses and the delegation of TLDs into the root, giving ICANN tremendous leverage over entities that operate TLDs in the Internet's root.³⁹

60. As mentioned above, entities operating TLDs are named 'registries' or 'registry operators.' Registries must obtain a license from ICANN in order for their TLD zone file to be added to, and their TLD name servers to be accessible via, the Internet's root. ICANN determines the terms and conditions according to which Registries are entitled to have their TLD operate on the Internet.

61. Different types of TLDs exist. A first distinction is made between country code TLDs (ccTLDs) and generic TLDs (gTLDs). A ccTLD is a TLD that is generally used or reserved for a country, sovereign state, or dependent territory identified with a two-letter country code.⁴⁰

³⁶ CERN, *The birth of the web*, <http://home.cern/topics/birth-web> (RM 94).

³⁷ Milton Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace*, MIT Press 2002, p. 47.

³⁸ ICANN manages the root through its affiliate PTI. A more elaborate explanation is provided in **Regulatory Expert Report**, paras. 21 and following.

³⁹ **Regulatory Expert Report**, para. 31.

⁴⁰ J. Postel, *Domain Name System Structure and Delegation, Request for Comments 1591*, March 1994, <https://datatracker.ietf.org/doc/html/rfc1591> (RM 95).

They are subjected to requirements that are determined by each country's domain name regulation corporation. In contrast, the requirements for operating a gTLD are determined by ICANN. gTLDs can be divided into separate categories. First, there are the original gTLDs, *i.e.*, the gTLDs that exist since before ICANN's creation: .COM, .NET, and .ORG.⁴¹ After ICANN was created, it introduced additional gTLDs in three rounds.⁴² During a first round, it introduced seven sponsored and unsponsored gTLDs. The second round was reserved to sponsored gTLDs or sTLDs. The original gTLDs and the sponsored and unsponsored gTLDs delegated during the first two rounds are collectively referred to as 'legacy gTLDs'. The third round was known as the new gTLD Program. gTLDs delegated in this third round are referred to as 'new gTLDs'.

62. Registrars act as an intermediary between domain-name holders (also named 'registrants') and registries. They offer domain name registration services under TLDs through a direct access to the TLD registries. Registrars who want to offer domain name registration services are required to obtain an accreditation from ICANN. To that end, the interested entity must apply for accreditation and demonstrate that it meets all the technical, operational, and financial criteria necessary to qualify as a registrar business. The relationship between ICANN and every accredited registrar is governed by the individual Registrar Accreditation Agreements (RAA), which set out the obligations of both parties. The ICANN-accreditation only applies for gTLDs.⁴³ Registrars may also provide other value-added services to registrants, like web hosting, website development services, email communication, etc. Registrars pay a per domain name wholesale fee to registry operators to register domain names on behalf of

⁴¹ .EDU, .INT, .GOV, and .MIL are also original gTLDs (J. Postel, *Domain Name System Structure and Delegation, Request for Comments 1591*, March 1994, <https://datatracker.ietf.org/doc/html/rfc1591> (**RM 95**)). However, these gTLDs are subject to strict domain name registration requirements and are therefore not comparable to .COM, .NET and .ORG.

⁴² See Chapter V.A.2.e below.

⁴³ ICANN, *Information for registrars*, <https://www.icann.org/resources/pages/registrars-0d-2012-02-25-en> (**RM 96**).

their clients, the domain name holder or ‘registrant’. The price that a registrant pays for a domain name registration will include the wholesale fee set by the registry with a markup set by the registrar, and the fees that registries and registrars must pay to ICANN.

2. **ICANN’s regulation of competition and pricing in the DNS industry**

a. **The early days**

63. 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 business from the registrar business, (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) organizing competitive bids for reassigning the .ORG and .NET gTLDs.⁴⁴

64. NSI was also required to divest its registrar business. In March 2000, Verisign acquired NSI.⁴⁵ In 2003, Verisign divested the registrar business, which continues to operate as NSI.

b. **ICANN moved from competitive bidding processes to presumptive renewals with price caps**

65. In 2001, ICANN agreed with Verisign to (a) split the agreements for .COM, .NET and .ORG into three separate registry agreements, (b) shorten the term of .ORG to 31 December 2002, at which time a new operator would be selected to run .ORG, (c) extend the term of the .NET Registry agreement until 1 January 2006, at which time the .NET registry would be opened up to competitive proposals (in which Verisign could bid), and (d) extend the .COM registry agreement (RA) until 2007, at which time the .COM RA would be renewed in

⁴⁴ **Regulatory Expert Report**, paras. 33-48.

⁴⁵ **Regulatory Expert Report**, paras. 39, 42.

perpetuity unless Verisign were found to be in breach of the .COM Agreement.⁴⁶ Verisign could thus benefit from a presumptive renewal.

66. Around the same time, Afilias and NeuLevel⁴⁷ entered into a RA to operate .INFO and .BIZ, respectively. Despite the more favorable renewal terms offered to Verisign for the largest TLD, .COM, the option for a presumptive renewal was not offered to Afilias and NeuLevel for the .INFO and .BIZ TLDs. In a desire to launch their new businesses, already delayed by five months, NeuLevel and Afilias had no choice but to agree to less favorable renewal terms and execute their RAs on 11 May 2001.⁴⁸ Afilias and NeuLevel could thus expect that ICANN would organize a competitive bidding process for the .INFO and .BIZ at the expiry of their RAs.

67. In 2002, ICANN organized a competitive bidding process for .ORG, using criteria established by ICANN's multistakeholder community.⁴⁹ One of the 12 criteria was *'the type, quality, and cost of the registry services proposed.'* More specifically, it stated, *'in view of the noncommercial character of many present and future .ORG registrants, affordability is important. A significant consideration will be the price at which the proposal commits to provide initial and renewal registrations and other registry services. The registry fee charged to accredited registrars should be as low as feasible, consistent with the maintenance of good-quality service.'*⁵⁰ ICANN selected Public Interest Registry (PIR) as the registry operator for .ORG. On 2 December 2002, ICANN and PIR entered into an unsponsored RA for the administration of the .ORG top level domain. That Agreement was very similar to the ones

⁴⁶ **Regulatory Expert Report**, para. 42.

⁴⁷ A now dissolved joint venture between the U.S. company Neustar and the Australian based Melbourne IT that obtained the license to operate the .BIZ registry. Neustar was recently acquired by GoDaddy. At the time of the challenged decisions, the .BIZ registry was operated by Neustar (see <https://www.home.neustar/about-us/our-history> (**RM 97**)).

⁴⁸ **Regulatory Expert Report**, para. 43.

⁴⁹ **Regulatory Expert Report**, paras. 44-46.

⁵⁰ **Regulatory Expert Report**, para. 46; **RM 11**, <https://archive.icann.org/en/tlds/org/criteria.htm>.

signed by Afilias and NeuLevel for the .INFO and .BIZ TLDs, respectively. Unlike the former .ORG agreement with Verisign, this agreement had no presumption of renewal, and prohibited PIR from acting as a registrar with respect to the .ORG TLD.⁵¹ PIR could thus expect that ICANN would organize a competitive bidding process for the .ORG at the expiry of the .ORG RA.

68. In 2005, ICANN organized a competitive bidding process for the original gTLD .NET, which was developed by adopting recommendations from ICANN's multistakeholder community, as represented in the GNSO.⁵²

69. On 8 June 2005, against the background of a pending litigation with Verisign regarding a new commercial service that Verisign deployed on the .COM and .NET gTLDs which threatened the security and stability of the Internet according to ICANN⁵³, ICANN formally selected Verisign as the winner of the RFP for .NET. It entered into a RA with Verisign for the .NET registry effective 1 July 2005. Unlike the .ORG, .INFO, and .BIZ RAs at the time, Verisign was able to negotiate a presumptive renewal for the registry.⁵⁴ The .NET RA was different from the draft RA that ICANN had published when organizing the competitive bidding process and allowed for a removal of price caps. The registrars denounced ICANN's decisions to lift price controls in the new .NET RA. On 12 October 2005, ICANN amended the .NET RA to address the concerns (with respect to pricing) raised by the registrars.⁵⁵

70. On 24 October 2005, ICANN and Verisign announced an end to their litigation through a settlement agreement that also contained a newly proposed RA for .COM. For the first time, Verisign received approval from ICANN to raise the prices of .COM registrations up to 7%

⁵¹ **Regulatory Expert Report**, para.48.

⁵² ICANN, *ICANN releases .NET RFP for Public Comment*, 12 November 2004, <https://www.icann.org/en/announcements/details/icann-releases-net-rfp-for-public-comment-12-11-2004-en> (RM 98).

⁵³ See **Regulatory Expert Report**, paras. 49 and following.

⁵⁴ **Regulatory Expert Report**, paras. 49-60.

⁵⁵ *Infra*, Chapter V.C; **Regulatory Expert Report**, paras. 58-60.

per year, provided that Verisign gave at least 6 months' notice. Following hundreds of public comments opposing the possibility for Verisign to increase prices, ICANN revised the settlement agreement allowing Verisign to increase prices up to a 7% price cap in 4 out of the 6-year term.⁵⁶

71. The change was not well taken by the ICANN community. E.g., on 7 July 2006, Jonathon L. Nevett (now CEO of PIR) commented on behalf of the registrar NSI:

'Sound public policy requires competition before deregulation. Further, sound public policy requires effective regulation of a monopolist, in situations in which competition does not discipline pricing. The lifting of cost-based requirements for price increases under the proposed .com Registry Agreement would not retain a meaningful role for ICANN over the registry operator as a regulated monopoly. Representative Rick Boucher (D-Va.) noted in a letter to Assistant Attorney General for Antitrust Thomas Barnett, "Management of a TLD registry is a natural monopoly. Periodic market testing in the form of competitive bidding through which other companies seek to operate the TLD is an effective way to assure reasonable pricing of .com domain names." [...]

*Telecommunications policy in the United States and in other countries has not followed this flawed model of attempting to deregulate a monopolist such as the .com registry operator before competition has been established. Congress has not deregulated first and then hoped that competition would emerge. Similarly, ICANN was created to administer the DNS in a manner that advances competition. Renewal terms that set objectives for ICANN regarding competition milestones are critical to ensure that the transition to privatization follows – rather than precedes – the realization of robust registry competition.'*⁵⁷

72. However, as ICANN had already allowed the incumbent registry operator the possibility to increase its prices and benefit from a presumptive renewal, it gave leverage to the registry operators of .ORG, .INFO and .BIZ when their RAs expired. They were able to argue that denying the same terms and conditions ICANN had granted to the incumbent to newer registries, was discriminatory and, thus, a violation of ICANN's non-discrimination

⁵⁶ **Regulatory Expert Report**, paras. 64-67

⁵⁷ Comments of Network Solutions, LLC before the Department of Commerce National Telecommunications and Information Administration, 7 July 2006, https://www.ntia.doc.gov/legacy/ntiahome/domainname/dnstransition/comments/dnstrans_comment0609.pdf (**RM 99**), p. 7.

obligation.⁵⁸ On 8 September 2006, the ICANN Board officially approved the new .ORG, .INFO and .BIZ RAs. These RAs included the same possibility to increase price caps that were included in the .NET RA.⁵⁹ They also contained a presumptive renewal clause.

73. ICANN had thus shifted from a competitive bidding process for legacy gTLDs to presumptive renewals with price caps.

c. ICANN's pricing policy development efforts

74. ICANN's conclusion of the 2006 RAs for .ORG, .INFO and .BIZ short-circuited the ICANN community's pricing policy development efforts.

75. In December 2005, the GNSO sought to commence a policy development process on standardizing the contractual conditions for existing and new gTLD registries. The GNSO's policy development process became known as the 'Feb 06 PDP'. The topics of the Feb 06 PDP included the development of a (i) policy regarding price controls for registry services (*e.g.*, price caps, same pricing for all registrars), and (ii) objective measures (cost calculation method, cost elements, reasonable profit margin) for approving an application for a price increase when a price cap exists.⁶⁰

76. In September 2006, ICANN's General Counsel pointed out that the extent to which the policy recommendations could be enforced depended on the language in the applicable RAs. Some RAs limited the extent as to how so-called 'Consensus Policies' could impose amendments on existing RAs. However, ICANN's General Counsel assured the community that the policy recommendations may nonetheless '*be useful in negotiating future agreements*

⁵⁸ Regulatory Expert Report, paras. 68-80.

⁵⁹ Regulatory Expert Report, paras. 79-80.

⁶⁰ Regulatory Expert Report, paras. 81-83.

*and might impact the amendments to existing agreements, even where consensus policy might limit the impact of such advice or policy on current Agreements.’*⁶¹

77. Instead of putting the ongoing negotiations regarding the .COM, .ORG, .INFO, and .BIZ renewal RAs on hold, pending the completion of the Feb 06 PDP, ICANN rushed into executing new RAs. Any Consensus Policies developed through the Feb 06 PDP would not apply to these new RAs. Instead, each of these agreements incorporated presumptive renewal, price caps, and standardized definitions for ‘Consensus Policies’ that included limitations on what could not be the subject of a Consensus Policy. One of the limitations was that Consensus Policies shall not ‘*prescribe or limit the price of Registry Services.*’ As a result, the recommendations of the Feb 06 PDP would not retroactively apply to the already executed RAs, but could have an impact on future RAs (*e.g.*, when an existing RA is up for renewal).⁶²

78. Finally, the GNSO recommended *inter alia* that there should be a policy guiding RA renewals, and that individual negotiations for fees paid to ICANN should be avoided. A majority supported the concept of a re-bid of registry contracts.⁶³ ICANN staff clarified that the approach developed for fees attached to the rebid ‘*would apply to existing contracts upon renewal, but would not apply retroactively to existing contracts.*’⁶⁴ Following this clarification, the GNSO Council accepted the recommendation by supermajority.⁶⁵

79. On 23 January 2008, the ICANN Board accepted ‘*the GNSO’s recommendations on contractual conditions for existing gTLDs, and direct[ed] staff to implement the*

⁶¹ **Regulatory Expert Report**, para. 85, ICANN, *Memo from ICANN’s General Counsel John Jeffrey to GNSO (Bruce Tonkin) re Consensus Policies*, 27 September 2006,

https://gns0.icann.org/sites/default/files/filefield_5766/jeffrey-to-tonkin-27sep06.pdf (RM 100)

⁶² **Regulatory Expert Report**, para. 86.

⁶³ ICANN (Liz Williams), *Task Force Report No. 2006/01/03.2 – Policies for Contractual Conditions Existing Registries PDP Feb 06*, 10 April 2007, https://gns0.icann.org/sites/default/files/filefield_6411/gns0-pdp-feb06-tfr-10apr07.pdf (RM 101), p. 11, para. 3.8; ICANN, *GNSO Council Teleconference Minutes*, 9 August 2007, <https://gns0.icann.org/en/meetings/minutes-gns0-09aug07> (RM 102).

⁶⁴ ICANN, *GNSO Council Teleconference Minutes*, 9 August 2007, <https://gns0.icann.org/en/meetings/minutes-gns0-09aug07> (RM 102).

⁶⁵ ICANN, *GNSO Council Teleconference Minutes*, 9 August 2007, <https://gns0.icann.org/en/meetings/minutes-gns0-09aug07> (RM 102).

*recommendations as outlined in the Council Report to the Board for PDP Feb-06.*⁶⁶

80. However, there were no signs of ICANN staff implementing the GNSO's recommendations as accepted by the ICANN Board, including with respect to the 2019 renewal of the .ORG, .INFO and .BIZ RAs.

d. **ICANN's vertical integration policy development efforts**

81. Prior to the 2012 new gTLD round (*infra*), there had been no official policy regarding the subject of cross-ownership of registries and registrars. Whether ICANN permitted cross-ownership of registries and registrars and to what degree, was determined contractually.

82. On 28 January 2010, the GNSO Council initiated a PDP on Vertical integration of registries and registrars. However, on 8 October 2010, the GNSO informed the ICANN Board that it was unable to reach consensus on any of the proposals it had previously submitted to the ICANN Board. On 5 November 2010, the ICANN Board took an unexpected decision not to restrict cross-ownership between registries and registrars for gTLDs to be delegated during the 2012 new gTLD round.⁶⁷⁶⁸

83. A different approach was taken for existing gTLD operators. ICANN developed a specific process for handling requests to remove cross-ownership restrictions for existing gTLDs. When ICANN posted its initial draft process, the U.S. Department of Justice ('DoJ') recommended that ICANN undertake a more comprehensive competitive analysis to understand the potential consumer harms in lifting the cross-ownership restrictions for existing registries operating under price caps. The DoJ pointed out that *'it is well established that firms subject to price caps or other regulatory restrictions can evade such restrictions by integrating*

⁶⁶ ICANN, *Minutes for the Special Meeting of the ICANN Board of Directors*, 23 January 2008, <https://www.icann.org/resources/board-material/minutes-2008-01-23-en> (**RM 103**).

⁶⁷ The 2012 new gTLD round is explained in Chapter V.A.2.e(iii) below.

⁶⁸ **Regulatory Expert Report**, paras. 117-134; ICANN, Approved Board Resolution 2010.11.05.02 – Special Meeting of the ICANN Board of Directors, ICANN's Silicon Valley Office, Palo Alto, California, USA, 5 November 2010, <https://www.icann.org/resources/board-material/resolutions-2010-11-05-en> (**RM 54**).

*either upstream or downstream.*⁶⁹ In addition, cross-ownership may allow a registrar or registry to disadvantage its rivals, by closing competition and harming registrants. The DoJ explained that, because there are often deficiencies to vertical integration, the DoJ typically requires a showing of market power before it considers whether vertical arrangement poses serious competitive concerns. The DoJ considered that *‘ICANN should retain its prohibition on vertical integration for existing gTLDs, except in cases where ICANN, in consultation with public and private sector stakeholders and independent analysts, determines the registry does not have, or is unlikely to obtain, market power.’* The DoJ considered that this approach was necessary for ICANN to honor its commitment to promote competition.⁷⁰

84. ICANN modified its proposed process. On 18 October 2012, the ICANN Board adopted this final process for handling requests for removal of cross-ownership restrictions for existing registries.⁷¹

85. However, the registry operators for .ORG, .INFO and .BIZ did not go through this process prior to having their price caps and cross-ownership restrictions removed in June 2019.⁷²

e. ICANN’s introduction of new gTLDs

86. ICANN has expanded the gTLD namespace in three rounds.

(i) The 2000 Proof of Concept Round

87. In mid-April 2000, ICANN’s policy-making body⁷³ recommended that the ICANN

⁶⁹ For example, a gTLD subject to price could develop or purchase a registrar, granted an exclusive contract, and exercise its market power by increasing the registrar’s price (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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf> (RM 21), p. 2).

⁷⁰ **Regulatory Expert Report**, paras. 135-140.

⁷¹ **Regulatory Expert Report**, paras. 141-142.

⁷² **Regulatory Expert Report**, paras. 142, 148-160.

⁷³ The DNSO, *i.e.*, the predecessor of the GNSO.

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.⁷⁴ The ICANN Board eventually selected seven new gTLD proposals to enter into contract negotiations.⁷⁵ 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 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, .INFO and .BIZ gTLD registry operators likely could profitably charge even higher fees.⁷⁶

(ii) The 2004 Sponsored TLD Round

88. After the 2000 proof-of-concept round, ICANN has organized a limited round for introducing new gTLDs that was reserved to sponsored TLDs only.⁷⁷ As a Sponsored TLD, policies regarding eligibility to register names within those TLDs as well as the price of domain

⁷⁴ 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).

⁷⁵ 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)

⁷⁶ 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).

⁷⁷ 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 (RM 32).

name registrations to registrars, were matters delegated to the sponsoring organization and therefore were not subject to any price controls.⁷⁸

(iii) **The 2012 new gTLD Program**

89. 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 2011.⁷⁹

90. 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. Price caps for New gTLDs were not deemed necessary according to a report/opinion by Dennis Carlton that was commissioned by ICANN. As a matter of fact, the existence of price caps in major legacy gTLDs (such as .COM, .ORG, .INFO, and .BIZ) was an important factor in Carlton's opinion that no price caps were necessary for new gTLDs.

91. In the context of the New gTLD Program, ICANN created a base RA for new gTLDs. The ICANN Board decided that ICANN would permit existing registry operators to transition to the base RA, with the exception that additional conditions might be necessary and appropriate to address particular circumstances of established registries.⁸⁰

B. ICANN moved the non-price capped gTLDs, including .MOBI, .CAT, .TRAVEL, .TEL, .ASIA, to the base registry agreement

92. Between October 2015 and March 2017, ICANN renewed the RAs for the non-price capped gTLDs .MOBI, .CAT, .TRAVEL and .TEL. The new RAs were based on the base RA

⁷⁸ **Regulatory Expert Report**, paras. 61-63.

⁷⁹ 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 (**RM 32**); 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**).

⁸⁰ ICANN, *Approved Board Resolution 2010.11.05.02 – Special Meeting of the ICANN Board of Directors, ICANN's Silicon Valley Office, Palo Alto, California, USA, 5 November 2010*, <https://www.icann.org/resources/board-material/resolutions-2010-11-05-en> (**RM 54**).

for new gTLDs. ICANN explained that, ‘*in order to account for the specific nature*’ of these gTLDs, a few provisions included in the previous versions of the respective RAs were still carried over to the renewal agreements.⁸¹

93. ICANN organised a public comment period for each of these renewals⁸², and drafted a report after the respective public comment periods.⁸³ ICANN received few public comments, namely 4 regarding .MOBI, 15 regarding .CAT and .TRAVEL, and 27 regarding .TEL.

94. Following each report, the ICANN Board issued a resolution approving the renewal agreement. ICANN also provided a detailed rationale for these resolutions, including a summary of the concerns or issues raised by the community, the materials reviewed by the

⁸¹ ICANN, *Public Comment Announcement re Proposed Renewal of .MOBI Sponsored Registry Agreement*, 23 December 2016, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-mobi-sponsored-registry-agreement-23-12-2016> (**RM 104**); ICANN, *Public Comment Announcement re Proposed Renewal of .CAT Sponsored Registry Agreement*, 28 May 2015, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-cat-sponsored-tld-registry-agreement-28-05-2015> (**RM 105**); ICANN, *Public Comment Announcement re Proposed Renewal of .TRAVEL Sponsored Registry Agreement*, 125 May 2015, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-travel-sponsored-tld-registry-agreement-12-05-2015> (**RM 106**); ICANN, ICANN, *Public Comment Announcement re Proposed Renewal of .TEL Sponsored Registry Agreement*, 4 August 2016, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-tel-registry-agreement-04-08-2016> (**RM 107**).

⁸² ICANN, *Public Comment Announcement re Proposed Renewal of .MOBI Sponsored Registry Agreement*, 23 December 2016, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-mobi-sponsored-registry-agreement-23-12-2016> (**RM 104**); ICANN, *Public Comment Announcement re Proposed Renewal of .CAT Sponsored Registry Agreement*, 28 May 2015, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-cat-sponsored-tld-registry-agreement-28-05-2015> (**RM 105**); ICANN, *Public Comment Announcement re Proposed Renewal of .TRAVEL Sponsored Registry Agreement*, 125 May 2015, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-travel-sponsored-tld-registry-agreement-12-05-2015> (**RM 106**); ICANN, ICANN, *Public Comment Announcement re Proposed Renewal of .TEL Sponsored Registry Agreement*, 4 August 2016, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-tel-registry-agreement-04-08-2016> (**RM 107**).

⁸³ ICANN, *Public Comment Report re Proposed Renewal of .MOBI Sponsored Registry Agreement*, 20 February 2017, <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-mobi-renewal-20feb17-en.pdf> (**RM 108**); ICANN, *Public Comment Report re Proposed Renewal of .CAT Sponsored Registry Agreement*, 15 August 2015, <https://itp.cdn.icann.org/en/files/registry-agreement/reissued-report-comments-cat-renewal-18aug15-en.pdf> (**RM 109**); ICANN, *Public Comment Report re Proposed Renewal of .TRAVEL Sponsored Registry Agreement*, 18 August 2015, <https://itp.cdn.icann.org/en/files/registry-agreement/reissued-report-comments-travel-renewal-18aug15-en.pdf> (**RM 110**); ICANN, *Public Comment Report re Proposed Renewal of .TRAVEL Sponsored Registry Agreement*, 7 October 2016 <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-tel-renewal-07oct16-en.pdf> (**RM 111**).

Board, the factors that the Board has found to be significant, and, most importantly, the positive or negative community impacts of the Board's resolutions.⁸⁴

95. The RA for the non-price capped .ASIA gTLD has been renewed more recently, on the same date as the RAs for .INFO, .BIZ and .ORG.⁸⁵ The renewal of the .ASIA RA was also based on the base RA for new gTLDs, with a few provisions carried over from the previous RA 'in order to account for the specific nature of the .ASIA TLD'.⁸⁶ ICANN organized a public comment period⁸⁷ and drafted a report afterwards.⁸⁸ There were 18 public comments in total (including 1 duplicate). In contrast with the previous renewals for non-price capped gTLDs, ICANN did not post any resolution or rationale for the renewal of the .ASIA RA. Such Board resolution and rationale is also missing regarding the renewal of the RAs for .INFO, .BIZ and .ORG.

C. ICANN attempted to remove the price caps in .NET

96. After Verisign had won the rebid for operating .NET in 2005, it entered into a new RA for .NET, effective 1 July 2005. The agreement contained a presumptive renewal clause and a price cap that would extinguish in time. The new .NET RA only required VeriSign to commit to a maximum price of \$4.25 for the first 18 months of the Agreement. Thereafter, all price caps for .NET were eliminated:

⁸⁴ ICANN, *Adopted Board Resolution 2017.03.16.03*, 16 March 2017, <https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#1.d> (RM 112); ICANN, *Adopted Board Resolution 2015.09.28.04*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c> (RM 113); ICANN, *Adopted Board Resolution 2015.09.28.05*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d> (RM 114); ICANN, *Adopted Board Resolution 2016.11.08.07*, 8 November 2016, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en> (RM 115).

⁸⁵ *I.e.*, 30 June 2019 (See .ASIA Registry Agreement of 30 June 2019, <https://itp.cdn.icann.org/en/files/registry-agreements/asia/asia-agmt-pdf-30jun19-en.pdf> (RM 116); RM 28-30).

⁸⁶ ICANN, *Public Comment Announcement re Proposed Renewal fo .ASIA Registry Agreement*, 27 March 2019, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-asia-registry-agreement-27-03-2019> (RM 117).

⁸⁷ ICANN, *Public Comment Announcement re Proposed Renewal fo .ASIA Registry Agreement*, 27 March 2019, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-asia-registry-agreement-27-03-2019> (RM 117).

⁸⁸ ICANN, *Public Comment Report re Proposed Renewal of .ASIA Sponsored Registry Agreement*, 31 May 2019, <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-asia-renewal-31may19-en.pdf> (RM 118).

‘On 1 January 2007, the controls on Registry Operator’s pricing set forth in this Agreement shall be eliminated, provided that the same price shall be charged to all registrars [...].’⁸⁹

97. This move was vehemently criticized within the community, and the Registrars Stakeholder Group unanimously denounced ICANN’s decision to lift price caps in the new .NET RA.⁹⁰

98. Following this criticism, ICANN reopened the .NET RA and imposed a fixed price during the first 18 months of the agreement, followed by the ability to increase prices by maximum 10% per year.⁹¹

99. Interestingly, the original 2005 .NET RA which eliminated the price caps is no longer available on the ICANN webpage, where previous RAs are posted. ICANN only posts the 2005 .NET RA which reintroduced the price cap.⁹² The original 2005 .NET RA is only retrievable through extensive internet searches or via a direct link.⁹³

100. The .NET RA was renewed again in 2011 and in 2017. With respect to its latest renewal, ICANN stated that the proposed renewal was *‘based on the [then] current .NET Registry Agreement with modifications agreed upon by ICANN and Verisign, and includes certain provisions incorporated into legacy gTLD Registry Agreements (such as from the.ORG*

⁸⁹ See ICANN, *Original 2005 .NET Registry Agreement of 1 July 2005*, archived at <http://www.icann.org/tlds/agreements/net/net-registry-agreement-01jul05.pdf> (RM 119). Section 7.3(a) stated: *‘From 1 July 2005 through 31 December 2006, the price 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, shall not exceed US\$4.25 (consisting of a US\$3.50 service fee and a US\$0.75 ICANN fee). On 1 January 2007, the controls on Registry Operator’s pricing set forth in this Agreement shall be eliminated, provided that the same price shall be charged to all registrars with respect to each annual increment of a new or renewal domain name registration, and for transferring a domain name registration from one ICANN-accredited registrar to another (provided that volume discounts and marketing support and incentive programs may be made if the same opportunities to qualify for those discounts and marketing support and incentive programs is available to all ICANN-accredited registrars).’*

⁹⁰ **Regulatory Expert Report**, para. 59.

⁹¹ **Regulatory Expert Report**, para. 60.

⁹² ICANN, *Amended 2005 .NET Registry Agreement of 1 July 2005*, <https://www.icann.org/en/registry-agreements/net/net-registry-agreement-1-7-2005-en> (RM 120); See also, ICANN, *Overview of .NET Registry Agreements*, <https://www.icann.org/en/registry-agreements/details/net?section=agreement> (RM 121), the Original 2005 .NET RA of 1 July 2005 (RM 119) is not available there.

⁹³ The original 2005 .NET RA is archived at <http://www.icann.org/tlds/agreements/net/net-registry-agreement-01jul05.pdf> (RM 119).

*Registry Agreement, dated 22 August 2013), as well as certain provisions from the base New gTLD Registry Agreement.*⁹⁴

101. ICANN maintained the price caps in the .NET RA and the possibility to increase price caps by 10% per year. ICANN received 23 public comments to the proposed renewal, most opposing the increase in fees.⁹⁵

102. On 24 June 2017, the ICANN Board met and considered the renewal of the .NET RA. The Board meeting resulted in a resolution approving the renewal, and authorizing the ICANN President and CEO (or his designee) to take such actions as appropriate to finalize and execute the new .NET RA.⁹⁶

D. ICANN removed the price caps in .PRO

103. On 28 May 2015, ICANN posted for public comment a proposed agreement for renewal of the 2010 RA for .PRO.⁹⁷ The 2010 RA for .PRO was originally set to expire on 22 April 2015, but was extended (after its expiry date) on 24 April 2015.

104. The .PRO gTLD was one of the gTLDs that ICANN delegated in the context of the 2000 Proof of Concept round for new gTLDs. In contrast with .INFO and .BIZ (which were also delegated during the same round), .PRO was not very successful and remained a tiny registry. By the time the 2010 RA for .PRO was set to expire (in April 2015), .PRO counted 124,053 domain names under management (DUMs).⁹⁸ As a comparison, in April 2015, .ORG

⁹⁴ ICANN, *Public Comment Announcement re Proposed Renewal of .NET Registry Agreement*, 20 April 2017 <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-net-registry-agreement-20-04-2017> (RM 122); ICANN, *Public Comment Report re Proposed Renewal of .NET Registry Agreement*, 13 June 2017, <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-net-renewal-13jun17-en.pdf> (RM 123).

⁹⁵ ICANN, *Public Comment Report re Proposed Renewal of .NET Registry Agreement*, 13 June 2017, <https://itp.cdn.icann.org/en/files/registry-agreement/report-comments-net-renewal-13jun17-en.pdf> (RM 123).

⁹⁶ ICANN, *Adopted Board Resolution 2017.06.24.22*, 24 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.e> (RM 124).

⁹⁷ ICANN, *Public Comment Announcement re Proposed Renewal of .PRO Unsponsored Registry Agreement*, 28 May 2015, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-pro-unsponsored-registry-agreement-28-05-2015> (RM 125).

⁹⁸ See Cell C59 in the .PRO DUMs Overview of April 2015, available at <https://www.icann.org/sites/default/files/mrr/pro/pro-transactions-201504-en.csv> (RM 126).

counted 10,556,095 DUMs;⁹⁹ .INFO counted 5,282,057 DUMs;¹⁰⁰ and .BIZ counted 2,370,971 DUMs.¹⁰¹

105. Until 2015, .PRO operated under a fixed fee schedule. Domain name registrations were offered at a fixed wholesale price of US \$6.00 per year for registrations or renewals of domain names.¹⁰²

106. In 2015, ICANN proposed to renew the .PRO RA on the basis of the base RA for new gTLDs. Only a few provisions were different from this base RA ‘*to account for the specific nature*’ of the .PRO gTLD. In its announcement, ICANN did not even mention that the fixed wholesale price would no longer be taken up in the renewal agreement for .PRO.¹⁰³

107. Unsurprisingly in view of the tiny nature of .PRO, the renewal of the 2010 RA for .PRO remained largely unnoticed. ICANN received 14 public comments in total. None of the public comments took issue with the removal of the fixed wholesale price in .PRO.¹⁰⁴

108. On 28 September 2015, the ICANN Board met and considered the proposed renewal of the .PRO RA. The Board meeting resulted in a resolution, approving the renewal and authorizing the ICANN President and CEO (or his designee) to take such actions as appropriate to finalize and execute the new .PRO RA.¹⁰⁵

⁹⁹ See Cell C428 at <https://www.icann.org/sites/default/files/mrr/org/org-transactions-201504-en.csv> (RM 127).

¹⁰⁰ See Cell C356 at <https://www.icann.org/sites/default/files/mrr/info/info-transactions-201504-en.csv> (RM 128).

¹⁰¹ See Cell C309 at <https://www.icann.org/sites/default/files/mrr/biz/biz-transactions-201504-en.csv> (RM 129).

¹⁰² Un-sponsored TLD Agreement: Appendix F (.PRO), revised 25 March 2004, <https://www.icann.org/en/registry-agreements/pro/un-sponsored-tld-agreement-appendix-f-pro-25-3-2004-en#ExhibitF> (RM 130).

¹⁰³ ICANN, *Public Comment Announcement re Proposed Renewal of .PRO Un-sponsored Registry Agreement*, 28 May 2015, <https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-pro-un-sponsored-registry-agreement-28-05-2015> (RM 125).

¹⁰⁴ ICANN, *Public Comments Report re Proposed Renewal of .PRO Un-sponsored Registry Agreement*, 18 August 2015, <https://itp.cdn.icann.org/en/files/registry-agreement/reissued-report-comments-pro-renewal-18aug15-en.pdf> (RM 131).

¹⁰⁵ ICANN, *Approved Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (RM 132).

E. ICANN removed the price caps in .ORG, .INFO and .BIZ

1. The removal was sudden and non-transparent

a. ICANN communicated about the removal of price caps after it had already made the decision

109. On 18 March 2019, ICANN announced that it planned to renew the .ORG and .INFO RAs, making these more similar to the terms of the base registry agreement (RA) 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 *casu quo* Afiliats 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.’¹⁰⁶

110. On 3 April 2019, ICANN issued the same announcement for .BIZ.¹⁰⁷

111. Prior to 18 March 2019 and 3 April 2019, there were no indications whatsoever about ICANN’s plans to renew the .ORG, .INFO and .BIZ RAs without price caps. There had been no discussions with the ICANN community, no analysis of the effects to the Internet community of such a radical change, no signs of a careful and dutiful deliberation.

112. The opposite is true. In 2009, when ICANN considered whether to introduce new gTLDs (as opposed to legacy gTLDs) without price caps, the ICANN-commissioned expert,

¹⁰⁶ [Annex 2](#) for .ORG and [Annex 3](#) for .INFO.

¹⁰⁷ [Annex 4](#).

Prof. Carlton, responded as follows to the concern that the absence of price caps for new gTLDs could result in the elimination of price caps for legacy gTLDs such as .ORG, .INFO, and .BIZ:

‘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.**’¹⁰⁸*

113. Thus, ICANN’s own expert was able to affirmatively state that there was no basis for the concern that the absence of price caps for new gTLDs could result in the elimination of price caps in .ORG, .INFO, and .BIZ.

114. Prof. Carlton went even further, considering that the existence of price caps in these legacy gTLDs constrains the ability of new gTLD registry operators to charge non-competitive prices.

‘The fact that the existing major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices. [... T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.’¹⁰⁹

115. In other words, the existence of price caps in major legacy gTLDs justified the introduction of new gTLDs without price caps. The existence of those price caps is an important factor that may have prevented new gTLD registry operators from acting opportunistically.

116. With its announcements on 18 March 2019 and 3 April 2019, ICANN turned this logic around by 180 degrees, using the absence of price caps in new gTLDs as a ‘justification’ (albeit an ill-founded and conjectural one) to repeal price caps in .ORG, .INFO, and .BIZ.

¹⁰⁸ **RM 24**, para. 22

¹⁰⁹ **RM 23**, para. 73.

117. As explained in Section V.E.3 below, ICANN’s plan to remove the price caps in .ORG, .INFO and .BIZ was not well received by the Internet community. ICANN nevertheless pushed through this radical change in an opaque process. Despite requests for transparency in a DIDP request, reconsideration requests, and document production which lasted for over a year since Namecheap filed its IRP request, ICANN remains unable to show even the slightest sign of deliberations about its decision to repeal the price caps in .ORG, .INFO and .BIZ.

b. **There are no signs of discussions or deliberations regarding the removal of price caps**

(i) **The ‘negotiations’ between ICANN and the registry operators**

(a) **The context of the ‘negotiations’**

118. ICANN maintains that the discussions regarding the renewal of the RAs without the price caps started in May 2018.¹¹⁰ However, there are no documents in the record that support this claim.

119. According to ICANN, the discussions did not focus on price controls. Therefore, ICANN considers that any document that would mark the start of the negotiations is not responsive. However, ICANN is claiming that the negotiations started in May 2018 and that the negotiations did not focus on price controls. ICANN could prove that claim by producing the communications, marking the start of the negotiations and all draft RAs that were exchanged between ICANN and the .ORG, .INFO, and .BIZ registry operators. Yet, ICANN has refused to do so.

120. The only draft RAs exchanged between ICANN and the .ORG, .INFO and .BIZ registry operators are **Annexes 91 and 94**. These draft RAs are an almost exact copy of the base RA that ICANN developed for *new* gTLDs, as opposed to *legacy* gTLDs.

¹¹⁰ P.O. No. 5, para. 16: ‘ICANN indicated during the December 2, 2020 hearing that discussions with the .ORG, .INFO and .BIZ registry operators began in May 2018.’

121. There are, roughly speaking, four variants of the base RA for new gTLDs: (i) standard base RA, (ii) base RA for community gTLDs, (iii) base RA for intergovernmental organizations (IGO) or governmental entities (GE), and (iv) base RA for so-called .brand registry operators. ICANN uses the same document as base RA for these four variants. This document indicates which clauses are to be used or deleted, depending on the type of gTLD operator (standard, community, IGO/GE, or .brand registry operator). For .brand registry operators, ICANN has introduced Specification 13, which is an annex to the base RA, which provides certain modifications to the RA, for those applicants that qualify as a .Brand TLD.¹¹¹ In addition, all registry operators can ascribe to specific public interest commitments to be included in Specification 11 to the base RA.

122. Apart from these differences, depending on the type of new gTLD and the commitments the new gTLD operator wants to ascribe to, all new gTLD registry operators have entered in virtually the same RA. As a result, all new gTLD registry operators must comply with the same technological minimum standards, the same data escrow requirements, and the same operational processes in their dealings with ICANN.

123. The back-end registry operators *c.q.* registry operators for .ORG, .INFO, and .BIZ also provide registry services for new gTLDs. Hence, these back-end registry operators *c.q.* registry operators have already aligned their internal processes, standards, and registry platforms to the requirements of the base RA. As a result, they have an incentive for .ORG, .INFO, and .BIZ to align with the requirements of the base RA.

¹¹¹ The requirements to qualify as a .brand registry operator include:

- The TLD string is identical to the textual elements protectable under applicable law, of a registered trademark valid under applicable law;
- Only Registry Operator, its Affiliates or Trademark Licensees are registrants of domain names in the TLD and control the DNS records associated with domain names at any level in the TLD;
- The TLD is not a Generic String TLD (as defined in Specification 11);
- Registry Operator has provided ICANN with an accurate and complete copy of such trademark registration.

124. According to the affidavit by Russ Weinstein, he managed the negotiations for the 2019 .ORG, .INFO and .BIZ RAs on behalf of ICANN. He declares that the removal of price caps was not a predominant topic in the negotiations between ICANN and the .ORG, .INFO and .BIZ registry operators. According to his affidavit, *‘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.’*¹¹²

125. Looking at the available record, the question is whether price caps were even a discussion topic at all.

126. ICANN did produce a number of redline versions of the base RA, as exchanged with the .ORG, .INFO and .BIZ registry operators. The redline changes in these documents do not relate to topics that require intense discussion between parties. Instead, the changes relate to the nature of the gTLD and the identity of the registry operator as ‘non-community’, ‘non-IGO/GE’, ‘non-brand’. Consequently, the redline versions removed the clauses specific to community, IGO/GE and .brand gTLDs from the base RA. ICANN and the .ORG, .INFO and .BIZ registries then appended an addendum to the agreement, modifying those clauses of the base RA that are specific to the launch of a new gTLD and the process for adding a new gTLD to the Internet’s root zone. As .ORG, .INFO and .BIZ were already operational in the Internet’s root zone for close to two decades or more, it is obvious that these terms within the base RA could not be *‘applicable for these legacy gTLDs’*.

127. If that is all the negotiations between ICANN and the .ORG, .INFO and .BIZ registry operators focused on, then there was not much to discuss.

¹¹² **Annex 90**, Affidavit by Russell Weinstein, executed on 13 October 2021.

128. However, for a change as drastic as the removal of the price caps, one would expect the negotiations to focus on such removal. The record contains no sign of any negotiations between ICANN and the registry operators about the removal of the price caps or of the registry operators even asking for such removal.

(b) The ‘negotiations’ with PIR (.ORG)

129. The record contains only one email regarding the contract negotiations with PIR, *i.e.* an email from Russ Weinstein to PIR of 17 January 2019.¹¹³ Following the Panel’s order in P.O. No. 12¹¹⁴, ICANN produced the attachments to this email, containing (i) Redline versions of (a) the base RA, and (b) an addendum to the RA to remove those terms from the base RA that are not applicable to a legacy gTLD, and (ii) a clean version of this amendment.¹¹⁵ These documents were sent ‘

Redacted – Confidential Information

.’¹¹⁶ ICANN informed PIR Redacted – Confidential Information

The next weekend could be either the weekend of 19-20 January 2019 or the weekend of 26-27 January 2019. ICANN has later confirmed the existence of a Board workshop in Los Angeles from 25 to 28 January 2019, where the Board discussed the proposed renewal agreements for .ORG, .INFO and .BIZ.¹¹⁷

130. The record contains no further communications between ICANN and PIR informing and/or inquiring about the outcome of the Board’s meeting.

(c) The ‘negotiations’ with Afilias (.INFO)

131. The record contains only two email chains with communications between ICANN and

¹¹³ **Annex 69**; The record contains three additional communications between ICANN and PIR Redacted – Confidential Information will be discussed separately (**Annexes 73, 74 and 77**).

¹¹⁴ P.O. 12, §§15 and 24.

¹¹⁵ **Annex 91**.

¹¹⁶ **Annex 69**.

¹¹⁷ Letter from Cyrus Namazi (ICANN) to Zak Muscovitch, (General Counsel Internet Commerce Association), <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf> (**Annex 92**). *Infra*, Chapter V.E.1.b(ii).

the .INFO registry operator, Afilias. The first email chain relates to

Redacted - Confidential Information

.¹¹⁸ The record contains no further information with respect to a meeting during which Redacted - Confidential Information were discussed.

132. The second email chain relates to a request Redacted – Confidential Information

.¹¹⁹ Following the Panel’s order in P.O. No. 12¹²⁰, ICANN produced the attachments to this email, containing (i) a redline version of the base RA, (ii) a clean version of the base RA, and (iii) an addendum to the RA to remove those terms from the base RA that are not applicable to a legacy gTLD.¹²¹

133. The first email in the chain dates of 20 February 2019 and states:

Redacted – Confidential Information

•122

134. The discussion ‘ Redacted – Confidential Information

¹²³ The changes in the redline version of the base RA relate to the nature of the gTLD and the identity of the registry operator as ‘non-community’, ‘non-IGO/GE’, ‘non-brand’.¹²⁴

¹¹⁸ Annexes 65 and 93.

¹¹⁹ Annex 72.

¹²⁰ P.O. 12, §§15 and 24.

¹²¹ Annex 94.

¹²² Annex 72.

¹²³ Annex 90.

¹²⁴ Annex 94.

(d) **The ‘negotiations’ with Neustar (.BIZ)**

135. The records contains eight¹²⁵ documents plus one duplicate with emails between ICANN and the .BIZ registry operator, Neustar.

136. The first document produced by ICANN is an email of 18 September 2018 from ICANN (Russ Weinstein) to Neustar Redacted – Confidential Information ¹²⁶
The email announces Redacted – Confidential Information

¹²⁷

137. Redacted - Confidential Information She was Neustar’s Deputy General Counsel and Chief Privacy Officer between 2012 and 2019. She has been an ICANN Board Member since November 2016. Redacted - Confidential Information

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138. Redacted - Confidential Information
As a for-profit company, Neustar does not share the same interest as ICANN, who must operate in the public interest.

¹²⁵ Initially seven, but ICANN was ordered to produce **Annex 99**.

¹²⁶ **Annex 63**.

¹²⁷ **Annex 63**.

¹²⁸ **Annex 70**.

139. When considering Namecheap’s Reconsideration Request 19-2, the Board meeting minutes indicate that Ms. Burr ‘*abstained from consideration of the matter indicating potential or perceived conflicts of interest, or out an abundance of caution.*’¹²⁹ However, Ms. Burr did not abstain from the consideration of the EFF’s similar Reconsideration Request 19-3 regarding the same topic and voted in favor in the resolution rejecting it.¹³⁰ Also in the consideration of Namecheap’s related Reconsideration Request 20-1, Ms. Burr no longer abstained herself and voted in favor of the resolution rejecting Namecheap’s Reconsideration Request 20-1.¹³¹

140. In addition, Redacted - Confidential Information

132

Redacted - Confidential Information

133

141. In any event, the 18 September 2018 email from Russ Weinstein indicates that

Redacted – Confidential Information

The email further mentions that Redacted – Confidential Information

However, there are no signs of any such discussion, apart from some – partly

¹²⁹ **Annex 95**, ICANN, *Minutes – Regular Meeting of the ICANN Board*, 3 November 2019, <https://www.icann.org/resources/board-material/minutes-2019-11-03-en>;

¹³⁰ **Annex 95**, ICANN, *Minutes – Regular Meeting of the ICANN Board*, 3 November 2019, <https://www.icann.org/resources/board-material/minutes-2019-11-03-en>;

¹³¹ **Annex 96**, ICANN, *Minutes – Board Accountability Mechanisms Committee (BAMC) Meeting 21 April 2020*, 5 May 2020, <https://www.icann.org/resources/board-material/minutes-bamc-2020-04-21-en>; **Annex 97**, ICANN, *Minutes – Special Meeting of the ICANN Board 20 May 2020*, 19 June 2020, <https://www.icann.org/resources/board-material/minutes-2020-05-20-en>.

¹³² **Annex 84**, REV00005027.

¹³³ **Annex 84**, REV00006176.

redacted – cursory notes from an ICANN staff member who was not familiar with the RA negotiations in an internal ICANN email of 22 October 2018:

Redacted – Confidential Information

134

142. On 28 January 2019, Russ Weinstein contacted Neustar again, stating that, as they discussed, Redacted – Confidential Information

’ His

expectation was Redacted – Confidential Information

135

143. On 11 February 2019, Neustar Redacted – Confidential Information

¹³⁴ Annex 98.
¹³⁵ Annex 99.

¹³⁶

144. ICANN, by means of Russ Weinstein, responded to Neustar’s complaint on 12 February 2019. ICANN’s response Redacted – Confidential Information

137

145. Apart from a few communications Redacted – Confidential Information
,¹³⁸ the record contains no documents pertaining to

¹³⁶ Annex 70.

¹³⁷ Annex 70.

¹³⁸ Annex 75.

negotiations with Neustar. With such an extension, the terms of the 2013 RA would have remained in full force and effect, inclusive of the price caps.¹³⁹ The extension amendment could be executed by ICANN staff without Board action. *A contrario*, a renewal of the RA without price caps required Board action. The aim of the amendment ^{Redacted – Confidential Information}

140

(ii) **No deliberations on the removal of price caps**

146. There is virtually no record on any deliberations ICANN may have had on the removal of price caps.

147. Early September, ^{Redacted – Confidential Information}

141

148. ^{Redacted – Confidential Information}

.¹⁴² The remainder of his email is redacted. The agendas for the

¹³⁹ [Annex 100](#).

¹⁴⁰ [Annex 75](#).

¹⁴¹ [Annex 67bis](#), pp. 16-17.

¹⁴² [Annex 64](#).

2018 Board meetings following 25 September 2018 do not mention a discussion on ‘*Price Caps in legacy gTLD renewals*’.¹⁴³ As a result, there has not been a formal Board meeting, discussing the price caps in legacy gTLD renewals.

149. On 26 November 2018, Redacted – Confidential Information Cyrus Namazi (ICANN’s Vice President of the Global Domains Division at the time¹⁴⁴)

Redacted – Confidential Information

.145

150. On 27 November 2018 Cyrus Namazi and Vinciane Koeningsfeld had further correspondence on the topic. Originally, ICANN redacted entire emails from this correspondence, which made it difficult to follow the conversation. On 29 November 2021, ICANN submitted an unredacted version of the conversation:

– Redacted – Confidential Information

¹⁴³ See <https://www.icann.org/resources/pages/2018-board-meetings>.

¹⁴⁴ Cyrus Namazi was promoted senior VP of ICANN’s Global Domains Division afterwards (ICANN, *Announcement re Appointment of Cyrus Namazi*, 21 February 2019, <https://www.icann.org/en/announcements/details/cyrus-namazi-appointed-to-senior-vice-president-of-icanns-global-domains-division-21-2-2019-en> (RM 133)). After he had executed the .ORG, .INFO and .BIZ 2019 RAs on behalf of ICANN, he left the organization in April 2020.

¹⁴⁵ **Annex 66**.

Redacted – Confidential Information

- At 9:55AM, Vinciane Koenigsfeld responded. Originally, the response was redacted entirely. The unredacted response reads:

Redacted – Confidential Information

- At 4:25pm, Cyrus Namazi responded:

Redacted – Confidential Information

- At 7:27 AM, Vinciane Koenigsfeld responded:

Redacted – Confidential Information

.¹⁴⁶

151. The topics Redacted – Confidential Information and Redacted – Confidential Information

appear nowhere on a published agenda for an ICANN Board meeting. No reason is provided as to why the then Chair of the ICANN Board, Cherine

Chalaby, Redacted – Confidential Information . Did he want to

Redacted – Confidential Information

¹⁴⁶ Annexes 66 and 66bis.

152. In addition, the previously redacted text makes mention of ^{Redacted – Confidential Information}

. However,

Redacted – Confidential Information

Moreover, as further explained in Chapter IX.C.8 below, the renewal of the .ORG, .INFO and .BIZ RAs had important policy implications, which ICANN completely ignored.

153. On 5 December 2018, ICANN staff had a meeting. ICANN’s notes of the meeting are redacted almost entirely:

Redacted - Confidential Information

147

154. In spite of the redactions, it is apparent that ICANN staff envisioned ^{Redacted – Confidential Information}

155. Between 14 and 15 January 2019, ^{Redacted - Confidential Information}

148

156. On 16 January 2019, staff had another meeting. The notes of this meeting are also fully redacted except for the following:

Redacted - Confidential Information

¹⁴⁷ Annexes 67 and 67bis, at p. 7.

¹⁴⁸ Annex 84, Document ID REV00023264, REV00023267, REV00023591.

Redacted - Confidential Information

149

157. In between these two staff meetings, Russ Weinstein provided a status update on the Redacted – Confidential Information to Cyrus Namazi on 6 January 2019, stating the following:

Redacted – Confidential Information

150

158. On 17 January 2019, Russ Weinstein informed PIR Redacted – Confidential Information

.151

159. On 22 January 2019, ICANN received an email from its go-to economist Dennis Carlton, Redacted - Confidential Information

¹⁵² This is the last communication between ICANN and Dennis Carlton. However, there is no reason why Dennis Carlton would

Redacted - Confidential Information

153 Redacted - Confidential Information

¹⁵⁴ On 24 November 2021, ICANN alleged that, in his email of 22 January 2019, Dennis Carlton Redacted - Confidential Information

, but that there Redacted - Confidential Information

¹⁴⁹ Annex 67 and 67bis, at p. 1.

¹⁵⁰ Annex 68.

¹⁵¹ Annex 69.

¹⁵² Annex 84, Document ID REV00023591.

¹⁵³ Annex 84, Document ID REV00023592.

¹⁵⁴ Annexes 101 and 103.

However, ICANN did not contest that Redacted - Confidential Information

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160. Secret Board meetings were held in Los Angeles between 25 and 28 January 2019.

ICANN has referred to these secret Board meetings in a letter of 26 July 2019, stating:

*'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.'*¹⁵⁶

161. ICANN also referred to these secret Board meetings in a communication of 9 July 2019 by ICANN's Director of Global Media at the time, Brad White, to a journalist, and specified that Redacted – Confidential Information ¹⁵⁷

162. Despite not being minuted, the Board meetings that took place between 25 and 28 January 2019 resulted in a decision by the Board on the removal of the Price Control Provisions. Indeed, on 12 February 2019, Russ Weinstein informed Neustar that

Redacted – Confidential Information

158

2. **ICANN organized a public comment phase after it had decided to remove the price caps**

163. Early 2019, ICANN prepared for the public comment period related to the renewal of the .ORG, .INFO and .BIZ RAs. Redacted – Confidential Information

¹⁵⁹ Already before the start of the public comment phase,

¹⁵⁵ **Annexes 102 and 104.**

¹⁵⁶ **Annex 92.** Letter from Cyrus Namazi (ICANN) to Zak Muscovitch, (General Counsel Internet Commerce Association), 26 July 2019, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

¹⁵⁷ **Annex 105.** Bates No. ICANN-NC-008556-ICANN-NC-008557.

¹⁵⁸ **Annex 70.**

¹⁵⁹ **Annexes 106, 107, 109, and 110.**

ICANN staff was aware of the sensitive nature of the price caps removal and tried not to draw the attention to the removal of price caps in its announcement of the public comments. On 22 February 2019, ICANN’s Services Specialist, Registry Services and Engagement, Danielle Gordon,

Redacted – Confidential Information

.¹⁶⁰ ICANN’s Director, Operations & Policy

Research, Karen Lentz,

Redacted – Confidential Information

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164. The final version of ICANN’s announcement read as follows:

‘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.’¹⁶²

3. ICANN ignored the public comments: had it ever the intention to respect the concerns voiced by the public?

a. ICANN received an unprecedented number of public comments

165. The public comment period regarding the renewal of the .INFO and .ORG RAs ran from 18 March to 29 April 2019, and regarding the .BIZ RA from 3 April to 14 May 2019.

166. The proposed removal of price caps in .ORG, .INFO and .BIZ was not well received within the Internet community. By 29 April 2019, ICANN had received over 3,500 comments rejecting the proposed change.¹⁶³ In 2013, when the .ORG, .INFO and .BIZ RAs were up for

¹⁶⁰ **Annex 106**, p. 4 (Bates No. ICANN-NC-016370); Redacted - Confidential Information

¹⁶¹ **Annex 107**, p. 4 (ICANN-NC-013288); Redacted - Confidential Information

¹⁶² **Annex 2** for .ORG, **Annex 3** for .INFO, and **Annex 4** for .BIZ.

¹⁶³ **Annexes 5-7.**

renewal, while maintaining the price caps, ICANN reported one comment on the .ORG renewal and three comments on the .INFO and .BIZ proposed renewals.¹⁶⁴ In 2019, comments came from small non-profits, international organizations, government agencies, members of government, individuals, families, businesses, entrepreneurs, and people from lesser developed regions. Large and well-known non-profits such as NPR¹⁶⁵, YMCA of the USA¹⁶⁶, C-SPAN¹⁶⁷, National Geographic Society¹⁶⁸, Oceana¹⁶⁹, AARP¹⁷⁰, The Conservation Fund¹⁷¹, National Trust for Historic Preservation¹⁷² and ASAE¹⁷³ all opposed the proposed removal of price caps.¹⁷⁴ An analysis of the data shows that comments came from a varied cross-section of Internet users and that about 20% of all comments regarding .ORG were submitted by Namecheap customers.¹⁷⁵ In total, ICANN received more than 4,070 comments on the proposed change for .ORG, .INFO, and .BIZ.¹⁷⁶

167. Almost all comments submitted rejected the proposed removal of the price caps in these legacy gTLDs.

b. ICANN processed the public comments administratively, but failed to consider them

168. The documents produced by ICANN show that ICANN has been processing the public comments administratively. However, there are no documents showing that ICANN has

¹⁶⁴ ICANN, *Minutes – Special Meeting of the Board*, 22 August 2013, <https://www.icann.org/resources/board-material/minutes-2013-08-22-en#2.b>: ‘Akram clarified that ICANN only received three public comments on the .BIZ and .INFO proposed renewals and one comment on the .ORG renewal. Therefore, it is hard to support the suggestion that there is an overwhelming community issue about the proposed renewals that needs attention prior to voting.’ (**Annex 108**).

¹⁶⁵ <https://www.npr.org/>

¹⁶⁶ <https://www.ymca.org/>

¹⁶⁷ <https://www.c-span.org/>

¹⁶⁸ <https://www.nationalgeographic.org/society/>

¹⁶⁹ <https://oceana.org/>

¹⁷⁰ <https://www.aarp.org/>

¹⁷¹ <https://www.conservationfund.org/>

¹⁷² <https://savingplaces.org/>

¹⁷³ <https://www.asaecenter.org/>

¹⁷⁴ **Annex 111.**

¹⁷⁵ **Annexes 8 and 112.**

¹⁷⁶ **Annexes 4-7.**

actually considered the public comments and deliberated on them.

169. ICANN has shared over 5,000 documents showing ICANN's efforts in administering the public comments. ICANN's Production No. 1 contains 5,277 documents regarding the more than 4,070 comments on .ORG, .INFO, and .BIZ. Over 99% of those documents consist of (i) a cover e-mail requesting authorization to publish the public comment on ICANN's website, and (ii) the public comment as attachment. The remaining documents also relate to the administrative processing of the public comments. ICANN's production No. 1 contains no documents regarding any deliberation that might have taken place regarding the negative reactions, expressed by the public at large.

170. ICANN's further productions contain a number of preparatory documents for ICANN's staff reports of the three public comment proceedings, namely draft versions of the staff report with internal comments. Again, these internal comments focus on the processing of public comments; not deliberations on the substance of many valid comments. The draft report last modified on 14 May 2019 states the following:

Redacted - Confidential Information

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171. Russ Weinstein commented on this paragraph: Redacted - Confidential Information

¹⁷⁸ 'Org' in this quote refers to the ICANN organization, which is commonly referred to as 'ICANN org'. The final version of the staff report states:

*'ICANN org will consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement.'*¹⁷⁹

¹⁷⁷ Annex 109, p. 1 (Bates No. ICANN-NC-016487).

¹⁷⁸ Annex 109, p. 1 (Bates No. ICANN-NC-016487).

¹⁷⁹ Annex 5.

172. ICANN thus stated that it would consider the public comments. However, ICANN fails to produce any documents that show ICANN’s consideration of the public comments, let alone any independent assessment by the ICANN Board.

173. Nevertheless, the independent consideration by the ICANN Board would have been normal procedure. That is not only apparent from Russ Weinstein’s comment,

Redacted – Confidential Information

¹⁸⁰ Two Excel

spreadsheets from ICANN’s Google Drive also confirmed the need for the Board’s consideration of the public comments as part of the standard procedure.¹⁸¹

174. These Excel spreadsheets Redacted - Confidential Information

One Excel spreadsheet relates to Redacted - Confidential Information

¹⁸² The other Excel spreadsheet relates to Redacted - Confidential Information

¹⁸³ ICANN has not provided a similar document for the public comment phase on .BIZ.

175. The Excel spreadsheets describe Redacted - Confidential Information

Once the public comment period is closed, the ICANN staff issues a report on the public comments received and it prepares a draft Board paper. Then, ICANN staff (i) requests to add the item to the Board agenda, and (ii) completes and sends the Board paper.

The Board then reviews and approves. Redacted – Confidential Information

¹⁸⁴

176. The Excel spreadsheets further indicate the upcoming Board meetings

Redacted – Confidential Information

¹⁸⁰ **Annex 109**, p. 1 (Bates No. ICANN-NC-016487).

¹⁸¹ **Annexes 82 and 83**.

¹⁸² **Annex 83**.

¹⁸³ **Annex 82**.

¹⁸⁴ **Annexes 82 and 83**.

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177. The Excel spreadsheets further indicate that (i) Redacted – Confidential Information

¹⁸⁶ and (ii) Redacted – Confidential Information

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178. However, there are no published Board meeting agendas on which the renewal of the .INFO RA was scheduled. There are also no published Board meeting agendas on which the renewal of the .ORG RA was scheduled. Equally, there are no published Board meeting agendas on which the renewal of the .BIZ RA was scheduled.¹⁸⁸

179. Nevertheless, the record shows that the ICANN Board met at ICANN65 in Marrakech, which took place from 24 to 27 June 2019 and reaffirmed its approval of the renewal of the RAs for .ORG, .INFO and .BIZ without the price caps. On 26 July 2019, ICANN disclosed the existence of the Marrakech Board meeting in a letter to the Internet Commerce Association:

‘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

¹⁸⁵ **Annexes 82 and 83.**

¹⁸⁶ **Annex 83.**

¹⁸⁷ **Annex 82.**

¹⁸⁸ See <https://www.icann.org/resources/pages/2019-board-meetings>.

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.¹⁸⁹

180. A non-public letter from Cyrus Namazi to a journalist also confirms the existence of the secret Board meeting Redacted – Confidential Information

190

181. When the journalist inquired Redacted – Confidential Information

191

c. ICANN put aside the public comments and proceeded with the execution of the registry agreements

182. ICANN rejected all comments against removing the price caps with a conclusory

¹⁸⁹ Letter from Cyrus Namazi (ICANN) to Zak Muscovitch, (General Counsel Internet Commerce Association), 26 July 2019, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf> (**Annex 92**).

¹⁹⁰ **Annex 105**.

¹⁹¹ **Annex 105**.

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.’¹⁹²

183. 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. That requirement also existed in the previous versions of the .ORG, .INFO, and .BIZ registry agreements together with the Price Control Provisions.

184. 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.¹⁹³

F. ICANN ignored the commitments PIR was prepared to make in response to the public comments

185. On 1 May 2019, immediately after the closing of the public comment period regarding the renewal of the .ORG registry agreement, Public Interest Registry’s CEO Jonathon Nevett sent a letter to the ICANN Board, specifying that the letter was not intended for publication.¹⁹⁴

In this letter, PIR addressed Redacted – Confidential Information

¹⁹² **Annex 5-7.**

¹⁹³ **RM 18, 27-28.**

¹⁹⁴ **Annex 113** (ICANN inappropriately qualifies this communication as HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY. Namecheap requests that ICANN be ordered to reproduce Annex 113 as CONFIDENTIAL).

¹⁹⁵ **Annex 113.**

186. Despite this Redacted – Confidential Information there is no sign of any follow up by ICANN to transform this willingness into a contractual obligation and address the public comments by including this commitment in the RA.

187. Prior to sending this letter to the Board, PIR’s CEO Redacted – Confidential Information

¹⁹⁶ The message is indicative of

Redacted – Confidential Information

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188. The existence of such close ties also puts in context the message from Russ Weinstein to Neustar about Redacted – Confidential Information 198

G. ICANN refused to reverse its decision to remove the price caps

189. 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. Namecheap’s request is known as ‘Reconsideration Request 19-2’.¹⁹⁹ 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.²⁰⁰

190. In an attempt to resolve the issues related to the removal of the price caps and the proposed acquisition of PIR, Namecheap entered into a cooperative engagement process (‘CEP’) with ICANN on 18 November 2019.²⁰¹

¹⁹⁶ Annex 114 (ICANN inappropriately qualifies this communication as HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY. Namecheap requests that ICANN be ordered to reproduce Annex 114 as CONFIDENTIAL).

¹⁹⁷ Annex 114.

¹⁹⁸ Annex 70.

¹⁹⁹ Annex 8.

²⁰⁰ Annexes 8 and 10.

²⁰¹ Annexes 13 and 14.

191. On 21 November 2019, the ICANN Board denied Namecheap’s Reconsideration Request. The CEP was unsuccessful.

192. During its 21 November 2019 discussion, some ICANN Board members inquired about the need for an economic study of how removing the pricing restrictions would encourage competition:

*‘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.’²⁰²*

193. It is apparent from the Board minutes that no such study was undertaken or presented to the Board. Instead of focusing on the consequences for removing price caps in legacy gTLDs, the Board only considered economic studies that took place ‘*during the development of the New gTLD Program.*’ There is no mention about any later studies that took place. Consequently, there is no sign that the emails and memoranda then shared between ICANN staff and Dennis Carlton were presented to the Board.

H. ICANN rationalized its decision to remove the price caps in an after-the-fact explanation

194. It is only after Namecheap had challenged ICANN’s decision to remove the price caps that the ICANN Board tried to construct a justification in its response to Reconsideration Request 19-2.

195. It tried as follows:

²⁰² ICANN, *Minutes – Special Meeting of the ICANN Board on 21 November 2019*, 27 January 2020, <https://www.icann.org/resources/board-material/minutes-2019-11-21-en> (**Annex 115**).

‘There is no support for the Requestor’s assertion that ICANN Staff’s belief in this regard was based upon “conclusory statements not supported by evidence.”[...] Among other things, ICANN org considered Professor Carlton’s 2009 expert analysis of the Base RA, including his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.[...] Finally, ICANN Staff was aware of the Board’s 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.’²⁰³

196. There are many serious issues with ICANN’s after-the-fact justification which is based on a ‘Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries’ of 2009. To name a few:

- Dennis Carlton’s report is not a fact-based analysis and only a preliminary report, showing that his final report was not even considered when ICANN tried to construct a justification;
- The subject-matter of the reports (both the preliminary report and the final reports) is not related to price caps in legacy TLDs; the reports only discuss price caps for new gTLD registries;
- The reports support a conclusion that price caps must be maintained in legacy TLDs. In the final report, Dennis Carlton made clear that he saw no basis for eliminating price caps in existing gTLDs. He had understood from ICANN that there was no basis for the concern that the absence of price caps for new gTLDs could result in the elimination of price caps for .COM, .NET, .ORG, .INFO, .BIZ, and others;
- In 2013, the then already four years old report was clearly not an impediment to maintain the price cap when renewing the .ORG, .INFO and .BIZ RAs at that time.

²⁰³ **Annex 11.**

197. It is remarkable that ICANN hired the services of Dennis Carlton

Redacted - Confidential Information

Needless to note that

his report from 2009 was shared with the Internet community – as it ought to –

Redacted - Confidential Information – although it should in view of many obligations that apply to ICANN under the applicable law (all discussed below under Chapter 0) as violated by ICANN (all discussed below under Chapter 0). One can only conclude that Redacted - Confidential Information

198. ICANN has thus given no explanation whatsoever that would justify a removal of the price caps. Such justification does simply not exist, as demonstrated by the **Economic Expert Report II** (*infra*).

I. ICANN maintained the price caps in .NAME

199. Just like .INFO and .BIZ, the .NAME gTLD (which is operated by Verisign) was delegated in the context of the 2000 Proof of Concept round for new gTLDs. In contrast with .INFO and .BIZ, .NAME remains a tiny registry. In July 2021, .NAME counted 116,689 domain names under management (DUMs)²⁰⁴. That same month, .ORG counted 10,966,457

²⁰⁴ See Cell C194 of .NAME DUMs Overview of July 2021, available at <https://www.icann.org/sites/default/files/mrr/name/name-transactions-202107-en.csv> (**RM 134**).

DUMs,²⁰⁵ .INFO counted 4,179,074 DUMs;²⁰⁶ and .BIZ counted 1,438,191 DUMs.²⁰⁷

200. On 3 July 2012, ICANN posted for public comment a proposed agreement for renewal of the 2007 RA for .NAME.²⁰⁸ Although the .NAME RA did not yet align with the base RA for new gTLDs, ICANN explicitly referred to this base RA in its rationale for approving the renewal of the .NAME RA on 13 October 2012: *‘The provisions regarding registry-level fees and pricing constraints are for the most part consistent with the new gTLD base agreement and the current major gTLDs.’*²⁰⁹

201. The 2012 .NAME RA provides for a price cap which was initially set to a maximum of US \$6.00 per year for registrations, renewals or transfers of domain names with a maximum 10% increase each year.²¹⁰ These price cap provisions are still applicable to this day.

202. The 2012 RA for .NAME was set to expire on 15 August 2018. However, on 8 August 2018, the term was extended until 15 August 2020.²¹¹

203. On 5 August 2020, ICANN extended the term of the 2012 RA once more to 15 August 2024. The extension agreement provides that the parties shall cooperate and negotiate in good faith to agree upon an amendment to the .NAME RA by the first anniversary of this Amendment No. 3 Effective Date to incorporate various provisions set forth in the Third

²⁰⁵ See Cell C1661 of .ORG DUMs Overview of July 2021, available at <https://www.icann.org/sites/default/files/mrr/org/org-transactions-202107-en.csv> (RM 135).

²⁰⁶ See Cell C377 of .INFO DUMs Overview of July 2021, available at <https://www.icann.org/sites/default/files/mrr/info/info-transactions-202107-en.csv> (RM 136).

²⁰⁷ See Cell C374 of .BIZ DUMs Overview of July 2021, available at <https://www.icann.org/sites/default/files/mrr/biz/biz-transactions-202107-en.csv> (RM 137).

²⁰⁸ ICANN, *Public Comment Announcement re Proposed Renewal of .NAME Registry Agreement* <https://www.icann.org/en/public-comment/proceeding/name-registry-agreement-renewal-03-07-2012> (RM 138).

²⁰⁹ ICANN, *Approved Board Resolution 2012.10.13.04*, 13 October 2012, <https://www.icann.org/resources/board-material/resolutions-2012-10-13-en#2.a> (RM 139).

²¹⁰ See Section 7.3 of the 2012 .NAME RA: <https://www.icann.org/en/registry-agreements/name/name-registry-agreement-1-12-2012-en> (RM 140).

²¹¹ Amendment No. 2 to the 2012 .NAME RA, 8 August 2018, <https://itp.cdn.icann.org/en/files/registry-agreements/name/name-amend-2-pdf-08aug18-en.pdf> (RM 141).

Amendment to the .COM Registry Agreement, dated 27 March 2020, and in the ‘Base Registry Agreement’.²¹²

204. On 3 August 2021, ICANN extended the term for the good faith negotiations. The Parties now have to agree upon an amendment to the .NAME RA by 13 December 2021 to incorporate the various provisions set forth in the Third Amendment to the .COM Registry Agreement, dated 27 March 2020, and in the ‘Base Registry Agreement.’²¹³

VI. APPLICABLE LAW

205. 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 must be assessed includes: (i) ICANN’s Articles of Incorporation and Bylaws – both of which require compliance with *inter alia* International law²¹⁴ 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, ICANN and its Board must comply with the fundamental principles embodied in these rules.

²¹² Amendment No. 3 to the 2012 .NAME RA, 5 August 2020, <https://itp.cdn.icann.org/en/files/registry-agreements/name/name-amend-3-pdf-05aug20-en.pdf> (**RM 142**).

²¹³ Amendment No. 4 to the 2012 .NAME RA, 3 August 2021, <https://itp.cdn.icann.org/en/files/registry-agreements/name/name-amend-4-pdf-03aug21-en.pdf> (**RM 143**).

²¹⁴ 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).

VII. ICANN’S FUNDAMENTAL OBLIGATIONS UNDER THE APPLICABLE LAW

A. ICANN must comply with general principles of international law

206. Given ICANN’s global public benefit mission to ‘*operate for the Internet community as a whole*’ ICANN must, first and foremost, carry out ‘*its activities in conformity with relevant principles of international law and applicable international conventions.*’²¹⁵

207. The requirement to comply with principles of international law was deliberate. The original draft of ICANN’s Articles of Incorporation did not include any reference to international law.²¹⁶ The fifth draft of ICANN’s Articles of Incorporation – *i.e.*, the version of the Articles of Incorporation that ICANN submitted to the U.S. Government in response to the White Paper²¹⁷ – provided that ICANN should carry out its activities ‘with due regard for applicable local and international law’.²¹⁸ This provision was added ‘in response to various suggestions to recognize the special nature of [the] organization and the general principles under which it will operate.’²¹⁹ After negotiations with the U.S. Government and several Internet stakeholders, ICANN augmented its obligations under international law on 21 November 1998.²²⁰ From that date onwards, ICANN’s Articles of Incorporation have provided that:

‘The Corporation shall operate for the benefit of the Internet Community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent

²¹⁵ ICANN, Articles of Incorporation, Article 4.

²¹⁶ ICANN, *Draft Articles of Incorporation of new IANA*, 25 August 1998, <http://forum.icann.org/iana/comments/formation/..articles1.html> (RM 144).

²¹⁷ NTIA, *Letter from Jon Postel to NTIA regarding Management of Internet Names and Addresses*, <https://www.ntia.doc.gov/legacy/ntiahome/domainname/proposals/icann/Letter.htm> (2 October 1998) (RM 145); ICANN, Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, <https://www.ntia.doc.gov/legacy/ntiahome/domainname/proposals/icann/Articles.htm> (RM 146).

²¹⁸ ICANN, *Draft Articles of Incorporation – Fifth Iteration: Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, <http://forum.icann.org/iana/comments/formation/..articles5.html> (RM 147).

²¹⁹ ICANN, *Draft Articles of Incorporation – Fifth Iteration: Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, <http://forum.icann.org/iana/comments/formation/..articles5.html> (RM 147).

²²⁰ ICANN, *Minutes of Special Meeting 21 November 1998*, <https://www.icann.org/resources/board-material/minutes-1998-11-21-en> (RM 148).

processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.’²²¹

208. The Articles of Incorporation do not require ICANN merely to have ‘due regard’ for ‘international law’; ICANN must act ‘in conformity with relevant principles of international law and applicable international conventions’. As accepted both by legal scholars²²² and case law,²²³ ICANN’s requirement to act in conformity with relevant principles of international law includes conformity with ‘the general principles of law recognized as a source of international law’. General principles of international law can thus be said to serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted.

209. In contrast with previous drafts of the Articles of Incorporation, the Articles of Incorporation that were ultimately adopted and the current version of ICANN’s Articles of Incorporation put principles of international law first, before applicable international conventions, local law and ICANN’s Bylaws. ICANN reversed the order of the applicable rules in recognition of the international scope of its mission, and of the fundamental principle that international law prevails over local law.²²⁴ As a result, any principles enshrined in Californian or other applicable local law, ICANN’s Articles of Incorporation and/or ICANN’s Bylaws will

²²¹ ICANN, Articles of Incorporation, as revised 21 November 1998, <https://www.icann.org/resources/pages/articles-2012-02-25-en> (**RM 149**), Article 4; ICANN, Articles of Incorporation (Amended and Restated Articles of Incorporation of Internet Corporation of Assigned Names and Numbers as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016) (**RM 1**), Article III.

²²² Expert Report of Jack Goldsmith, *in* ICDR Case No. 50 117 T 00224 08, 22 January 2009, pp. 12-16, §§ 23-27 (**RM 150**).

²²³ *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Independent Review Panel Declaration, 19 February 2010 (**RM 3**), para. 140.

²²⁴ See e.g., PCIJ, *Interpretation of the Convention between Greece and Bulgaria respecting reciprocal emigration, signed at Neuilly-sur-Seine on November 27th, 1919 (Question of the Greco-Bulgarian ‘communities’)*, Advisory Opinion of 31 July 1930, *P.C.I.J. Rep., Series B*, No. 17, 32 (**RM 151**); PCIJ, *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzich territory*, Advisory Opinion of 4 February 1932, *P.C.I.J. Rep., Series A/B*, No. 44, 24 (**RM 152**); ICJ, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 April 1947*, Advisory Opinion of 26 April 1988, *I.C.J. Rep* 1988, 12, § 57 (**RM 153**).

only apply to the extent that they are fully compatible with international law. ICANN's Articles of Incorporation and Bylaws must thus be interpreted in a way that is consistent with general principles of international law. If ICANN adopts secondary rules, such as policies and processes, ICANN should warrant the compliance of these secondary rules with international law, applicable local law, its Articles of Incorporation and its Bylaws; in that order.

210. Since 2016, ICANN's Bylaws also explicitly provide that '*ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets.*'²²⁵

B. ICANN's Commitments and Core Values

211. ICANN's Bylaws add (i) six specific Commitments that ICANN is bound by, and (ii) eight Core Values that should also guide the decisions and actions of ICANN.

212. ICANN's six Commitments Nos. i to vi are:

(i) Preserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;

(ii) Maintain the capacity and ability to coordinate the DNS at the overall level and work for the maintenance of a single, interoperable Internet;

(iii) Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination;

(iv) 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;

²²⁵ ICANN Bylaws, Article 1(2)(a).

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

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.²²⁶

213. ICANN's eight Core Values Nos. i to viii are:

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

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

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

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

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

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

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

(viii) Subject to the limitations set forth in Section 27.2, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against other parties.²²⁷

²²⁶ ICANN Bylaws, Article 1(2)(a).

²²⁷ ICANN Bylaws, Article 1(2)(b).

214. Article 1(2)(c) Bylaws clarifies that the ‘**Commitments** reflect ICANN’s fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN’s activities.’

215. With respect to the **Core Values**, Article 1(2)(c) Bylaws provides:

‘The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.’

216. In addition to its Commitments and Core Values, ICANN’s Bylaws contain specific provisions with fundamental obligations and restrictions. These provisions are often restating ICANN’s fundamental obligations, as taken up in its Commitments and Core Values. Consequently, ICANN’s Bylaws are somewhat repetitive on certain obligations, which only shows the cardinal importance of these principles.

217. ICANN’s fundamental obligations, as taken up in the Articles of Incorporation and Bylaws are supplemented by ICANN’s Expected Standards of Behavior.²²⁸ Those who take part in the ICANN multi-stakeholder process, including Board, staff and all those involved in Supporting Organization and Advisory Committee councils must abide by these standards, which require them to:

- ‘Act in accordance with ICANN’s Bylaws. In particular, participants undertake to act within the mission of ICANN and in the spirit of the values contained in the Bylaws.
- **Adhere to ICANN’s conflict of interest policies.**
- Treat all members of the ICANN community equally, irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age, or sexual orientation; members of the ICANN community should treat each other with civility both face-to-face and online.

²²⁸ **RM 186-188.**

- Respect *all members of the ICANN community equally, behave in a professional manner and demonstrate appropriate behavior. ICANN strives to create and maintain an environment in which people of many different backgrounds and cultures are treated with dignity, decency, and respect. Specifically, participants in the ICANN process must not engage in any type of harassment. Generally, harassment is considered unwelcome hostile or intimidating behavior -- in particular, speech or behavior that is sexually aggressive or that intimidates based on attributes such as race, gender, ethnicity, religion, age, color, national origin, ancestry, disability or medical condition, sexual orientation, or gender identity.*
- **Act in a reasonable, objective and informed manner** when participating in **policy development and decision-making processes**. This includes regularly attending all scheduled meetings and exercising independent judgment based solely on what is in the **overall best interest of Internet users** and the stability and security of the Internet's system of unique identifiers, irrespective of personal interests and the interests of the entity to which an individual might owe their appointment.
- Listen to the views of all stakeholders when considering policy issues. ICANN is a unique multi-stakeholder environment. Those who take part in the ICANN process must **acknowledge the importance of all stakeholders** and seek to understand their points of view.
- Work to build consensus with other stakeholders in order to find solutions to the issues that fall within the areas of ICANN's responsibility. The ICANN model is based on a bottom-up, consensus driven approach to policy development. Those who take part in the ICANN process must take responsibility for ensuring the success of the model by trying to build consensus with other participants.
- Facilitate **transparency and openness** when participating in policy development and decision-making processes.
- **Support the maintenance of robust mechanisms for public input, accountability, and transparency so as to ensure that policy development and decision-making processes will reflect the public interest and be accountable to all stakeholders.**
- **Conduct themselves in accordance with ICANN policies.**
- Protect the organization's assets and ensure their efficient and effective use.
- **Act fairly and in good faith** with other participants in the ICANN process.
- Promote ethical and responsible behavior. **Ethics and integrity are essential, and ICANN expects all stakeholders to behave in a responsible and principled way.'**

C. ICANN must act in good faith

218. Many of the guiding substantive and procedural rules in ICANN's Articles and Bylaws – including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith,

which is considered to be the foundation of all law and all conventions. As stated by the International Court of Justice (ICJ), the principle of good faith is ‘*[o]ne of the basic principles governing the creation and performance of legal obligations.*’²²⁹

219. The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations. The principle is considered so fundamental that it need not be explicitly stated in order to apply and no derogation is permitted. Many of ICANN’s obligations which arise from the general principle of good faith are taken up explicitly in ICANN’s governing documents. These obligations are discussed below (*infra*, Chapters VII.D, VII.E, and VII.H).

D. ICANN must act neutrally, fairly and without discrimination

220. ICANN is subject to a fundamental obligation to act fairly and apply its standards, policies, policies, procedures neutrally, and without discrimination. Not only does this obligation arise from general principles of international law, it is also laid down repeatedly in ICANN’s governing documents. Article II(3) of ICANN’s Bylaws is entitled ‘non-discriminatory treatment’ and provides that:

‘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.’

221. This prohibition on discrimination has been included in ICANN’s Bylaws since the corporation submitted its application in 1998 to operate as the DNS custodian.²³⁰ In their

²²⁹ Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits) (**RM 154**); *see also* Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June) (**RM 155**) (good faith is a ‘well established principle of international law’).

²³⁰ NTIA, *Letter from Jon Postel to NTIA regarding Management of Internet Names and Addresses*, <https://www.ntia.doc.gov/legacy/ntiahome/domainname/proposals/icann/Letter.htm> (2 October 1998) (**RM 145**); ICANN, *Bylaws for the Internet Corporation for Assigned Names and Numbers – A California Nonprofit Public Benefit Corporation*, <https://www.ntia.doc.gov/legacy/ntiahome/domainname/proposals/icann/Bylaws.htm> (**RM 156**).

original version, ICANN’s Bylaws contained no example of a substantial and reasonable cause that could justify disparate treatment.²³¹ Following negotiations with U.S. government officials and Internet stakeholders, ICANN added the promotion of effective competition as a possible justification for disparate treatment.²³² In 2002, ICANN changed the numbering of its Bylaws and added the title ‘non-discriminatory treatment.’²³³ Apart from these mainly cosmetic amendments, the article has never been changed, neither did it change with the entry into force of ICANN’s post-IANA transition Bylaws adopted on 1 October 2016. The fact that the article on non-discrimination has remained unchanged ever since ICANN became the DNS custodian, evinces the fundamental nature of the principle of non-discrimination as regards ICANN’s operations.

222. In addition, Article I(2)(a)(v) of ICANN’s Bylaws mentions as a Commitment for ICANN to ‘*make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)*’.

223. ICANN thus dedicated a Commitment and a separate article in its Bylaws to non-discriminatory treatment, containing conclusive language that it ‘shall not’ act inequitably or single out a party for disparate treatment. It follows that the principle of non-discrimination is a cornerstone for ICANN’s actions and decisions.

224. It is settled case law that the general principle of equal treatment and non-discrimination requires that comparable situations are not treated differently unless differentiation is

²³¹ ICANN, *Bylaws for the Internet Corporation for Assigned Names and Numbers – A California Nonprofit Public Benefit Corporation*, <https://www.ntia.doc.gov/legacy/ntiahome/domainname/proposals/icann/Bylaws.htm> (RM 156), Article IV(1)(c).

²³² ICANN Bylaws, as adopted effective 21 November 1998, <https://www.icann.org/resources/unthemed-pages/bylaws-1998-11-23-en> (RM 157), Article IV(1)(c).

²³³ ICANN Bylaws, as adopted effective 15 December 2002, <https://www.icann.org/resources/unthemed-pages/bylaws-2002-12-15-en> (RM 158), Article II(3).

objectively justified.²³⁴ Under international law, the principle of non-discrimination has two components: it requires authorities to treat (i) like cases alike, and (ii) unlike cases differently. This is a general axiom of rational behavior²³⁵, that one may expect from an entity with a mission as important as ICANN's. The axiom protects against arbitrary decision-making and reaffirms that ICANN must respect the rule of law.²³⁶

E. ICANN must operate in an open and transparent manner

225. Another cornerstone for ICANN's decision-making process is its obligation to operate in an open and transparent manner. ICANN's commitment to transparency is contained in ICANN's Articles of Incorporation, Bylaws, and supplemented by its Expected Standards of Behavior.

226. ICANN's transparency obligation was already included in Article 4 of the draft Articles of Incorporation it proposed in response to the U.S. Government's White Paper. Article 4, which, after adoption, remained unchanged in this respect, provided that ICANN shall operate *'for the benefit of the Internet community as a whole, carrying out its activities [...], through open and transparent processes that enable competition and open entry in Internet-related markets'*. Similarly, Article III of ICANN's Bylaws has always stated that ICANN and its constituent bodies²³⁷ *'shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness'*.

²³⁴ See e.g., CJEU, T-704/14, 26 October 2017, *Marine Harvest ASA v European Commission*, ECLI:EU:T:2017:753, http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2017.424.01.0028.01.ENG, (RM 159), §207.

²³⁵ See e.g., *Matadeen and Others v. M.G.C. Pointu and Others (Mauritius)* [1998] UKPC 9, 18 February 1998, Section 9. Democracy and equality, <https://www.bailii.org/uk/cases/UKPC/1998/9.htm> (RM 160); ECtHR (Grand Chamber), *Thlimmenos v. Greece*, 6 April 2000, Reports of Judgments and Decisions 2000-IV, ECLI:CE:ECHR:2000:0406JUD003436997 (RM 189), § 44.

²³⁶ *'Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.'* (ICJ, *Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Rep* 1989, 15 (RM 161), § 128.

²³⁷ ICANN's constituent bodies were named subordinate entities until ICANN's 'new' Bylaws were adopted effective 15 December 2002.

227. These provisions have later been supplemented by the Commitments, which provide under Article I(2)(a)(iv) that ICANN must ‘[e]mploy 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.’

228. The emphasis ICANN has put on transparency is sensible. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting role that ICANN occupies.²³⁸ The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken.²³⁹

229. The coupling of the terms ‘open’ and ‘transparent’ in ICANN’s governing documents, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision making. During ICANN’s first public meeting, Esther Dyson, ICANN’s first Chair, stated the following about ICANN’s commitment to openness and transparency:

*‘But to me, being open isn’t simply posting your minutes out. To be honest, when I read our minutes, I’m embarrassed. Like any legal minutes, they say almost nothing. And I think **it is our duty** and it’s – frankly, we’ve got to do it or we won’t win anybody’s trust, not just to post our minutes, but **to explain what we did, what was our reasoning.** And*

²³⁸ See A. Kotera, *Regulatory Transparency*, in P. MUCHLINSKI, F. ORTINO, C. SCHREUER, OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (2008), p. 619; see Stacy Baird, *The Government at the Standards Bazaar*, 18 STAN. L. & POLICY REV. (2007), pp. 35, 96-97.

²³⁹ See Sacha Prechal and Madeleine de Leeuw, *Dimensions of Transparency: The Building Blocks for a New Legal Principle?*, REVIEW OF EUROPEAN ADMINISTRATIVE LAW (2007), p. 51.

*sometimes that means we have to trust you, because we need to explain, well, we did this because, you know, there are these two points of view and we're trying to find a balance between them. And sometimes we need to make explicit things that our lawyers would prefer for us to keep implicit. But at some point, I'd rather say these things, I'd rather ask Frank^[240] about his contract, I'd rather point out that there's tensions between the SO's and the rest of the community than simply try and hide it and pretend it's not there. So to me, **transparency is not simply exposure, but explanation.**'²⁴¹*

230. In 2009, when it executed the Affirmation of Commitments with the U.S. Government, ICANN committed itself to providing a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN had relied.²⁴² ICANN committed itself to being transparent, so as to ensure that the outcomes of its decision-making would reflect the public interest; its decisions were to contain both a rationale and adequate explanation.²⁴³

231. Since ICANN's inception (as has been confirmed in its governing documents), ICANN has been committed to maintaining and improving, at a continuing basis, robust mechanisms to support the most developed notion of transparency.²⁴⁴

232. Since October 2016, Article III of ICANN's Bylaws explicitly commits ICANN to this developed notion of transparency and provides:

'ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the

²⁴⁰ Esther Dyson referred to Frank Fitzsimmons, one of the nine initial directors of ICANN. He served on the ICANN Board from October 1998 to December 2002.

²⁴¹ ICANN Public Meeting Transcript, Meeting Held in Cambridge, Massachusetts Saturday, 14 November, 9:00 am - 4:00 pm, 14 November 1998, <http://cyber.law.harvard.edu/icann/cambridge-1198/archive/transparency.html> (RM 162), p. 222.

²⁴² Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, 30 September 2009, https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf (RM 83), Article 7.

²⁴³ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, 30 September 2009, https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf (RM 83), Article 9.1.

²⁴⁴ See Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, 30 September 2009, https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf (RM 83), Article 9.1.

development of policy considerations), and (c) encourage fact-based policy development work. **ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).**'

F. ICANN must act in the public interest for the benefit of the Internet Community as a whole

233. Article II of the Articles of Incorporation provides that ICANN is:

*'a nonprofit **public benefit** corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for charitable and public purposes. The Corporation is organized, and will be operated, exclusively for charitable, educational, and scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any future United States tax code. Any reference in these Articles to the Code shall include the corresponding provisions of any future United States tax code. In furtherance of the foregoing purposes, and **in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the Corporation shall, except as limited by Article IV hereof, 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 by carrying out the mission set forth in the bylaws of the Corporation ("Bylaws"). Such global public interest may be determined from time to time. Any determination of such global public interest shall be made by the multistakeholder community through an inclusive bottom-up multistakeholder community process.'***

234. ICANN must thus act in the global public interest. This fundamental requirement is also taken up in ICANN's Commitment No. iv, which commits ICANN to seek input from the public *'for whose benefit ICANN in all events shall act'*.²⁴⁵ No exceptions are allowed from this Commitment to act in the public interest.

235. In addition, Article III of the Articles of Incorporation and Article I(2)(a) requires that ICANN operate *'for the benefit of the Internet community as a whole'*. No exceptions are allowed from this requirement either.

236. ICANN's Core Values Nos. ii and iv further emphasize the need to act in the global public interest:

²⁴⁵ ICANN Bylaws, Article I(2)(a)(iv).

- Article I(2)(b)(ii) provides that ICANN should ‘[s]eek[...] and support[...] **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;
- Article I(2)(b)(iv) provides that ICANN should ‘[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and **beneficial to the public interest** as identified through the bottom-up, multistakeholder policy development process;

237. Finally, ICANN’s Core Values recognize that ICANN should be ‘[s]triving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture.’²⁴⁶ However, such reasonable balance must always benefit the public interest and the Internet community as a whole. ICANN may not be captured by the interests of a self-interested party or forces with narrow interests or favor the commercial interests of one stakeholder group to the detriment of the Internet community as a whole. Avoiding that key Internet resources are captured by a self-interested party or forces with narrow interests has been one of the key objectives in privatizing Internet governance.²⁴⁷ Capture occurs when a regulator may come to be dominated by the interests they regulate and not by the public interest. Capture refers to a situation in which a regulated entity or industry exerts a strong influence over the organization tasked with regulating that entity or industry. ICANN must thus avoid that it becomes dominated by the interests it regulates and not by the public interest.

²⁴⁶ ICANN Bylaws, Article I(2)(b)(vii).

²⁴⁷ 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**).

G. ICANN must preserve and enhance the openness of the DNS and the Internet, enable competition and open entry in Internet-related markets

238. Another cardinal obligation is that ICANN must preserve and enhance the openness of the DNS and the Internet, enable competition and open entry in Internet-related markets. That obligation is stated explicitly in Article III of the Articles of Incorporation, Article I(2)(a) of the Bylaws, and ICANN's first Commitment. ICANN's Commitment No. i requires that ICANN '*[p]reserve and enhance [...] openness of the DNS and the Internet*'.

239. Openness of the DNS and the Internet has multiple dimensions, including '*technical, economic and social factors, such as market conditions, governance, legal environments and procedures, and human rights*.'²⁴⁸ These multiple dimensions are clearly present in ICANN's governance documents, which focus on technical²⁴⁹, economic and social factors²⁵⁰, governance, and human rights.²⁵¹ Economic factors are omnipresent in ICANN's Articles of Incorporation and Bylaws. As explained above, Article III of the Articles of Incorporation requires the ICANN carry out its activities through open and transparent processes that '*enable competition and open entry in Internet-related markets*.' In addition ICANN's Core Values Nos. iii and iv specify that ICANN should, '*[w]here feasible and appropriate, depend[...] on market mechanisms to promote and sustain a competitive environment in the DNS market*', and '*[i]ntroduc[e] and promot[e] competition in the registration of domain names where*

²⁴⁸ OECD, "Economic and Social Benefits of Internet Openness", *Digital Economy Policy Paper No. 257*, https://www.oecd-ilibrary.org/economic-and-social-benefits-of-internet-openness_5jlwqf2r97g5.pdf?itemId=%2Fcontent%2Fpaper%2F5jlwqf2r97g5-en&mimeType=pdf (RM 163); See also: Jeremy West, *A Framework for Understanding Internet Openness*, Global Commission on Internet Governance Paper Series No. 35, May 2016, https://www.cigionline.org/static/documents/gcig_no.35_web.pdf (RM 164).

²⁴⁹ ICANN is committed to preserve and enhance *inter alia* 'the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet' (ICANN Bylaws, Article I(2)(a)(i)).

²⁵⁰ *Infra*.

²⁵¹ With respect to human rights, ICANN's Core Value No. viii specifies that ICANN should respect internationally recognized human rights (ICANN Bylaws, Article I(2)(b)(viii)), and ICANN should be developing a framework of interpretation for human rights in accordance with Article 27(2) of its Bylaws.

practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process’.

240. The strong focus on competition and open entry in Internet-related markets in ICANN’s governance documents shows that ICANN must preserve and enhance the economic openness of the DNS and the Internet. Indeed, economic openness *‘involves accessibility, the ability to consume and supply Internet services on a cross-border basis, and regulatory transparency.’*²⁵² It varies with *‘the ability of users to get online and to use the Internet to enhance their economic opportunities and put them to productive uses. For instance, economic openness increases as broadband infrastructure grows, but it decreases when access providers lack competition and charge higher prices or provide poorer service as a result.’*²⁵³

241. It is for this purpose, to prevent providers of registry services from charging prices above competitive levels, that ICANN was created. In preserving and enhancing the economic openness of the DNS and the Internet, ICANN should depend on market mechanisms, to the extent it is *‘feasible and appropriate’* and *‘practicable and beneficial to the public interest’*. If market mechanisms are insufficient to create economic openness of the DNS and the Internet, then ICANN must step in.

H. ICANN must remain accountable

242. ICANN’s fundamental obligations, as described above, are not merely aspirational

²⁵² OECD, “Economic and Social Benefits of Internet Openness”, *Digital Economy Policy Paper No. 257*, https://www.oecd-ilibrary.org/economic-and-social-benefits-of-internet-openness_5jlwqf2r97g5.pdf?itemId=%2Fcontent%2Fpaper%2F5jlwqf2r97g5-en&mimeType=pdf (RM 163); See also: Jeremy West, *A Framework for Understanding Internet Openness*, Global Commission on Internet Governance Paper Series No. 35, May 2016, https://www.cigionline.org/static/documents/gcig_no.35_web.pdf (RM 164).

²⁵³ OECD, “Economic and Social Benefits of Internet Openness”, *Digital Economy Policy Paper No. 257*, https://www.oecd-ilibrary.org/economic-and-social-benefits-of-internet-openness_5jlwqf2r97g5.pdf?itemId=%2Fcontent%2Fpaper%2F5jlwqf2r97g5-en&mimeType=pdf (RM 163); See also: Jeremy West, *A Framework for Understanding Internet Openness*, Global Commission on Internet Governance Paper Series No. 35, May 2016, https://www.cigionline.org/static/documents/gcig_no.35_web.pdf (RM 164).

standards that ICANN may choose to adopt on a voluntary basis. They impose unambiguous commitments, and parties affected by ICANN's actions must be entitled to a meaningful review of ICANN's compliance with these fundamental obligations.²⁵⁴ ICANN has committed itself to ensuring accountability in the Affirmation of Commitments.²⁵⁵ Since 2016, ICANN's Commitment No. vi sets forth that ICANN must *'[r]emain accountable to the Internet community through mechanisms defined in [ICANN's] Bylaws that enhance ICANN's effectiveness'*. Article IV(1) of ICANN's Bylaws further provides that ICANN *'shall be accountable to the community for operating in accordance with the Articles of Incorporation and [ICANN's] Bylaws, including the Mission set forth in Article 1 of [ICANN's] Bylaws.'* As a result, ICANN has not merely committed itself to complying with its fundamental obligations; it has also committed itself to mechanisms that must offer redress of any violation of those obligations.

VIII. STANDARD OF REVIEW AND AUTHORITY OF THE PANEL

A. Standard of review

243. ICANN's Response includes a brief section on the Panel's 'Standard of Review' that is inaccurate and incomplete. ICANN's 'Standard of Review' section states in its entirety:

'An IRP Panel is asked solely to evaluate whether an ICANN action or inaction was consistent with ICANN's Articles, Bylaws, and internal policies and procedures.[...] However, with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.[...]

Rather, the core task of an IRP Panel is to determine whether ICANN has exceeded the

²⁵⁴ ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Final Declaration, 9 July 2015 (**RM 165**), §§ 107-109; ICDR Case No. 01-14-0002-1065, *Gulf Cooperation Council (GCC) v. ICANN*, Interim Declaration on Emergency Request for Interim Measures of Protection, 12 February 2015 (**RM 166**), §59.

²⁵⁵ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, 30 September 2009, https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf (**RM 83**), Articles 3 and 9.1.

*scope of its Mission or otherwise failed to comply with its foundational documents and procedures.*²⁵⁶

244. ICANN's statement seriously misstates the Panel's mandate and the applicable standard of review.

245. Rule 11 of ICANN's Interim Supplementary Rules, entitled 'Standard of Review' states in its relevant part:

*'Each IRP PANEL shall conduct an **objective, de novo examination** of the DISPUTE.*

a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.'

b. All DISPUTES shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

c. For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.'

246. Article 4(3)(i) of the Bylaws contains an almost verbatim copy of Rule 11 of ICANN's Interim Supplementary Rules.

247. In its Response, ICANN omits nearly all relevant provisions of its own 'Standard of Review' requirements for IRPs, as stated in its Bylaws and the Interim Supplementary Procedures. ICANN only partially cites the provisions with respect to the Board's exercise of its fiduciary duties and even there, it leaves out the provision that the Panel '*shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.*'

248. As explained below, there can be no doubt that this Panel's standard of review is an 'objective, de novo examination of the dispute'. As acknowledged by ICANN in previous IRPs,

²⁵⁶ ICANN's Response to Namecheap's Request for IRP of 10 April 2020, § 38 (ICANN's Response also contains § 39 under the Heading 'Standard of Review'. However, that paragraph relates to the definition of a Claimant and a Dispute).

the *de novo* standard of review requires the Panel to make its ‘*own independent interpretation of the ICANN Articles of Incorporation and Bylaws.*’²⁵⁷

1. **Standard of review for analyzing ICANN’s actions and inactions**

249. ICANN’s constituent documents require this Panel to conduct ‘*an objective, de novo examination of the DISPUTE*’. The DISPUTE is the claim that actions or failures to act committed by the ICANN Board, individual Directors, Officers, or staff members violated ICANN’s Articles of Bylaws.²⁵⁸

250. In making an objective, de novo examination of the DISPUTE, Rule 11(a) of the Interim Supplementary Rules instructs the Panel to make ‘*findings of fact to determine whether the COVERED ACTION*’ (i.e., the actions or failures to act committed by the Board, individual Directors, Officers, or staff members) ‘*constituted an action or inaction that violated ICANN’s Articles or Bylaws.*’

251. Rule 11(b) of the Interim Supplementary Rules instructs the Panel to decide *all* DISPUTES ‘*in compliance with ICANN’s Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.*’

252. These rules apply to all ICANN’s actions and/or inactions that are the subject of a DISPUTE in an IRP, irrespective as to whether the action or inaction is committed by the ICANN Board, individual Directors, Officers, or staff members.

2. **Standard of review for analyzing ICANN Board’s actions and inactions**

253. Board actions and inactions must also be the subject of an ‘objective, de novo

²⁵⁷ Cross-Examination of ICANN Board Member, Ms. Becky Burr in the .WEB Case: ‘*[LITWIN.] And the CCWG intended that the IRP Panel is supposed to decide disputes based on its own independent interpretation of ICANN’s articles and bylaws, correct? [BURR.] That is what this says. I have no idea if that particular sentence is in the bylaws itself, but it is definitely — Q. I am not asking -- A. -- a de novo review.*’ (ICDR Case No. 01-18-0004-2702, *Afilias Domains No. 3 Limited v. ICANN*, Merits Hearing, Tr. Day 2 (4 Aug. 2020), 319:14-25 as quoted in the claimant’s Post-Hearing Brief of 12 October 2020 (**RM 167**), p. 125, endnote 538.

²⁵⁸ Article 4(3)(b)(ii) *juncto* Article 4(3)(b)(iii) Bylaws.

examination’, conducted by the IRP Panel. Rule 11(c) of the Interim Supplementary Procedures provides that, ‘[f]or claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.’

254. Nothing in Rule 11(c) of the Interim Supplementary Procedures points to a deviation from the objective and *de novo* standard that the IRP Panel must apply to assess a violation of ICANN’s Articles and/or Bylaws. Rule 11(c) merely provides that, for claims arising out of the Board’s exercise of its fiduciary duties, the Panel shall not *replace* the Board’s reasonable judgment insofar the Board’s action or inaction is within the realm of reasonable business judgment.

255. *A contrario*, if the IRP Panel determines that the Board’s action or inaction is not within the realm of reasonable business judgment, then the IRP Panel may replace the Board’s decision with its own.

256. To determine whether or not a Board’s action or inaction is within the realm of reasonable business judgment, inspiration can be found in prior IRP decisions, under the then applicable rules. In the first IRP, the Panel determined that ‘*the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially.*’²⁵⁹ ²⁶⁰

257. With the adoption of the amended Bylaws of 11 April 2013, IRP Panels were required to apply a ‘defined standard of review’, focusing on (i) did the Board act without conflict of

²⁵⁹ ICM IRP Declaration (**RM 3**), §136.

²⁶⁰ For a detailed overview of the first IPR decisions, see Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International (**RM 32**). The authors represented many claimants in these cases. In his foreword, David H. Bernstein, Partner, Debevoise & Plimpton LLP, Adjunct Professor, New York University School of Law and George Washington University Law School, and Arbitrator wrote: ‘*Their recommendations are no doubt colored by their perspectives; after all, the authors have been involved in many of the leading IRP proceedings and have counseled innumerable applicants on their rights in the domain name system and the new gTLD application process. But the authors were able to substantiate their thesis with crystal clear and sound reasoning, and what they have very effectively done is to shine a bright light on ICANN’s procedures, and prompt an appropriate debate on how ICANN can improve its model to support the continued growth and fairness of the DNS, and hence the Internet.*’

interest in taking its decision?; (ii) Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them? ; and (iii) Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company (*i.e.*, ICANN)? This standard of review for Board actions and inactions was introduced with the stated purpose of enhancing ICANN’s accountability.²⁶¹ IRP Panels have consistently rejected ICANN’s argument that the three-prong test would entitle the ICANN Board to deference. Instead, ICANN and its Board’s conduct should be reviewed and appraised objectively and independently, without any presumption of correctness.²⁶²

258. Since the 2016 amendment of its Bylaws, ICANN’s Bylaws no longer refer to the three-prong test of the 2013 defined standard of review. However, as the 2016 amendment aimed at increasing ICANN’s accountability and strengthening the effectiveness of the IRP²⁶³, it cannot have been the intention to grant more deference to the ICANN Board, compared to the three-prong test of the 2013 definition. As determined by the GCC IRP Panel, the standard of review is ‘*a de novo standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.*’^[...] This is

²⁶¹ ICANN, *Rationale for Resolution 2013.04.11.06*, <https://www.icann.org/resources/board-material/resolutions-2013-04-11-en#1.d.rationale> (**RM 168**); ICANN, *Rationale for Resolutions 2012.12.20.17-2012.12.20.19*, <https://www.icann.org/resources/board-material/resolutions-2012-12-20-en#2.c.rationale> (**RM 169**).

²⁶² ICDR Case No. 50-20-1400-0247, *Booking.com B.V. v. ICANN*, Final Declaration, 3 March 2015 (Booking.com IRP Declaration, **RM 170**), §111; DCA Final IRP Declaration (**RM 165**), §76; ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015 (Vistaprint IRP Declaration, **RM 171**), §§124-126; ICDR Case No. 01-14-0000-9604, *Merck KGaA v. ICANN*, Final Declaration of the Independent Review Process Panel, 11 December 2015 (Merck IRP Declaration, **RM 172**), §20; ICDR consolidated Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN and Little Birch LLC et al. v. ICANN*, Final Declaration, 11 February 2016 (Despegar et al. IRP Declaration, **RM 173**), §§64, 88, and 113; ICDR Case No. 01-14-0001-6263, *Donuts Inc. v. ICANN*, Final Declaration of the Panel, 5 May 2015 (Donuts IRP Declaration, **RM 174**), §131; ICDR Case No. 01-14-0001-5004, *Dot Registry LLC v. ICANN*, Declaration of the Independent Review Panel, 29 July 2016 (Dot Registry IRP Declaration, **RM 175**), §§68-69; ICDR Case No. 01-14-0002-1065, *Gulf Cooperation Council (GCC) v. ICANN*, Partial Final Declaration of the Independent Review Process Panel, 19 October 2016 (GCC IRP Declaration, **RM 176**), § 93.

²⁶³ **RM 84**.

consistent with the very name of the IRP process – an **independent** review of the contested Board action.’²⁶⁴

*

259. The present IRP does not relate to claims arising out of the Board’s exercise of its fiduciary duties. The present IRP is targeted against ICANN for the violations by the ICANN organization of its Articles of Incorporation and Bylaws. The IRP Panel must apply an objective and *de novo* standard of review and is entitled to replace ICANN’s decision with its own.

260. Assuming, *arguendo*, that the business judgment rule has any application (*quod non*), the secrecy regarding the ICANN Board’s conduct makes it impossible for this Panel to evaluate the reasonableness of that conduct.²⁶⁵

B. Authority of the Panel

261. The Panel is fully empowered under the Bylaws to resolve disputes by ordering remedies that ensure ICANN complies with its Articles of Incorporation and Bylaws.

262. Specifically, pursuant to Article 4(3)(a) of the ICANN Bylaws, the Purposes of the IRP are, *inter alia*, to:

- ‘**[e]nsure that ICANN [...] complies with its Articles of Incorporation and Bylaws**’;
- ‘**[e]nsure that ICANN is accountable to the global Internet community and Claimants**’;
- ‘**[l]ead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction**’; and

²⁶⁴ GCC IRP Declaration (**RM 176**), §93.

²⁶⁵ See ICDR Case No. 01-16-0000-7056, *Amazon EU S.A.R.L. v. ICANN*, Final Declaration, 10 July 2017 (Amazon IRP Declaration, **RM 177**), §111: ‘*In absence of any statement of the reasons by the [Board] for denying the applications, beyond deference to the GAC advice, we conclude that the NGPC failed to act in a manner consistent with its obligation under the ICANN governance documents to make an independent, objective decision on the applications at issue. [...] Moreover, without such an explication of a reason indicating a well-founded public policy interest, the Panel is unable to discharge meaningfully its independent review function to determine whether the NGPC made an independent, objective and merits-based decision in this matter.*’

- *‘[p]rovide a mechanism for the **resolution** of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.’*

263. In addition, Section 4(3)(x) of the ICANN Bylaws provides that (i) the IRP is a *‘final, binding arbitration’*, (ii) *‘IRP Panel decisions are binding final decisions to the extent allowed by law’*, (iii) *‘IRP Panel decisions [...] are intended to be enforceable in any court with jurisdiction over ICANN without a de novo review of the decision of the IRP Panel [...] with respect to factual findings or conclusions of law’* and (iv) *‘ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration’*.

264. Thus, ICANN’s Bylaws are clear that, legally, the IRP is an international arbitration, that the Panel is an arbitral tribunal, that the Panel’s decision is an arbitral award, and that the decision is final and binding on the parties and capable of enforcement.

265. Pursuant to Article 4(3)(v), the Panel’s decision will have to *‘reflect a **well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws**, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.’*

266. To resolve the Dispute, the Panel has broad inherent discretion to fashion relief. The Panel has the authority to order affirmative declaratory relief, deciding that ICANN has violated its Articles of Incorporation and Bylaws and requiring ICANN to put an end to this violation by adopting the Panel’s decision.

IX. ARGUMENT

A. The Panel has the authority to grant the requested relief

267. With the present IRP, Namecheap requests that the Panel makes the necessary findings of fact and of law to bring the dispute to an end. Namecheap requests that the Panel order affirmative declaratory relief, as the Panel is authorized to grant. The specific relief is detailed below.

B. Namecheap has locus standi

1. Namecheap is harmed

268. Under ICANN's Bylaws, a Claimant must have standing (*locus standi*) to pursue an IRP claim. A 'Claimant' includes a legal entity that 'has been materially affected by a Dispute.'²⁶⁶ 'To be materially affected, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.'²⁶⁷

269. As confirmed by this Panel in P.O. No. 8, Namecheap made out a *prima facie* case for standing.²⁶⁸ This Panel concurred with the Emergency Panelist's ruling in that regard:

'38. The Panel concurs with the Emergency Panelist's common sense ruling on standing with respect to the price control issue:

*[A]s a Registrar of the .ORG gTLD, Namecheap is exposed to the risk of increased pricing for registry services. This is a harm that is directly and causally related to the alleged violation that ICANN has not followed proper procedures and has improperly consented to the renewal of the Registry Agreement without price control provisions. It makes no difference that the harm is potential and monetary harm not occurred to date. The evidentiary support is implicit from the undisputed facts regarding the renewal of the .ORG Registry Agreement and Namecheap's status as a Registrar for the .ORG gTLD. It makes no difference that Namecheap is not a party or third-party beneficiary to the Agreement. Namecheap faces a harm that it was not exposed to with the price controls in place.'*²⁶⁹

²⁶⁶ Bylaws, Article IV(3)(b)(i) (RM 2).

²⁶⁷ *Id.*

²⁶⁸ P.O. 8, §48.

²⁶⁹ P.O. 8, §38.

270. This Panel dismissed ICANN’s argument that the harm (in this instance, price increases) must have already occurred.²⁷⁰ As stated by the Panel:

‘43. It makes little sense to wait until after prices have actually increased to review ICANN’s decision to remove price controls. Delay increases the risk that it may be too late to unring the bell. All stakeholders, including ICANN, share an interest in such challenges being resolved promptly, so that there will be clarity as to whether that decision remains in effect.

44. It bears emphasis that the purpose of price controls is to limit the prices that can be charged. Conversely, removal of price controls serves no purpose other than making it possible for prices to be increased without restrictions. Thus, the risk of future increases in prices cannot be deemed to be speculative or indirect. Rather, it is the natural and expected consequence of removing price controls, even if this risk has not yet materialized.’²⁷¹

271. Together with Namecheap’s *prima facie* showing of standing submitted on 21 December 2020, Namecheap submitted two Affidavits and the Expert Report of Prof. Dr. Frank Verboven and Dr. Gregor Langus (the Economic Expert Report I). The Economic Expert Report I established that registries operating .ORG, .INFO and .BIZ gTLDs hold considerable market power and that the price caps have likely been effective in keeping prices of these gTLDs closer to competitive levels.²⁷² The Economic Expert Report I also established that there is *‘a significant likelihood that price controls would be effective in the future’*.²⁷³ It follows that ICANN’s removal of the price control provisions will likely result in an increase in Namecheap’s costs for registry services.²⁷⁴ This cost increase harms Namecheap.²⁷⁵ A mere expectation of an increase in registry prices is sufficient to show harm.²⁷⁶ This is because such expectation reduces Namecheap’s expected profits and its net present value.²⁷⁷

²⁷⁰ See P.O. 8, §§39 and following.

²⁷¹ P.O. 8, §§43 and 44.

²⁷² Economic Expert Report I, para. 49.

²⁷³ Economic Expert Report I, para. 79.

²⁷⁴ Economic Expert Report I, para. 50.

²⁷⁵ Economic Expert Report I, para. 55.

²⁷⁶ Economic Expert Report I, paras. 10, 78.

²⁷⁷ Economic Expert Report I, paras. 10, 79-80.

272. Namecheap’s harm is now further confirmed by the Economic Expert Report II . The Experts were able to review additional evidence, *i.e.* the characteristics of demand for registrations in .ORG, .INFO, .BIZ, and in other TLDs, and indicators of market power. This evidence provides further indications that registries of .ORG, .INFO and .BIZ hold considerable and persistent market power, despite the introduction of more than a thousand of new gTLDs since 2012.²⁷⁸ The Economic Expert Report II also provides evidence indicating that price caps on .ORG, .INFO and .BIZ have been effective in limiting the ability of the registries to exploit their market power.²⁷⁹ This confirms the Experts’ expectations that the removal of price caps results in an upward pressure on wholesale fees and consequently harm to Namecheap and other independent registrars.²⁸⁰

273. Moreover, in their Economic Expert Report II, Prof. Dr. Verboven and Dr. Langus were able to identify an additional mechanism through which a removal of price caps on wholesale registration fees can harm Namecheap and other independent registrars: a removal of price caps can also be expected to harm the profits that registrars make by providing value-added services.²⁸¹

274. The additional evidence of Namecheap’s harm confirms Namecheap’s standing in this IRP.

2. Namecheap’s actions are timely

275. ICANN’s Interim Supplementary Procedures provide that a Claimant must institute an IRP ‘*no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE*’. Namecheap became aware of the ‘material effect of the action or inaction’ on 1 July 2019, one day after ICANN renewed the .ORG,

²⁷⁸ Economic Expert Report II, para. 223.

²⁷⁹ Economic Expert Report II, para. 224.

²⁸⁰ Economic Expert Report II, para. 225.

²⁸¹ Economic Expert Report II, para. 226.

.INFO, and .BIZ RAs.²⁸² Namecheap filed Reconsideration Request 19-2 on 12 July 2019²⁸³, which tolled the 120-day statute of limitations.

276. ICANN argues that Namecheap's Reconsideration Request 19-2 related to the .ORG and .INFO renewals, but did not include .BIZ.²⁸⁴ That is incorrect.

277. Reconsideration Request 19-2 relates to the ICANN's renewal of the .ORG, .INFO and .BIZ RAs. In its request for relief for the Reconsideration Request, Namecheap requested '*that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs*.'²⁸⁵ That includes the .BIZ gTLD.

278. The fact that Reconsideration Request 19-2 was targeted against all previously price capped legacy TLDs for which ICANN renewed the RA on 1 July 2019 is also apparent from the following sections in Reconsideration Request 19-2:

- Section 3: '*The decision by ICANN org to unilaterally remove the price caps when renewing legacy TLDs with little (if any) evidence to support the decision goes against ICANN's Commitments and Core Values, and will result in harm to millions of internet users throughout the world.*'²⁸⁶;
- Section 6: '*As a domain name registrar, removal of price caps for legacy TLDs will negatively impact Namecheap's domain name registration business.*'²⁸⁷;
- Section 7: '*All domain name registrants, especially those who have domains in legacy TLDs with longstanding price caps, will be adversely affected when legacy TLDs begin to raise prices outside of previously established norms.*'²⁸⁸;
- Section 8, footnote 1: '*Comments for the renewal of .biz and .asia registry agreements were reviewed, and were similar in content and support of maintaining price caps as the comments for the .org and .info agreements. They are not included in this analysis because many are duplicates comments submitted by the same commenters.*'²⁸⁹

²⁸² See Section 5 of Namecheap's Reconsideration Request 19-2 ([Annex 8](#)).

²⁸³ [Annex 8](#).

²⁸⁴ See ICANN's Response to Namecheap's Request for IRP of 10 April 2020, §64.

²⁸⁵ Section 9 of Namecheap's Reconsideration Request 19-2 ([Annex 8](#)).

²⁸⁶ Section 3 of Namecheap's Reconsideration Request 19-2 ([Annex 8](#)).

²⁸⁷ Section 6 of Namecheap's Reconsideration Request 19-2 ([Annex 8](#)).

²⁸⁸ Section 7 of Namecheap's Reconsideration Request 19-2 ([Annex 8](#)).

²⁸⁹ Section 8 of Namecheap's Reconsideration Request 19-2, page 5 ([Annex 8](#)).

279. Hence, it is clear that Namecheap challenged ICANN’s actions and inactions regarding .BIZ in Reconsideration Request 19-2 and that these actions and inactions form part of the dispute.

280. *Arguendo*, should there have been any unclarity regarding the scope of Namecheap’s Reconsideration Request 19-2 (*quod non*), it was the ICANN Board’s duty to request for clarification in order to exercise due diligence and care in having a reasonable amount of facts before it in order to make its decision on the Reconsideration Request.

C. ICANN violated its Articles of Incorporation and Bylaws at numerous occasions

281. ICANN violated its Articles of Incorporation and Bylaws before, when and after taking the decision to lift the price caps in .ORG, .INFO and .BIZ.

1. ICANN organized secret Board meetings

a. ICANN was not transparent about its plan to take the decision to lift the price caps

282. Article 3(4) of ICANN’s Bylaws provides that, ‘*at least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.*’

283. ICANN should thus have provided notice of the meeting in which it considered the removal of price caps and have put the proposed decision on the Board’s agenda.

284. Before said decision, ICANN regularly posted the agendas of its Board meetings on its website. However, ICANN has not done so for the envisaged decision to lift the price caps.

285. ICANN’s decision not to post the agenda and provide prior notice was intentional and deliberate: As explained in Chapter V.E.1.b(ii) above, the confidential record shows preparations to Redacted – Confidential Information 290 The

²⁹⁰ **Annex 64.**

confidential record also shows that ICANN's Chair at the time Redacted – Confidential Information

Instead, the Redacted – Confidential Information

However, the record contains no agenda for a Board meeting that would discuss the renewal of the .ORG, .INFO and .BIZ RAs without the price caps.

286. ICANN provides no explanation or justification for not providing such notice, and for not making the Board's agenda public before the Board's debate, deliberation, and decision.

287. Consequently, ICANN has violated: Article 3(4) of its Bylaws, its fundamental transparency obligations, and its fundamental obligation to act in good faith.

b. ICANN kept the deliberation and the relevant resolutions secret

288. ICANN kept its deliberations on the price caps and even the existence of such deliberations hidden from the public.

(i) ICANN must keep written minutes under Californian law and under its Bylaw

289. ICANN is required to keep written minutes of all Board decisions and proceedings, by virtue of Californian law and its own Bylaws.

290. The California Corporations Code (CCC) requires nonprofit corporations such as ICANN to keep '*minutes of the proceedings of its members, board and committees of the board*' in '*written form or in any other form capable of being converted into clearly legible tangible form or in any combination of the foregoing*' and which may be admitted as evidence for all accepted purposes.²⁹¹

291. Article 3(5)(a) of ICANN's Bylaws requires ICANN to keep Board minutes. Even if the Board determines not to disclose minutes of a matter according to Article 3(5)(b) and

²⁹¹ See Cal. Corp. Code. Sections 6320, 8320, 9510.

3(5)(d) of the ICANN Bylaws, ICANN is required under Article 3(5)(c) and 3(5)(d) of its Bylaws to describe in general terms the reason for such nondisclosure.

292. In the case at hand, the ICANN Board held at least two meetings where it approved ICANN's decision to remove price caps and proceed with renewal of the .ORG, .INFO and .BIZ RAs. However, by ICANN's own admission, ICANN did not keep minutes for these meetings.²⁹²

293. Contrary to ICANN's allegations, these meetings were not mere informational workshops, but formal meetings resulting in Board decisions. That is apparent from ICANN's preparations of the Board meeting as well as from ICANN's communications on the Board meeting. In its preparations, ICANN staff envisioned Redacted – Confidential Information

²⁹³ and in ICANN staff's documenting the Board Meeting Process.²⁹⁴ On 12 February 2019, Russ Weinstein informed Neustar that

Redacted - Confidential Information

²⁹⁵ Hence, the ICANN organization Redacted – Confidential Information

Finally,

ICANN wrote that during the Board meetings, the '*ICANN org recommended adopting the Base RA rather than maintaining the price controls.*'²⁹⁶ As a result, ICANN staff merely made a recommendation to the ICANN Board. Such recommendation must have resulted in a formal decision by the ICANN Board to give ICANN staff the authorization to execute the new agreements for .ORG, .INFO and .BIZ.

²⁹² [Annex 105](#).

²⁹³ [Annex 67](#), at p. 7.

²⁹⁴ [Annexes 82 and 83](#).

²⁹⁵ [Annex 70](#).

²⁹⁶ [Annex 92](#), Letter from Cyrus Namazi (ICANN) to Zak Muscovitch, (General Counsel Internet Commerce Association), 26 July 2019, <https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf>.

294. Yet, there are no minutes documenting the Board’s decision.

295. Consequently, ICANN has violated the CCC, thereby violating Article III of its Articles of Incorporation, and Articles 1(2)(a) of the ICANN Bylaws. In addition, ICANN has violated Article 3(5)(a) of the ICANN Bylaws.

(ii) **ICANN must post written minutes under its Bylaws**

296. Article 3(5)(a) of the ICANN Bylaws requires ICANN to post the Board minutes on the ICANN website. As ICANN failed to post minutes regarding the decision to renew the .ORG, .INFO and .BIZ RAs without price caps, ICANN has also violated this Bylaws provision.

(iii) **ICANN must publish resolutions under its Bylaws**

297. Article 3(5)(b) of the ICANN Bylaws requires ICANN to publish the resolutions passed by the Board on the ICANN website.

298. As explained above, the ICANN staff’s recommendation must have resulted in a formal decision by the ICANN Board to give ICANN staff the authorization to execute the new agreements for .ORG, .INFO and .BIZ. Such authorizations are given through Board resolutions. As explained in Chapters V.B and V.D above, prior renewals of RAs for legacy gTLDs were always preceded by a Board resolution that ICANN published on its website.²⁹⁷

299. Yet, regarding the 2019 renewal of the .ORG, .INFO and .BIZ legacy gTLDs, no such resolution was published. Hence, ICANN violated Article 3(5)(b) of its Bylaws.

²⁹⁷ See e.g., ICANN, *Adopted Board Resolutions 2013.08.22.10-12*, 22 August 2013, <https://www.icann.org/resources/board-material/resolutions-2013-08-22-en> (**RM 178**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 22 August 2013, <https://www.icann.org/resources/board-material/minutes-2013-08-22-en> (**RM 179**); ICANN, *Adopted Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (**RM 180**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 28 September 2015, <https://www.icann.org/resources/board-material/minutes-2015-09-28-en#1.e> (**RM 181**); ICANN, *Adopted Board Resolution 2017.06.24.22*, 22 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.e> (**RM 124**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 24 June 2017, <https://www.icann.org/resources/board-material/minutes-2017-06-24-en> (**RM 182**).

(iv) **ICANN must publish Board actions in a preliminary report under its Bylaws**

300. Article 3.5 (c) of the ICANN Bylaws requires ICANN to publish Board actions on the ICANN website in the form of a preliminary report. No such preliminary report is available for ICANN's decision to renew the .ORG, .INFO and .BIZ RAs without price caps. Hence, ICANN violated Article 3.5 (c) of its Bylaws.

(v) **ICANN must keep records of the voting by Board members**

301. Article 2(1) *juncto* Article 3(6)(a)-(c) of ICANN's Bylaws sets out the procedure that must be followed with respect to 'any policies that are being considered by the Board for adoption that **substantially affect the operation of the Internet or third parties**, including the imposition of any fees or charges.' The procedure provides for a public comment phase and *inter alia* requires a majority vote of all ICANN's Directors (*i.e.*, ICANN Board Members with voting power²⁹⁸) and a publication of the vote of each Director.

302. In all other matters, Article 2(1) of ICANN's Bylaws provides that 'the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board' and a quorum must be present 'unless otherwise specifically provided in these Bylaws by reference to "of all Directors."' To establish a quorum, '[o]nly Directors shall be included in determining the existence of quorums, and in establishing the validity of votes taken by the Board' (Article 7(1) *in fine* of ICANN's Bylaws). A majority of the total number of Directors then in office is required to constitute a quorum. In this respect Article 7(17) of ICANN's Bylaws provides:

'Section 7.17 QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and

²⁹⁸ See Article 7(1) of ICANN's Bylaws, providing that '[t]he ICANN Board of Directors ("**Board**") shall consist of sixteen voting directors ("**Directors**"). In addition, four non-voting liaisons ("**Liaisons**") shall be appointed for the purposes set forth in Section 7.9.'

the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.'

303. In all cases, there must be a majority vote. Directors with a conflict of interest are not allowed to vote. In this respect, Article 7(6) of ICANN's Bylaws provides:

'Section 7.6. DIRECTORS' CONFLICTS OF INTEREST

*The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN. Each Director shall be responsible for disclosing to ICANN any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the CCC. In addition, each Director shall disclose to ICANN any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CCC. The Board shall adopt policies specifically addressing Director, Officer, EC and Supporting Organization conflicts of interest. **No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.'***

304. In the case at hand, there can be no doubt that the decision to renew the .ORG, INFO and .BIZ RAs without price caps constitutes new policy that substantially affects *'the operation of the Internet or third parties, including the imposition of any fees or charges.'*²⁹⁹ The effects are recognized in previous resolutions by the ICANN Board, e.g., when renewing the .ORG, .INFO and .BIZ RAs in 2013³⁰⁰, and more recently, in renewing the .PRO RA in 2015³⁰¹ and

²⁹⁹ For an evaluation of the effects, see the **Economic Expert Report II**.

³⁰⁰ ICANN, *Adopted Board Resolutions 2013.08.22.10-12*, 22 August 2013, <https://www.icann.org/resources/board-material/resolutions-2013-08-22-en> (**RM 178**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 22 August 2013, <https://www.icann.org/resources/board-material/minutes-2013-08-22-en> (**RM 179**).

³⁰¹ ICANN, *Adopted Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (**RM 180**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 28 September 2015, <https://www.icann.org/resources/board-material/minutes-2015-09-28-en#1.e> (**RM 181**).

the .NET RA in 2017.³⁰² For each of these renewals, the ICANN Board provided a rationale explaining (i) why the Board was addressing the issue, (ii) the proposal being considered, (iii) which stakeholders or others were consulted, (iv) what concerns or issues were raised by the community, (v) what significant materials the Board reviewed, (vi) the factors that the Board found to be significant, (vii) the positive or negative community impacts, (viii) the fiscal impacts or ramifications on the ICANN organization, the community, and/or the public, and (ix) the security, stability or resiliency issues relating to the DNS. For these resolutions, the Board's meeting minutes contain the voting record, showing which Directors voted in favor, who abstained and who did not participate to the voting for conflicts of interest reasons.

305. With respect to the 2019 RAs for .ORG, .INFO and .BIZ, no voting record is available. As a result, ICANN violated Articles 2(1) *juncto* Article 3(6)(a)-(c) of its Bylaws. ICANN may also have violated Articles 7(6) and 7(17) of its Bylaws. However, there being no voting record, there is not even a possibility for the Panel to discharge meaningfully its independent review function to determine whether ICANN complied with these Bylaws' provisions.

c. ICANN gave no justifiable rationale for the organization and holding of the decision

306. In contrast with prior RA renewals, ICANN never provided any rationale for its decision to renew the .ORG, .INFO and .BIZ RAs without price caps.

307. Pursuant to Article 3(1) of its Bylaws, ICANN and its constituent bodies must '*operate to the maximum extent feasible in an open and transparent manner*', which includes an obligation to publicly disclose the '*rationale for decisions made by the [ICANN] Board and ICANN's constituent bodies.*' In addition, Article 3(6)(c) of ICANN's Bylaws imposes the publication in the meeting minutes of '*the rationale for any resolution adopted by the Board*

³⁰² ICANN, *Adopted Board Resolution 2017.06.24.22*, 22 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.e> (**RM 124**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 24 June 2017, <https://www.icann.org/resources/board-material/minutes-2017-06-24-en> (**RM 182**).

(including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions).’

308. ICANN has never provided a rationale for its decision to renew the .ORG, .INFO and .BIZ RAs without price caps.

309. ICANN merely provided the following conclusory statement that is devoid of any supporting evidence:

‘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, .INFO and .BIZ] Registry Agreement[s are] 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.’³⁰³

310. As will be explained more fully in Chapters IX.C.3 and IX.C.7 below, ICANN’s conclusory statement is incorrect. Removing the price cap provisions is not consistent with ICANN’s Core Values. As a matter of fact, ICANN’s removal of the price cap provisions violates ICANN’s fundamental obligations, Commitments, and Core Values.

311. Consequently, by failing to provide a rationale, ICANN violated Articles 3(1) and 3(6)(c) of its Bylaws.

d. Consequences of ICANN’s violations

312. As a nonprofit corporation that accomplished actions in derogation of Californian law and its Bylaws, ICANN committed an ‘*ultra vires*’ act, *i.e.*, an act that exceeds its authority. ICANN not only violated its Bylaws, by committing an *ultra vires* act, ICANN’s Directors breached their fundamental obligations towards the Internet community. In addition, ICANN

³⁰³ [Annexes 5-7](#).

refuses to reveal when the decision on the removal of price caps was made or where such decision can be read.

313. Assuming, *arguendo*, that the business judgment rule has any application, the secrecy regarding the Board's conduct makes it impossible for this Panel to evaluate the reasonableness of that conduct.

314. Many questions remain unaddressed or unanswered, such as:

- Did ICANN consider expert advice before reaching the decision to renew the .ORG, .INFO and .BIZ RAs without price caps?
- Did ICANN and its Board exercise diligence, due care and independent judgment in reaching the decision to remove price caps and developing a rationale for such decision?
- Who participated at the meetings in which ICANN decided to renew the .ORG, .INFO and .BIZ RAs without price caps?
- Were conflicts of interest disclosed, particularly in view of the fact that at least one of ICANN's Board members, Ms. Becky Burr, was involved in the negotiations regarding .BIZ on behalf of Neustar?
- Did conflicted Board members abstain from ICANN's decision-making process entirely?
- Did the ICANN Board organize a vote?
- Did the ICANN Board organize a vote?

315. Any evidence that might provide an answer to these questions is shielded by ICANN's invocation of privilege in this matter.

316. As determined by the IRP Panel in the *Dot Registry case*, '*ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges*', but ICANN and its Board are '*not free, however, to disregard mandatory obligations under the Bylaws*.'³⁰⁴

³⁰⁴ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel, 29 July 2016 (Dot Registry IRP Declaration, **RM 175**), §149.

317. By shielding from public disclosure the agenda's, deliberations, minutes, decisions, voting record, and rationale, ICANN has put itself in contravention of Articles II and III of its Articles of Incorporation, Article 1(2)(a) of its Bylaws, Article 2(1) *juncto* Article 3(6)(a)-(c) of its Bylaws, Article 3(1) of its Bylaws, and Article 3(6)(c) of its Bylaws.

318. In addition, ICANN may also have violated Articles 7(6) and 7(17) of its Bylaws. In this respect, the Panel is requested to draw adverse inference from the fact that ICANN has failed to provide any information that would disprove its violation of Articles 7(6) and 7(17) of its Bylaws.

319. Consequently, ICANN's actions and inactions constitute a violation of:

- Articles II and III of ICANN's Articles of Incorporation because ICANN's actions and inactions are being in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a) of ICANN's Bylaws because ICANN's actions and inactions are being in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a)(iv) of ICANN's Bylaws because ICANN's actions and inactions breach ICANN's openness and transparency obligations;
- Article 1(2)(a)(vi) of ICANN's Bylaws because ICANN's actions and inactions disregard ICANN's commitment to remain accountable to the Internet community;
- Article 2(1) *juncto* Article 3(6)(a)-(c) of its Bylaws because ICANN's actions and inactions are in breach of ICANN's decision-making process;
- Article 3(1) of ICANN's Bylaws because ICANN's actions and inactions breach ICANN's openness, transparency and fairness obligations, including the need for a detailed and fact-based rationale; and
- Articles 7(6) and 7(17) of ICANN's Bylaws because ICANN's actions and inactions were taken without establishing a necessary quorum and without establishing the absence of conflicts of interest.

2. **ICANN’s staff did not have the authority to enter into the renewal agreements for .ORG, .INFO and .BIZ without price caps**

320. ICANN operates through its Board. Section 5210 of the CCC requires that all corporate powers be exercised by, or under direction of, ICANN’s Board.³⁰⁵ This requirement is confirmed in Article2(1) ICANN’s Bylaws, which provides in its relevant part that ‘*the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.*’

321. By carrying a resolution, the ICANN Board can delegate authorities and give specific instructions to ICANN’s staff, *e.g.*, to execute renewal agreements for legacy gTLDs on ICANN’s behalf.

322. Until the execution of the 2019 RAs for .ORG, .INFO and .BIZ, ICANN has always proceeded that way. *E.g.*, On 22 August 2013, the ICANN Board passed the following resolutions for the renewal of the .ORG, .INFO and .BIZ RAs in 2013:

- ‘*Resolved (2013.08.22.10), the proposed renewal .INFO Registry Agreement is **approved**, and the President, Generic Domains Division and the General Counsel are **authorized** to take such actions as appropriate to implement the agreement*’;
- ‘*Resolved (2013.08.22.11), the proposed renewal .ORG Registry Agreement is **approved**, and the President, Generic Domains Division and the General Counsel are **authorized** to take such actions as appropriate to implement the .ORG Registry Agreement*’;

³⁰⁵ Section 5210 of the California Corporations Code provides: ‘*Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.*’

ICANN has no ‘members’. Article 23 of ICANN’s Bylaws provides explicitly:

‘ICANN shall not have members, as contemplated by Section 5310 of the CCC, notwithstanding the use of the term "member" in these Bylaws, in any ICANN document, or in any action of the Board or staff. For the avoidance of doubt, the EC is not a member of ICANN.’

Hence, there can be no ‘*limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033).*’

- ‘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.’³⁰⁶

323. The Board passed similar resolutions for .PRO,³⁰⁷ .CAT,³⁰⁸ and .TRAVEL³⁰⁹ in 2015, for .TEL³¹⁰ in 2016, and for .MOBI³¹¹ and .NET³¹² in 2017.

324. In contrast with these resolutions, there is no record showing the approval and delegation of authority for the execution of the 2019 RAs for .ORG, .INFO and .BIZ. Consequently, these RAs have been executed without the necessary direction of the ICANN Board.

325. As a result, ICANN has committed an *ultra vires* act under Californian law, thereby violating Article III of its Articles of Incorporation. In addition, ICANN violated Article 2(1) of its Bylaws.

3. ICANN failed to perform the necessary analysis before removing the price caps in .ORG, .INFO and .BIZ

326. ICANN must not only develop a detailed rationale; for being able to do so, it must perform the necessary analysis before reaching well-informed decisions, based on expert advice and in the interest of the Internet community as a whole. That obligation is included *inter alia* in the ICANN Commitment No. iv, requiring ICANN to ‘(A) seek input from the

³⁰⁶ ICANN, *Adopted Board Resolutions 2013.08.22.10-12*, 22 August 2013, <https://www.icann.org/resources/board-material/resolutions-2013-08-22-en> (**RM 178**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 22 August 2013, <https://www.icann.org/resources/board-material/minutes-2013-08-22-en> (**RM 179**).

³⁰⁷ ICANN, *Adopted Board Resolution 2015.09.28.06*, 28 September 2015, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e> (**RM 180**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 28 September 2015, <https://www.icann.org/resources/board-material/minutes-2015-09-28-en#1.e> (**RM 181**).

³⁰⁸ **RM 180**, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c>.

³⁰⁹ **RM 180**, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d>.

³¹⁰ **RM 115**, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en>.

³¹¹ **RM 112**, <https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#1.d>.

³¹² ICANN, *Adopted Board Resolution 2017.06.24.22*, 22 June 2017, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.e>. (**RM 124**); ICANN, *Minutes of the Regular Meeting of the ICANN Board*, 24 June 2017, <https://www.icann.org/resources/board-material/minutes-2017-06-24-en> (**RM 182**).

public, for whose benefit ICANN in all events shall act, [and] (B) promote well-informed decisions based on expert advice (Article 1(2)(a)(iv) of ICANN's Bylaws). The obligation also stems from ICANN's transparency obligations, as taken up in Article III of ICANN's Articles of Incorporation and Article 3(1) of ICANN's Bylaws. These rules require *inter alia* that ICANN 'operate consistent with procedures designed to ensure fairness', 'provide detailed explanations of the basis for decisions', and 'encourage fact-based policy development work'. ICANN and its constituent bodies are required to document and publicly disclose the rationale for their decisions, which must include detailed and fact-based explanations.

327. Without such a publicly disclosed fact-based analysis,

- ICANN would break its commitment to remain **accountable** to the Internet community (Commitment No. vi, Article 1(2)(a)(vi) of ICANN's Bylaws);
- ICANN would break its commitment to preserve and enhance the **openness** of the DNS and the Internet (Commitment No. i, Article 1(2)(a)(i) of ICANN's Bylaws);
- ICANN would expose itself to **capture**, in violation of its Core Values;
- ICANN would be unable to determine whether (i) it is feasible and appropriate to depend on market mechanisms to promote and sustain a **competitive environment** in the DNS market (Core Value No. iii, Article 1(2)(b)(iii) of ICANN's Bylaws), (ii) introducing and promoting competition in the registration of domain names in the way ICANN intends to do it is beneficial to the **public interest** (Core Value No. (iv), Article 1(2)(b)(iv) of ICANN's Bylaws), and (iii) ICANN is working towards or achieving a reasonable balance between the **interests of different stakeholders**, while also avoiding capture (Core Value No. (vii), Article 1(2)(b)(vii) of ICANN's Bylaws).

328. In the case at hand, there is no record of any analysis that was made.

329. The fact that, during its 21 November 2019 discussion, some ICANN Board members inquired about the need for an economic study of how removing the pricing restrictions would encourage competition, shows that at least these Board members were aware that such analysis was the right approach to address the way forward:

'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.*³¹³

330. It is apparent from the Board minutes of its 21 November 2019 meeting³¹⁴ that no such study was undertaken or presented to the Board. Instead of focusing on the consequences for removing price caps in legacy gTLDs, the Board only considered economic studies that took place ‘during the development of the New gTLD Program.’ That was in 2009 or 10 years before the challenged decision! There is no mention about any later studies that took place. There is no sign

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331. Therefore, ICANN’s failure to base its decisions on expert advice submitted to the public for discussion, constitutes a violation of:

- Articles II and III of ICANN’s Articles of Incorporation because ICANN’s actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a) of ICANN’s Bylaws because ICANN’s actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a)(i) of ICANN’s Bylaws because ICANN’s actions and inactions disregard ICANN’s commitment to preserve and enhance the openness of the DNS and the Internet;
- Article 1(2)(a)(iv) of ICANN’s Bylaws because ICANN’s and inactions breach ICANN’s openness and transparency obligations;

³¹³ **RM 95**, <https://www.icann.org/resources/board-material/minutes-2019-11-21-en>.

³¹⁴ This is the meeting in which the Board considered Namecheap’s Reconsideration Request 19-2. The secret meeting during which the removal of the price caps was discussed has not been minuted.

- Article 1(2)(a)(vi) of ICANN’s Bylaws because ICANN’s actions and inactions disregard ICANN’s commitment to remain accountable to the Internet community;
- Article 1(2)(b)(iii), (iv), and (vii) *juncto* Article 1(2)(c) of ICANN’s Bylaws because ICANN ignores and fails to balance ICANN’s Core Values, thereby exposing ICANN to capture; and
- Article 3(1) of ICANN’s Bylaws because ICANN’s actions and inactions breach ICANN’s openness, transparency and fairness obligations, including the need for a detailed and fact-based rationale.

4. **ICANN inappropriately invoked legal privilege to cloak documents**

332. ICANN’s privilege log shows that Redacted - Confidential Information

The privilege log also refers to Redacted - Confidential Information

333. However, without exception, ICANN has cloaked these documents by invoking legal privilege. As explained above³¹⁵, ICANN is free to invoke legal privilege, as it is free to waive legal privilege. But invoking legal privilege cannot serve as an excuse to disregard ICANN’s fundamental obligations to be open and transparent, and to develop and document a detailed rationale, explaining the fact-based analysis ICANN performed based on expert advice.

334. In addition, had ICANN received independent expert advice with a justification for removing price caps in the .ORG, .INFO and .BIZ RAs, there would be no conceivable reason to keep it from public disclosure. Had ICANN shared such advice with its Board, there would also be no conceivable reason to hide it. Had the ICANN Board exercised its independent judgment on the advice and deliberated on the issue, there would be no reason for not providing a rationale.

³¹⁵ Chapter IX.C.1.d.

335. Therefore, the Panel is entitled to draw adverse inferences from ICANN's obstinate refusal to provide any documents showing ICANN's deliberations on the removal of price caps.

336. In view of the above, ICANN's invoking of legal privilege to cloak documents constitutes a violation of:

- Articles II and III of ICANN's Articles of Incorporation because ICANN's actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a) of ICANN's Bylaws because ICANN's actions and inactions are not in the global public interest, do not benefit the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a)(i) of ICANN's Bylaws because ICANN's actions and inactions disregard ICANN's commitment to preserve and enhance the openness of the DNS and the Internet;
- Article 1(2)(a)(iv) of ICANN's Bylaws because ICANN's actions and inactions breach ICANN's openness and transparency obligations;
- Article 1(2)(a)(vi) of ICANN's Bylaws because ICANN's actions and inactions disregard ICANN's commitment to remain accountable to the Internet community;
- Article 1(2)(b)(iii), (iv), and (vii) *juncto* Article 1(2)(c) of ICANN's Bylaws because ICANN ignores and fails to balance ICANN's Core Values, thereby exposing ICANN to capture; and
- Article 3(1) of ICANN's Bylaws because ICANN's actions and inactions breach ICANN's openness, transparency and fairness obligations, including the need for a detailed and fact-based rationale.

5. ICANN's Chair and ICANN staff knowingly hid information

337. Behaviour by the ICANN Chair and ICANN staff shows deliberate and conscious action to hide information.

First, ICANN’s Chair at the time, Mr. Cherine Chalaby, Redacted – Confidential Information

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Second, ICANN staff members who ‘negotiated’ the renewal RAs for .ORG, .INFO and .BIZ aimed at having the ICANN Board remove the price caps without benefiting from any economic advice on the issue. Indeed, on 6 January 2019, Russ Weinstein stated in a partly redacted message regarding the price caps on .ORG, .INFO and .ORG that

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³¹⁷ On 17 January 2019, Mr. Weinstein was able to inform PIR

Redacted – Confidential Information

³¹⁸ On 22 January 2019, ICANN’s legal staff received Redacted - Confidential Information

For both documents, ICANN

invokes privilege and there are no signs that Redacted - Confidential Information were shared with other ICANN staff and/or the ICANN Board.

338. On 12 February 2019, Russ Weinstein was pleased to inform that

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339. In view of the above, ICANN’s deliberate hiding of information constitutes a violation of:

- Articles II and III of ICANN’s Articles of Incorporation because ICANN’s actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a) of ICANN’s Bylaws because ICANN’s actions and inactions are not in the global public interest, do not benefit the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule

³¹⁶ [Annex 66.](#)

³¹⁷ [Annex 68.](#)

³¹⁸ [Annex 68.](#)

³¹⁹ [Annex 70.](#)

of law, and transparency), and are contrary to the openness and transparency obligations;

- Article 1(2)(a)(i) of ICANN’s Bylaws because ICANN’s actions and inactions disregard ICANN’s commitment to preserve and enhance the openness of the DNS and the Internet;
- Article 1(2)(a)(iv) of ICANN’s Bylaws because ICANN’s actions and inactions breach ICANN’s openness and transparency obligations;
- Article 1(2)(a)(vi) of ICANN’s Bylaws because ICANN’s actions and inactions disregard ICANN’s commitment to remain accountable to the Internet community;
- Article 1(2)(b)(iii), (iv), and (vii) *juncto* Article 1(2)(c) of ICANN’s Bylaws because ICANN ignores and fail to balance ICANN’s Core Values, thereby exposing ICANN to capture; and
- Article 3(1) of ICANN’s Bylaws because ICANN’s actions and inactions breach ICANN’s openness, transparency and fairness obligations, including the need for a detailed and fact-based rationale.

6. ICANN staff misled the Board Members

340. The behavior by ICANN staff members shows deliberate and conscious action to mislead the ICANN Board members.

341. During the Board’s 21 November 2020 discussions regarding Reconsideration Request 19-2, Board Members inquired about matters related to pricing and the need for an economic study about the effects of removing the existing price caps.³²⁰ Members of the ICANN organization then ‘*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.*’³²¹ No more detail is provided as to the content of these discussions.

³²⁰ **Annex 115**, ICANN, *Minutes – Special Meeting of the ICANN Board on 21 November 2019*, 27 January 2020, <https://www.icann.org/resources/board-material/minutes-2019-11-21-en>.

³²¹ **Annex 115**, ICANN, *Minutes – Special Meeting of the ICANN Board on 21 November 2019*, 27 January 2020, <https://www.icann.org/resources/board-material/minutes-2019-11-21-en>.

342. However, it is clear that (i) important information remained hidden for the Board and (ii) the Board was misled about the relevance of the information that was presented during those discussions.

343. First, the fact that Board Members inquired about the need for an economic study when considering Namecheap's reconsideration request – *i.e.*, long after the Board's secret meetings in which it decided to remove price caps –, confirms that the ICANN Board did not consider necessary expert advice before deciding to remove the price caps in .ORG, .INFO and .BIZ. One Board Member explicitly inquired '*whether there should be an economic study of how the market has evolved since 2009 prior to the Board taking action.*' Had it been considered before the Board giving Redacted – Confidential Information this question would not have been asked and there would have been no need for members of the ICANN organization to engage the Board in a discussion about the history of the price cap provisions and past economic studies.

344. Second, ICANN's Deputy General Counsel Ms. Amy Stathos, Redacted - Confidential Information³²² was present at the meeting. Ms. Stathos had briefed the Board about Namecheap's Reconsideration Request.³²³ Apparently, Ms. Stathos did not consider it necessary to inform the Board about Redacted - Confidential Information

. Instead, the Board was only briefed about the '*discussions and economic studies about pricing provisions that took place during the development of the New gTLD Program*'.³²⁴

345. The final determination of the ICANN Board on Reconsideration Request 19-2 (the 'Board's Final Determination') shows that the Board was misled about the scope and the findings in the 2009 Carlton Report that was made in the context of the New gTLD Program.

³²² ICANN invokes legal privilege for these conversations.

³²³ **Annex 115**, ICANN, *Minutes – Special Meeting of the ICANN Board on 21 November 2019*, 27 January 2020, <https://www.icann.org/resources/board-material/minutes-2019-11-21-en>.

³²⁴ **Annex 115**, ICANN, *Minutes – Special Meeting of the ICANN Board on 21 November 2019*, 27 January 2020, <https://www.icann.org/resources/board-material/minutes-2019-11-21-en>.

The Board's Final Determination states the following with reference to Carlton's 2009 preliminary report; not the final report:

*'In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.[...]' Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the market for gTLDs] limits or eliminates the suppliers' [i.e., the registry operators'] incentive and ability to act opportunistically."[...] He 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."[...]'*³²⁵

346. The Board's Final Determination then continues with an explanation of how ICANN developed the Base RA, without mentioning that the Base RA was developed specifically for new gTLDs.

347. The way in which the Board was misled may be subtle, but therefore not less real and damaging.

348. The scope of Carlton's 2009 analysis was narrower than what is described in the Board's Final Determination. Carlton's 2009 preliminary report provides:

*'I have been asked by counsel for ICANN to address whether price caps **that limit future increases in prices charged to registrars of these new gTLDs** would be necessary to insure the potential competitive benefits of the new gTLDs.'*³²⁶

349. Carlton's 2009 final report provides:

*'I have been asked by ICANN to analyze from an economic perspective ICANN's anticipated introduction of new generic top level domain names (gTLDs), and to identify and address the benefits and costs associated with ICANN's proposal. [...] In conjunction with this analysis, I also address whether price caps **that limit prices and future increases in prices charged by registries of these new gTLDs** would be necessary to achieve the potential competitive benefits of the new gTLDs.'*³²⁷

³²⁵ **Annex 11.**

³²⁶ **RM 183**, Dennis Carlton, *Preliminary analysis of Dennis Carlton regarding price caps for New gTLD Internet registries*, 4 March 2009, <https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf>.

³²⁷ **RM 23**, <http://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>.

350. The parts in bold have been elegantly left out of the ICANN Board’s Final Determination. However, these parts make clear that the scope of Carlton’s 2009 report was limited to pricing in *new* gTLDs, as opposed to *legacy* gTLDs. That is also apparent from the title and the content of the 2009 Carlton reports.

351. Carlton’s 2009 preliminary report is entitled ‘*Preliminary analysis of Dennis Carlton regarding price caps for New gTLD Internet registries*’. His 2009 final report is entitled ‘*Report of Dennis Carlton regarding ICANN’s proposed mechanism for introducing New gTLDs*’.

352. Carlton’s analysis is not applicable to major *legacy* gTLDs with price caps.³²⁸ Indeed, the existence of price caps in these *legacy* gTLDs was an argument that Dennis Carlton used to conclude that price caps in *new* gTLDs are not necessary:

‘The fact that the existing major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices.’³²⁹

353. The limited scope of Carlton’s 2009 report was not represented correctly to and by the ICANN Board. The fact that Carlton used price caps in *legacy* gTLDs as an argument to conclude that price caps in *new* gTLDs were not necessary was clearly not discussed with the Board.

354. Moreover, in response to concerns raised by the community and fellow economist Michael Kende, Dennis Carlton made clear that he saw no basis for eliminating price caps in existing gTLDs. He had understood from ICANN that there was no basis for the concern that

³²⁸ *Arguendo* even if Carlton’s arguments on price caps on *new* gTLDs were to have any relevance to the analysis of the likely effects on economic outcomes of price caps on *legacy* gTLDs, no such arguments were discussed, as is apparent from the fact that the Board’s Final Determination fails to address the issue and chose to misrepresent the scope of the report by leaving out the explicit reference to *new* gTLDs, as opposed to *legacy* gTLDs. That may not have been deliberate by the ICANN Board members, who may have relied on the presentation by ICANN staff and merely rubberstamped the documents, containing the misrepresentation as prepared by the ICANN staff. In any event, the Carlton’s 2009 report is irrelevant for assessing the effects of the removal of price caps in .ORG, .INFO and .BIZ as explained in the **Economic Expert Report II**, para. 131.

³²⁹ **RM 23**, <http://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf>, para. 73.

the absence of price caps for new gTLDs could result in the elimination of price caps for .COM, .NET, .ORG, .INFO, .BIZ. That observation of Carlton's report was also clearly not part of the Board's discussions.

355. One can only conclude from the above that ICANN acted in bad faith and misrepresented the '*discussions and economic studies about pricing provisions that took place during the development of the New gTLD Program*' and that because of this misrepresentation, the ICANN Board failed to exercise due diligence and care, thereby acting against the interest of the Internet community.

356. Consequently, ICANN's actions and inactions described in this section constitute a violation of:

- Articles II and III of ICANN's Articles of Incorporation because ICANN's actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a) of ICANN's Bylaws because ICANN's actions and inactions are not in the global public interest, do not benefit the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to the openness and transparency obligations;
- Article 1(2)(a)(i) of ICANN's Bylaws because ICANN's actions and inactions disregard ICANN's commitment to preserve and enhance the openness of the DNS and the Internet;
- Article 1(2)(a)(iv) of ICANN's Bylaws because ICANN's actions and inactions breach ICANN's openness and transparency obligations;
- Article 1(2)(a)(vi) of ICANN's Bylaws because ICANN's actions and inactions disregard ICANN's commitment to remain accountable to the Internet community;
- Article 1(2)(b)(iii), (iv), and (vii) *juncto* Article 1(2)(c) of ICANN's Bylaws because ICANN ignores and fail to balance ICANN's Core Values, thereby exposing ICANN to capture; and

- Article 3(1) of ICANN’s Bylaws because ICANN’s actions and inactions breach ICANN’s openness, transparency and fairness obligations, including the need for a detailed and fact-based rationale.

7. **ICANN entered into an agreement that goes against the interests of the Internet community as a whole, ignoring public comments**
 - a. **ICANN acted against the interests of the Internet community as a whole and ignored the public interest by deciding to remove the price caps in .ORG, .INFO and .BIZ**

357. ICANN must always act in the interests of the public and in the interests of the Internet community as a whole, and preserve and enhance openness of the DNS and the Internet. Where market mechanisms are failing to promote and sustain a competitive environment in the DNS market, ICANN must step in and ensure that the interests of the Internet community as a whole and the economic openness of the DNS and the Internet are preserved and enhanced. ICANN’s failure in doing so constitutes a violation of Articles II and III of ICANN’s Articles of Incorporation and of Articles 1(1)(a)(i), and 1(2) of ICANN’s Bylaws.

358. Pursuant to Article 1(2)(b) of ICANN’s Bylaws, ICANN should seek and support ‘*broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making [...] to ascertain the global public interest*’. Seeking such participation is not fulfilled by organizing a *pro forma* public comment phase. ICANN must take into account genuine concerns expressed by the Internet community and recognize the policy role of ‘*responsible entities that reflect the interests of affected parties and the roles of [...] relevant expert bodies*’.³³⁰

359. ICANN’s decision to remove the price caps for .ORG, .INFO and .BIZ is not in the interests of the Internet community as a whole.

³³⁰ Article 1(2)(b)(ii) of ICANN’s Bylaws.

360. ICANN did not care about analyzing how the interests of the Internet community would be affected by its decision to remove the price caps and it ignored the unprecedented number of public comments that rejected the ‘proposed’ removal of the price caps in .ORG, .INFO and .BIZ.

361. The positive effects of maintaining (or even strengthening) the price caps in .ORG, .INFO and .BIZ, and the negative effects of removing them have been broadly and repeatedly recognized by (i) economists commissioned by ICANN, (ii) the DoJ and the DoC, (iii) an overwhelming amount of public comments, opposing the removal of price caps, and (iv) the California Attorney General. As demonstrated by the Second Expert Report by Prof. Dr. Verboven and Dr. Langus, and supported by independent academic studies, ICANN had every reason to maintain price caps in .ORG, .INFO and .BIZ in the interest of the Internet community as a whole and to preserve the openness of the Internet and the DNS.

(i) **ICANN’s own studies call for price caps in .ORG, .INFO and .BIZ**

362. ICANN has recognized that (i) registries such as .ORG, .INFO and .BIZ possess ‘*attributes of monopoly power*’, and (ii) ICANN needs to address the potential for its exploitation.³³¹ If registries were allowed to exploit their market power by setting high registry fees, they would limit the extent to which competition among registrars could improve the economic outcomes in the DNS space. For that reason, ICANN introduced price caps into the RAs for .COM, .NET, and .ORG and later into the RAs for .INFO and .BIZ as well.³³²

363. In 2004, ICANN was able to observe that the first two rounds of expansion of the gTLD namespace had not resulted in effective competition to the .COM, .NET and .ORG registries.

³³¹ L. Touton (ICANN), *General Counsel’s Analysis of .name SLD E-mail Forwarding Service*, 31 July 2001, <https://www.icann.org/resources/unthemed-pages/report-name-tld-2001-07-31-en> (**RM 184**).

³³² **Economic Expert Report II**, paras. 87-88.

As shown in the ICANN-commissioned study by Summit Strategies International, only two gTLDs (.INFO and .BIZ) were successful in attracting a significant number of customers.³³³

364. Consequently, ICANN had all reasons to maintain the price caps in .ORG, .INFO and .BIZ following the first two rounds of expansion.

365. The situation did not change following the third round, the New gTLD Program. Following the introduction of new gTLDs, ICANN commissioned two economic reports to assess the impact of new gTLDs on competition. The first report describes the situation as of November 2014 and the second report describes the situation as of March 2016. Neither of those studies found evidence that the introduction of new gTLDs increased competition at the registry level.³³⁴

366. Finally, the final version of the 2009 report by Dennis Carlton that ICANN invoked as a *post factum* justification for removing the price caps – in reality, ICANN invoked a preliminary report by Dennis Carlton which was later superseded by two final reports – supports the conclusion that price caps must be maintained in legacy TLDs. In his final report, where he responds to the concerns raised by the economist Michael Kende, Dennis Carlton made clear that he saw no basis for eliminating price caps in existing gTLDs. He had understood from ICANN that there was no basis for the concern that the absence of price caps for new gTLDs could result in the elimination of price caps for .COM, .NET, .ORG, .INFO, .BIZ, and others:

‘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

³³³ Economic Expert Report II, paras. 97-98.

³³⁴ Economic Expert Report II, paras. 102-106.

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.’³³⁵

367. Not only did Dennis Carlton see no basis for the concern that the absence of price caps in new gTLDs could result in the elimination of price caps for the .ORG, .INFO and .BIZ legacy gTLDs; he confirmed that there are reasons to differentiate between new gTLDs and these legacy gTLDs, ‘*justified by substantial and reasonable cause*’.

368. Indeed, Dennis Carlton used the existence of price caps in these legacy gTLDs as an argument that price caps in new gTLDs would not be necessary:

‘The fact that the existing major TLDs are currently subject to price caps further constrains the ability of new gTLD registry operators to charge non-competitive prices. [... T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.’³³⁶

369. Hence, ICANN’s own experts advised against a removal of price caps in the .ORG, .INFO and .BIZ gTLDs.

(ii) **The DoJ and the DoC call for strict competition control in .ORG, .INFO and .BIZ**

370. On 18 December 2008, the DoC submitted a letter to ICANN reiterating the foundational and core principle for ICANN ‘*to manage the Internet domain name and addressing system (DNS) in a manner that permits market mechanisms to support competition and consumer choice so that lower costs are realized, innovation is promoted, and user choice and satisfaction are enhanced.*’³³⁷ The DoC stressed the need for ICANN to perform an economic study to address specific questions as to the structure of the domain name market and the effect of the market structure and pricing on new TLD entrance. Two years before, on

³³⁵ **RM 24**, para. 22.

³³⁶ **RM 23**, para. 73.

³³⁷ Letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**).

18 October 2006, the ICANN Board had directed ICANN's President to commission such economic study.³³⁸ However, there are no signs that such economic study was ever commissioned by ICANN, even after the DoC made explicit that *'ICANN needs to complete this economic study and the results should be considered by the community before new gTLDs are introduced.'*³³⁹ The 2009 Carlton study that ICANN commissioned is limited in scope and does not address any of the specific questions for which the ICANN Board ordered a study in 2006.

371. Attached to the DoC's letter of 18 December 2008, was a letter from the DoJ of 3 December 2008. The DoJ's letter also refers to the economic study that ICANN's President was instructed to commission. To the DoJ's knowledge, *'ICANN has neither studied competition among gTLDs at the registry level, nor commissioned such a study, despite the ICANN Board of Director's specific direction to do so.'*³⁴⁰

372. In its letter, the DoJ makes specific recommendations for ICANN's new gTLD Program, based on its findings of material market power in .COM, and the major legacy gTLDs (*i.e.*, .NET, .ORG, .INFO and .BIZ). The DoJ found evidence that these legacy gTLD registry operators *'may possess a degree of market power'* and that the market power inherent in these legacy gTLDs, although less than .COM, *'is still material'*. Without the constraints in the registry agreements (*i.e.*, price caps), the DoJ found that these registries *'could profitably charge even higher fees that reflect their market power as to registrants that are willing to pay*

³³⁸ **Regulatory Expert Report**, para. 100.

³³⁹ Letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**).

³⁴⁰ 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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**), p. 4.

a premium for their domains.’³⁴¹ The DoJ added that ‘the introduction of new gTLDs is not likely to constrain the exercise of market power by existing gTLDs’.³⁴²

373. The DoJ recognized that ICANN is ‘obligated to manage gTLDs in the interests of registrants and to protect the public interest in competition’, ‘to promote competition at the registry level, and that it must do so on the basis of evidence.’³⁴³ The DoJ considered that ‘ICANN should take steps to protect consumers from the exercise of market power by gTLD operators.’³⁴⁴ The DoJ concluded:

*‘ICANN’s approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition at the registry level. We respectfully suggest that the DOC refrain from expressing satisfaction with ICANN’s progress toward the goal of promoting competition among TLDs unless and until ICANN develops a credible and effective policy that compels it to employ tools such as competitive bidding to manage TLDs in a manner that safeguards the interests of registrants in obtaining high quality domains at the lowest possible prices. To date, we believe that ICANN has not come close to fulfilling its obligations to employ competitive principles in its management of TLD registry operations.’*³⁴⁵

³⁴¹ 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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**); **Regulatory Expert Report**, paras. 101-109.

³⁴² 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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**); **Regulatory Expert Report**, paras. 101-109.

³⁴³ 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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**), pp. 4 and 8.

³⁴⁴ 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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**), p. 6.

³⁴⁵ 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, attached to letter from Meredith A. Baker (NTIA) to Peter Dengate-Thrush (ICANN Board of Directors), 18 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf>, (**RM 21**), pp. 4 and 8.

374. Removing price caps is the exact opposite of taking steps to protect consumers from the exercise of market power by registry operators of major legacy gTLDs such as .ORG, .INFO and .BIZ.

375. Yet, without any evidence or support, ICANN decided to remove price caps contrary to the DoJ's and the DoC's explicit advice. As shown in more recent independent studies, the DoJ's and the DoC's advice remains valid to date.³⁴⁶

(iii) **The Internet community strongly opposes the removal of price caps**

376. ICANN received an overwhelming amount of public comments, strongly opposing the removal of price caps. Instead of addressing the genuine concerns from a cross-section of the Internet community, ICANN ignored those comments and proceeded with its planned removal of the price caps.

(iv) **The California Attorney General recognizes the concern that ICANN is no longer responsive to the needs of its stakeholders**

377. On 15 April 2020, the California Attorney General urged ICANN to reject the transfer of control over the .ORG registry to a for-profit corporation. In his letter, he expressed the concern that ICANN ignored an overwhelming amount of public comments, is no longer responsive to the needs of its stakeholders, and that the .ORG RA contains a presumption in favor of renewing the agreement following its expiration:

*'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.**^[347] 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*

³⁴⁶ See Chapter IX.C.7.a(v) below.

^[347] See e.g., <https://reviewsignal.com/blog/2019/06/24/the-case-for-regulatory-capture-at-icann/>.

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.³⁴⁸

(v) **Independent experts confirm the existence of market power in .ORG, .INFO and .BIZ, which calls for maintaining (or strengthening) the price caps in these legacy gTLDs**

378. In 2004, an OECD report assessed the competitive effects of the first round of gTLD expansion. The OECD considered that registries operating original gTLDs, such as .ORG, continued to hold significant market power and warned against alleviating the need for ongoing contractual oversight by ICANN.³⁴⁹ The first round of gTLD expansion resulted in seven additional gTLDs, of which .INFO and .BIZ acquired significant market power.

379. Following the third round of gTLD expansion (the New gTLD Program), an academic study concluded in 2015 that *‘the introduction of new TLDs had only minimal impact in the rate of registration of the old TLDs.*³⁵⁰ In other words, those legacy gTLDs with market power (including .ORG, .INFO and .BIZ) continue to have market power.

380. In 2021, the existence of market power in .ORG, .INFO and .BIZ was analyzed extensively by Prof. Dr. Verboven and Dr. Langus, who conclude that the registries operating .ORG, .INFO and .BIZ hold considerable market power. This market power allows them to *‘profitably increase the wholesale registration fees for the TLD above competitive benchmark*

³⁴⁸ **Annex 118**, Letter from California Attorney General Xavier Becerra to Maarten Botterman (ICANN Board Chair) and Göran Marby (ICANN President and CEO) of 15 April 2020

³⁴⁹ OECD Working Party on Telecommunication and Information Services Policies, *Generic Top Level Domain Names: Market Development and Allocation Issues*, STI/ICCP/TISP(2004)2/Final, 13 July 2004, <https://www.oecd.org/sti/ieconomy/32996948.pdf>, (RM 185) p. 4; **Economic Expert Report II**, para. 99.

³⁵⁰ Halvorson, T., Der, M.F., Foster, I., Savage, S., Saul, L.K. and Voelker, G.M. (2015). From .academy to .zone: An Analysis of the New TLD Land Rush; **Economic Expert Report II**, para. 106

levels.’ That is not beneficial for competition and for the Internet community as a whole as ‘[t]he fee increase, in turn, leads to higher retail registration fees and a reduction in registration volumes in the TLD to levels below socially optimal ones.’ Verboven & Langus explain that ‘[a] price cap on a TLD with market power can improve economic outcomes by bringing its wholesale fees to a lower level, closer to a competitive benchmark, where the registration volumes and the overall economic efficiency are higher.’

381. Without price caps, there is a great potential for abuse:

‘When unchecked by price caps, market power held by registries may also hamper the incentives for the registrars to enter the market at the downstream level of the DNS value chain, offer complementary products, and to innovate. This is because registries of TLDs with market power could appropriate a share of the additional value that the registrars create by raising wholesale prices in response to an increase in the value created by the registrars. As the fraction of the value created downstream that is appropriated by upstream firms increases due to market power increase, the incentives for such value creation decrease. Price caps on TLDs with market power may limit the extent of such appropriation and thereby also improve the economic outcomes by facilitating entry and innovation at the downstream level of the DNS value chain.’³⁵¹

382. Price caps in .ORG, .INFO and .BIZ have improved economic outcomes in the past, and it is expected that they would continue to do so in the future.³⁵²

383. Prof. Dr. Verboven and Dr. Langus conclude that there is a theoretical risk that price caps could worsen economic outcome, if imposed on TLDs that do not hold market power, or set at too low levels. However, in the case at hand, such risk is not present, as ‘the registries of .ORG, .INFO and .BIZ hold considerable persistent market power’ and price caps have been set at sufficiently high – if not too high – levels.³⁵³

384. ICANN cannot have expected that the removal of price caps would improve economic outcomes. At the same time, ICANN cannot have reliably excluded that the removal of price caps would worsen the economic outcomes in the DNS space.

³⁵¹ Economic Expert Report II., para. 214.

³⁵² Economic Expert Report II., para. 216.

³⁵³ Economic Expert Report II., para. 215.

b. Consequences of ICANN’s decision to remove the price caps in .ORG, .INFO and .BIZ

385. Faced with (i) the facts that no improvement could be expected of the price caps removal, and (ii) the risk that such removal would worsen economic outcomes, no reasonable person would decide to remove the price caps. The point is all the stronger for an entity with a unique role in coordinating and managing the Internet’s infrastructure with the express and affirmative mandate to promote competition, where feasible, and to act in the interests of the Internet community as a whole.

386. Previously, when ICANN attempted to remove price caps in .NET, ICANN rightfully changed its mind, responding to concerns expressed by the public in the interest of the Internet community as a whole. There is no evidence that the interests of the Internet community, the openness of the Internet and the DNS, and competition would be served by the removal of price caps. On the contrary, ICANN has been acting against their interests by removing price caps and creating a potential for the .ORG, .INFO and .BIZ registry operators to abuse their market power.

387. As a result, ICANN has violated Articles II, III of its Articles of Incorporation and Articles 1(2) and 3(1) of its Bylaws.

8. ICANN failed to implement policies, processes, decisions fairly

a. Summary of ICANN’s failures

388. Pursuant to ICANN’s Commitment No. v, ICANN must ‘*[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment*’ (Article 1(2)(a)(v) of ICANN’s Bylaws). Pursuant to Article 2(3) of its Bylaws, 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.*’ ICANN must ‘*operate to the maximum extent feasible in an open and transparent*

manner and consistent with procedures designed to ensure fairness’, engaging the multiple stakeholders and through a bottom-up policy development process (Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN’s Bylaws).

389. At several occasions, ICANN has put policies, processes and procedures in place to deal with ICANN’s affirmative mandate to promote competition where feasible and to preserve and enhance the openness of the Internet and the DNS. In this context, ICANN developed policies and processes on (i) vertical integration for legacy gTLDs, (ii) the renewal and pricing for .ORG, and (iii) the renewal and pricing of legacy gTLDs.

b. ICANN has failed to apply any of these policies and processes when lifting cross-ownership requirements and price caps for .ORG, .INFO and .BIZ. ICANN’s specific failures

(i) ICANN failed to apply fairly its policies and processes on vertical integration

390. On 21 April 2011, the ICANN Board directed the CEO to develop a process for existing gTLD registry operators to transition to the new base RA, or to request amendments to their RAs to remove the cross-ownership restrictions.³⁵⁴ This process would be available to existing operators upon Board approval of the new gTLD program, which happened later in June 2011.³⁵⁵

391. On 18 October 2012, following input by the ICANN community and discussions with the U.S. antitrust authorities, ICANN approved a final process for handling requests for the removal of cross-ownership restrictions for existing gTLDs.³⁵⁶

392. Despite this process being in place, the .ORG, .INFO and .BIZ registry operators went through this process prior to having their cross-ownership restrictions removed in their 2019

³⁵⁴ **Annex 116**, ICANN, *Minutes Special Meeting of the Board of Directors of 21 April 2011*, <https://www.icann.org/resources/board-material/minutes-2011-04-21-en#6.1>.

³⁵⁵ **Regulatory Expert Report**, para. 136.

³⁵⁶ **Regulatory Expert Report**, paras. 137-142.

RA.³⁵⁷

393. Consequently, ICANN failed to apply this process fairly.

(ii) **ICANN failed to apply fairly its standards, policies and processes on .ORG**

394. Between 4 June 2001 and 5 February 2002, the ICANN Community developed criteria for the selection of the successor .ORG registry operator. ICANN finalized the criteria on 20 May 2002.³⁵⁸

395. Among the criteria was *‘the type, quality, and cost of the registry services proposed.’* More specifically, it stated, *‘in view of the noncommercial character of many present and future .ORG registrants, affordability is important. A significant consideration will be the price at which the proposal commits to provide initial and renewal registrations and other registry services. The registry fee charged to accredited registrars should be as low as feasible, consistent with the maintenance of good-quality service.’*³⁵⁹

396. Nearly two decades later, ICANN reaffirmed that the commitments made in response to the selection criteria are still valid:

*‘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.’*³⁶⁰

³⁵⁷ **Regulatory Expert Report**, paras. 137-142.

³⁵⁸ **Regulatory Expert Report**, paras. 44-45; ICANN, *.org Reassignment Request for Proposal Materials*, 20 May 2002 (**RM 11**).

³⁵⁹ **Regulatory Expert Report**, para. 46; ICANN, *.org Reassignment Request for Proposal Materials*, 20 May 2002 (**RM 11**).

³⁶⁰ ICANN, *Correspondence from Maarten Botterman, Chair, ICANN Board of Directors to Gonzalo Camarillo, Chair, ISOC Board of Trustees*, 13 February 2020, <https://www.icann.org/en/system/files/correspondence/botterman-to-camarillo-13feb20-en.pdf> (**Annex 117**), p. 2.

397. PIR's CEO also reaffirmed that PIR Redacted - Confidential Information

³⁶¹ However, ICANN failed to include these commitments into the 2019 RA for .ORG. Consequently, ICANN no longer has the contractual means to enforce this commitment.

398. Until 2019, ICANN ensured that the criterion of the registry fee charged to accredited registrars being as low as feasible, consistent with the maintenance of good-quality service, could be fulfilled by imposing maximum prices in the .ORG RA.³⁶² With the adoption of the 2019 RA for .ORG, for no apparent reason and without any justification, ICANN abandoned the price caps mechanism that was in place to ensure that the .ORG registry fees remain '*as low as feasible, consistent with the maintenance of good-quality service.*' As a result, ICANN has given PIR the possibility to charge registry fees that are not as low as feasible, consistent with the maintenance of good-quality service.

399. Hence, ICANN's abandonment of price caps in .ORG is inconsistent with the standards and processes that ICANN put in place for the operation of .ORG. Consequently, ICANN failed to apply these standards, policies, and processes fairly.

(iii) **ICANN failed to apply fairly its policies and processes on the Feb06 Policy**

400. ICANN's Feb 06 policy development process resulted in the adoption of recommendations that there be a policy guiding RA renewals, and that individual negotiations for fees paid to ICANN be avoided. A majority supported the concept of a re-bid of registry contracts.³⁶³ While the approach for fees attached to a rebid would not apply retroactively to

³⁶¹ **Annex 113.**

³⁶² There can be a discussion as to whether the imposed price caps were sufficiently low to fulfil the criterion.

³⁶³ ICANN (Liz Williams), *Task Force Report No. 2006/01/03.2 – Policies for Contractual Conditions Existing Registries PDP Feb 06*, 10 April 2007, https://gns0.icann.org/sites/default/files/filefield_6411/gns0-pdp-feb06-tfr-10apr07.pdf (**RM 101**), p. 11, para. 3.8; ICANN, *GNSO Council Teleconference Minutes*, 9 August 2007, <https://gns0.icann.org/en/meetings/minutes-gns0-09aug07> (**RM 102**).

existing contracts, it *'would apply to existing contracts upon renewal.'*³⁶⁴

401. On 23 January 2008, the ICANN Board accepted the Feb06 recommendations and directed ICANN staff *'to implement the recommendations as outlined in the Council Report to the Board for PDP Feb-06.'*³⁶⁵

402. However, there are no signs of ICANN staff ever implementing the GNSO's recommendations as accepted by the ICANN Board, including with respect to the 2019 renewal of the .ORG, .INFO and .BIZ. A fair application of the Feb 06 policy would have required that ICANN implement the GNSO recommendations and develop an open and transparent process for the renewal of existing RAs, considering the possibility for competitive rebids. ICANN's staff, including ICANN's General Counsel, had ensured the ICANN community that these recommendations would *'be useful in negotiating future agreements and might impact the amendments to existing agreements'*. However, the opaque process for renewing the .ORG, .INFO and .BIZ RAs shows that ICANN failed to make a fair application of the Feb 06 recommendations.

c. Consequences of ICANN's failures

403. In view of the above, ICANN's failure to apply fairly its standards, processes and policies constitutes a violation of:

- Articles II and III of ICANN's Articles of Incorporation because ICANN's actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, and transparency), and are contrary to ICANN's openness and transparency obligations;
- Article 1(2)(a) of ICANN's Bylaws because ICANN's actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law

³⁶⁴ ICANN, *GNSO Council Teleconference Minutes*, 9 August 2007, <https://gns0.icann.org/en/meetings/minutes-gns0-09aug07> (**RM 102**).

³⁶⁵ ICANN, *Minutes for the Special Meeting of the ICANN Board of Directors*, 23 January 2008, <https://www.icann.org/resources/board-material/minutes-2008-01-23-en> (**RM 103**).

(good faith, rule of law, and transparency), and are contrary to ICANN’s openness and transparency obligations;

- Article 1(2)(a)(v) of ICANN’s Bylaws because ICANN’s actions and inactions are a failure to ‘[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment’
- Article 2(3) of ICANN’s Bylaws because ICANN’s actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably
- Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN’s Bylaws because ICANN’s actions and inactions are (i) a failure to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness, and (ii) engage the multiple stakeholders through a bottom-up policy development process.

9. **ICANN discriminated and acted inequitably by entering into the .ORG, .INFO and .BIZ registry agreements without price caps**

404. Pursuant to ICANN’s Commitment No. v, ICANN must ‘*[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment*’ (Article 1(2)(a)(v) of ICANN’s Bylaws). Pursuant to Article 2(3) of its Bylaws, 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.*’ These Bylaws provisions (among others) protect against arbitrary decision-making.

405. ICANN must guarantee non-discriminatory and equitable treatment in its administration of RAs. In this respect, Section 4.2 of the 2013 RAs for .ORG, .INFO and .BIZ specifically provided that (i) .COM, .ORG, .INFO, .NET, and .BIZ are deemed comparable gTLDs, and (ii) the terms of the RAs for these gTLDs must be similar.

406. Section 4.2 of the 2013 .ORG RA provided:

‘Upon renewal, in the event that the terms of this Agreement are not similar to the terms generally in effect in the Registry Agreements of the five most reasonably comparable gTLDs (provided however that if less than five gTLDs are reasonably comparable, then

*comparison shall be made with such lesser number, and .com, .info, .net and .biz are hereby deemed comparable), renewal shall be upon terms reasonably necessary to render the terms of this Agreement similar to such terms in the Registry Agreements for those other gTLDs (the “Renewal Terms and Conditions”).*³⁶⁶

407. The 2013 .INFO and .BIZ RAs contained the same clause, replacing the reference to the comparable .INFO *c.q.* .BIZ gTLD with the comparable .ORG gTLD.³⁶⁷ Clause 4.2 added that the terms regarding the price of registry services ‘*shall remain unchanged.*’³⁶⁸

408. It is unsurprising that ICANN deemed the .COM, .ORG, .INFO, .NET, and .BIZ comparable. Without exception, these constitute the successful legacy gTLDs with a high level of DUMs and significant market power.³⁶⁹

409. In contrast, .PRO and .NAME have been largely unsuccessful, as shown by their low level of DUMs. These gTLDs are thus not comparable.³⁷⁰

410. Yet, while the .NAME RA was up for renewal around the same time as the .ORG, .INFO and .BIZ RAs, ICANN maintained the price caps for .NAME. As recent as 3 August 2021, ICANN extended the current terms of the .NAME RA, maintaining the price caps. However, the rationale for price caps in .ORG, .INFO and .BIZ is much stronger than the rationale for price caps in .NAME. As ICANN decided to maintain price caps in .NAME, *a fortiori* ICANN should maintain price caps in .ORG, .INFO and .BIZ.

411. Before ICANN’s removal of the price caps in .ORG, .INFO and .BIZ, there has been only one price-capped gTLD for which ICANN decided to remove the price caps. In 2015, ICANN removed the price caps for the tiny .PRO gTLD.

412. In 2017, the .NET gTLD, which is comparable to .ORG, .INFO and .BIZ, was up for renewal. ICANN decided to maintain the price caps for .NET, while bringing the .NET RA

³⁶⁶ **RM 18**, emphasis added.

³⁶⁷ **RM 27-28**.

³⁶⁸ **RM 18, 27-28**.

³⁶⁹ See **Annex 119**.

³⁷⁰ See **Annex 119**.

also more in line with the Base RA for new gTLDs.

413. ICANN has provided no justification for its disparate treatment between (i) .ORG, .INFO and .BIZ, and (ii) the comparable gTLDs .NET, .COM, and the non-comparable gTLD .NAME. That also constitutes a violation of ICANN's transparency obligations, requiring a detailed rationale.

414. In its *post factum* justification for removing the price caps in .ORG, .INFO and .BIZ, ICANN relied upon the transition of .PRO (and non-price capped gTLDs) to the Base RA for new gTLDs.³⁷¹ However, ICANN remains silent about the more recent decision regarding .NET, where ICANN decided to maintain the price caps.

415. Consequently, there is no reasonable justification for ICANN to remove price caps in .ORG, .INFO and .BIZ, let alone a justification to treat these gTLDs differently than comparable gTLDs .NET and .COM. Moreover, the different treatment is inequitable towards the registrars and registrants in .ORG, .INFO and .BIZ, who now face the risk of opportunistic behavior and exploitation from gTLD operators with significant market power. Finally, ICANN's decision was purely arbitrary.

416. In view of the above, ICANN's discrimination and inequitable treatment in failing to account for the specific nature of the .ORG, .INFO and .BIZ gTLDs constitutes a violation of:

- Articles II and III of ICANN's Articles of Incorporation because ICANN's actions and inactions are not in the global public interest, go against the benefit of the Internet community as a whole, are contrary to relevant principles of international law (good faith, rule of law, transparency, and non-discrimination), and are contrary to ICANN's openness and transparency obligations;
- Article 1(2)(a) of ICANN's Bylaws because ICANN's actions and inactions are not in the global public interest, go against the benefit of the Internet

³⁷¹ **Annex 11**, pp. 17 and 19; Remarkably, ICANN also refers to the .BIZ gTLD, while .BIZ was part of the challenged actions in Namecheap's Reconsideration Request 19-2. That was well understood by the ICANN Board, as Ms. Becky Burr – who was affiliated with .BIZ at the time – recused herself from the Board's official discussion on Namecheap' Reconsideration Request 19-2, while she did participate in related Reconsideration Request that did not target .BIZ.

community as a whole, are contrary to relevant principles of international law (good faith, rule of law, transparency, and non-discrimination), and are contrary to ICANN's openness and transparency obligations;

- Article 1(2)(a)(v) of ICANN's Bylaws because ICANN's actions and inactions are a failure to '[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment'
- Article 2(3) of ICANN's Bylaws because ICANN's actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably and create disparate treatment that is not justified by substantial and reasonable cause.

10. **ICANN violated its transparency obligations in its processing of Namecheap's reconsideration requests**

417. Article 4(2)(m) of ICANN's Bylaws provides that '*[t]he 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.*'

418. In the case at hand, the task of the Board Accountability Mechanism Committee (BAMC) was taken over by the ICANN Board, as the BAMC could not reach the necessary quorum. However, that does not change the fact that the ICANN Board had to follow the same procedure and abide by the same requirements.

419. The record shows that the Board, replacing the BAMC, relied extensively on the views of ICANN staff on Namecheap's Reconsideration Request 19-2 and the related Reconsideration Request 19-3. ICANN's privilege log includes Redacted - Confidential Information

420. It is apparent from these records that ICANN staff Redacted - Confidential Information . Leading up to the Board's 'proposed determination on Reconsideration Request 19-2' of 3 November 2019, the privilege log shows the following records among others:

– Redacted - Confidential Information

72

– Redacted - Confidential Information

373

– Redacted - Confidential Information

374

– Redacted - Confidential Information

375

– Redacted - Confidential Information

376

– Redacted - Confidential Information

377

421. It is patently clear from these records that Redacted - Confidential Information

. Consequently, these views should have been made publicly available on ICANN’s website.

422. In addition, without access to these documents, it is impossible to determine whether the Board’s consideration of Namecheap’s Reconsideration Request was anything more than ICANN corporate counsel’s ‘*routine boilerplate drafting*’ for the Board’s meeting minutes and whether the Board’s discussion went beyond rubberstamping the memoranda that ICANN staff had prepared.

³⁷² Annex 84, REV00022518.

³⁷³ Annex 84, REV00005027.

³⁷⁴ Annex 84, REV00006176.

³⁷⁵ Annex 84, REV00013792.

³⁷⁶ Annex 84, REV00004491 and REV00004499.

³⁷⁷ Annex 84, REV00000242.

423. It is exactly this situation that made the IRP Panel in the *Dot Registry* case decide that ICANN violated its Bylaws. This Panel considered that by exercising of its litigation privileges, ICANN had put itself in a position to breach the obligatory requirement to make publicly available ICANN staff's comments made in the context of the Board's consideration of a Reconsideration Request.³⁷⁸

424. Hence, ICANN's actions and inactions in its consideration of Namecheap's Reconsideration Requests constitute a violation of Article 4(2)(m) of ICANN's Bylaws.

X. RELIEF REQUESTED

425. 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 further evidence, and (ii) to rebut ICANN's response in further briefs and during a hearing, Claimant respectfully requests that the Panel, in a binding Declaration:

- Declare that ICANN's decision to remove the price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination or arbitrariness;
 - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Articles 1(2)(a)(i), (iv) and (vi) of ICANN's Bylaws;
 - Articles 1(2)(b)(iii), (iv) and (vii) of ICANN's Bylaws,
 - Article 1(2)(c) of ICANN's Bylaws
 - Article 2(1) *juncto* Article 3(6)(a)-(c) of ICANN's Bylaws;

³⁷⁸ ICDR Case No. 01-14-0001-5004, *Dot Registry LLC v. ICANN*, Declaration of the Independent Review Panel, 29 July 2016 (**RM 175**).

- Article 3(1) of ICANN’s Bylaws;
 - Article 3(6)(c) of ICANN’s Bylaws;
 - Article 7(6) of ICANN’s Bylaws; and
 - Article 7(17) of ICANN’s Bylaws;
- Declare that ICANN’s stated objective and requirement that .ORG be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service is violated by ICANN’s decision to remove price caps in .ORG and must therefore be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article 1(2)(a) of ICANN’s Bylaws;
 - Article 1(2)(a)(v) of ICANN’s Bylaws;
 - Article 2(3) of ICANN’s Bylaws;
 - Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN’s Bylaws
- Declare that ICANN’s entering into registry agreements for .ORG, .INFO and .BIZ that do not contain price caps must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article 1(2)(a) of ICANN’s Bylaws
 - Article 1(2)(a)(v) of ICANN’s Bylaws


- Article 2(3) of ICANN's Bylaws because ICANN's actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably
 - Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN's Bylaws;
- Declare that ICANN's entering into the 2019 registry agreements for .ORG, .INFO and .BIZ without the cross-ownership restrictions that were in place for .ORG, .INFO and .BIZ at the date of the Board's adoption of the ICANN Board Resolution 2012.10.18.01 must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article 1(2)(a) of ICANN's Bylaws
 - Article 1(2)(a)(v) of ICANN's Bylaws
 - Article 2(3) of ICANN's Bylaws because ICANN's actions and inactions are a failure to apply its standards, policies, procedures, or practices equitably
 - Article 1(1)(a)(i) *juncto* Article 3(1) of ICANN's Bylaws.
- Declare that ICANN's rejection of Namecheap's Reconsideration Request No. 19-2 must be annulled as inconsistent with and violative of Article 4(2)(m) of ICANN's Bylaws;
- Declare that ICANN's actions and inactions to maintain the removal of price caps in .ORG, .INFO and .BIZ must be annulled as inconsistent with and violative of:
 - International law, particularly the fundamental obligations to act in good faith, transparently, and without discrimination;
 - Article II of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Article III of the Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, as approved by the ICANN Board on 9 August 2016, and filed with the California Secretary of State on 3 October 2016;
 - Articles 1(2)(a)(i), (iv) and (vi) of ICANN's Bylaws;
 - Articles 1(2)(b)(iii), (iv) and (vii) of ICANN's Bylaws,

- Article 1(2)(c) of ICANN's Bylaws
 - Article 2(1) *juncto* Article 3(6)(a)-(c) of ICANN's Bylaws;
 - Article 3(1) of ICANN's Bylaws;
 - Article 3(6)(c) of ICANN's Bylaws;
 - Article 7(6) of ICANN's Bylaws;
 - Article 7(17) of ICANN's Bylaws;
- Declare Namecheap the prevailing party in this IRP;
 - Award Namecheap its costs in this proceeding, including but not limited to its internal costs, legal advice and representation costs, costs of expert witnesses, and any other costs such as for document review and transportation, made or still to be made until the final resolution of this IRP; and
 - 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,

30 November 2021


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Counsel for Claimant


Jan Janssen
Counsel for Claimant