

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

**AFILIAS DOMAINS NO. 3 LIMITED'S
REPLY IN SUPPORT OF ITS ARTICLE 33 APPLICATION
FOR AN ADDITIONAL DECISION AND INTERPRETATION**

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I. INTRODUCTION

1. Afilias Domains No. 3 Limited (“**Afilias**”) hereby submits its Reply (“**Reply**”) in Support of its Article 33 Application for an Additional Decision and Interpretation of the Decision (“**Application**”), which is divided into 7 sections.

2. The Panel must first decide the scope of Article 33 of the ICDR Rules. As we discuss in **Section II** of this Reply, ICANN and the *Amici* urge the Panel to adopt an extremely narrow interpretation of the rule in Article 33 allowing a party to seek an additional decision on a claim that was left unresolved. Relying on general arbitral practice and academic commentary, their argument is based on a reading of the Article that is not supported by the Article’s plain text, or the context in which it is being invoked, or the purpose of the provision with reference to that context. The plain text of Article 33 does not include words such as “inadvertently omitted” or “unintentionally omitted” or “wholly omitted” when referring to an unresolved claim. Nor is ICANN’s and the *Amici*’s interpretation of the rule on unresolved claims supported by the requirements of the English Arbitration Act (“**EAA**”), the *lex loci arbitri* in this proceeding. And finally, ICANN’s and the *Amici*’s reading of the rule is flatly inconsistent with the Parties’ dispute resolution agreement, pursuant to which the Parties agreed that the substantive and procedural framework for this proceeding would be provided by ICANN’s Articles of Incorporation and Bylaws, the ICDR Rules, and the Supplemental Rules for IRP. The Bylaws, in particular, make it clear that a “claim” for the purposes of an IRP is a “Dispute” with respect to whether a “Covered Action” pled by a party claiming to be directly harmed by an action or omission of ICANN’s Board or Staff violates the provisions of the Articles, Bylaws or international law. The Bylaws also make it clear that the claims that an IRP panel is mandated to resolve in a well-reasoned decision, which includes findings of fact, are those set out in the claiming party’s request for IRP (or Amended Request for IRP as is the case in the present proceeding). There are three such claims that the

Panel did not resolve in its Decision, which we have referred to for present purposes as the “Rules Breach Claim,” the “International Law Claim,” and the “Disparate Treatment Claim.”

3. In **Section III**, we address ICANN’s and the *Amici*’s arguments on the Rules Breach Claim. In various parts of the Decision, the Panel acknowledged Afilias’ formulation of the Rules Breach Claim. It is a claim based on ICANN’s failure to enforce its New gTLD Program Rules when its Staff proceeded in June 2018 to delegate .WEB to NDC, having considered and rejected Afilias’ complaints.¹ Afilias’ claim was based on the substance of ICANN’s non-compliance with the New gTLD Program Rules, thus giving rise to breaches of the Articles and Bylaws, and not on process. Afilias’ claim was not that ICANN failed to issue a formal reasoned decision or otherwise make some sort of “pronouncement” regarding why it was proceeding with delegation. Specifically, we based the Rules Breach Claim on the following Covered Actions: ICANN’s failure to disqualify NDC’s application; its failure to reject NDC’s auction bids; its failure to deem NDC ineligible to enter into a registry agreement; and its failure to offer a .WEB registry agreement to Afilias—all of which were required by the New gTLD Program Rules, based on a plain reading of the rules, and their application in good faith. We asked for two types of relief associated with the Rules Breach Claim: declaratory relief and injunctive relief. In respect of the former, we asked the Panel to declare that the Covered Actions we had pled breached ICANN’s Articles and Bylaws, including international law. In respect of the latter, we asked the Panel to order ICANN to enforce the New gTLD Program Rules. Although the Panel recognized Afilias’ formulation of the Rules Breach Claim, it failed to decide it. Instead, it found a breach by ICANN of a Covered Action (*i.e.*, a failure “to pronounce”) that we had not even pled. And while the Panel

¹ The Panel will, of course, recall that, by this time, ICANN had the Domain Acquisition Agreement in its possession, had considered it, and was aware of NDC’s and Verisign’s intentional lack of candor with ICANN.

rejected the injunctive relief we had requested, it made no decision on the declaratory relief requested—even though ICANN accepted that such relief falls within the Panel’s jurisdiction.

4. ICANN and the *Amici*’s explanation for the Panel’s approach is contradictory and confusing. Their explanation is that the Panel lacked jurisdiction to decide the Rules Breach Claim, even though at least in ICANN’s case, in the course of the IRP it had specifically accepted that the Panel did have the necessary jurisdiction to issue the declaratory relief we requested. Accordingly, in Section III, we address ICANN’s newly-minted argument on the Panel’s jurisdiction and demonstrate that there is no substance or support for ICANN’s argument. We also discuss that if in fact it was the Panel’s opinion that it lacked jurisdiction over either the Dispute or the declaratory relief we requested, then it was incumbent upon the Panel to make a specific finding in this regard based on findings of fact and proper reasoning. But, if the Panel did not make a negative jurisdictional finding, then it is required, pursuant to its express mandate under the Bylaws, to decide the Rules Breach Claim and to resolve the Parties’ Dispute.

5. In **Section IV**, we address ICANN and the *Amici*’s arguments that Afilias did not present a distinct International Law Claim at all. With the aid of an annex (**Annex A**²), we demonstrate that ICANN and the *Amici* are simply incorrect. We address not only how the International Law Claim was presented and on what textual bases in the Articles and Bylaws, we also address why the Panel has jurisdiction over such a claim; and, as such, is required to decide the claim or explain in a well-reasoned manner why it did not.

6. In **Section V**, we address the Panel’s treatment of our Disparate Treatment Claim. ICANN and the *Amici* have little to say about this claim. The key point here is that while the Panel made findings of fact supporting a declaration that Afilias was treated disparately by ICANN, the

² Excerpts from the Record Establishing Afilias’ International Law Claim attached hereto as **Annex A**.

Panel did not include such a declaration in the Decision’s *dispositif*. This, we submit, the Panel must now do and also supplement its Decision with other findings of fact demonstrating the full extent to which ICANN treated Afiliás disparately and unfairly.

7. In **Section VI**, we address a central concern that will undoubtedly be on the Panel’s mind as it decides Afiliás’ Application: whether an additional decision would constitute a reconsideration or give rise to a reversal of the findings in the Decision. We show, with the assistance of a proposed additional *dispositif* (**Annex B**³), that it would not.

8. In **Section VII**, we address ICANN and the *Amici*’s arguments that the Panel does not need to entertain our requests for interpretation. We show why the specific points on which we focused in our requests for interpretation will facilitate a proper and fair implementation of the Decision as it stands, and also why the requested interpretations are needed for broader ICANN accountability purposes.

9. Finally, in **Section VIII**, we address ICANN’s request for costs based on the standards set out in the Decision.

II. THE FRAMEWORK FOR INTERPRETING ARTICLE 33

10. Afiliás on the one hand, and ICANN and the *Amici* on the other, disagree on the applicable standard for and scope of an Additional Award (“**Additional Decision**”) under Article 33.⁴ Plainly, therefore, the first question that the Panel needs to answer in resolving Afiliás’ application is the standard by which an IRP panel should make an additional decision or award.

³ Proposed Additional *Dispositif* is attached hereto as **Annex B**.

⁴ The Parties appear to agree that a “Final Decision” under the Articles, Bylaws, and Interim Supplemental Rules is the same as an “award” under the New York Convention and the English Arbitration Act. ICANN’s Response to Afiliás’ Article 33 Application (6 Aug. 2021) (“**ICANN’s Response to Application**”), n.74 (citing Arbitration Act 1996 (Eng.), **Ex. CA-124**, c. 23, § 33(1) and New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), [**Ex. RLA-94**], Art. V); *see id.*, n.44, n.75.

In this section we address ICANN and the *Amici*'s arguments regarding how the Panel should interpret Article 33 of the ICDR Rules.

11. As Afiliás explained in its Application, Article 33 enables a party to ask the tribunal (here, the IRP Panel), *inter alia*, to “make an additional award as to claims ... presented but omitted from the award.”⁵ If the tribunal, after hearing from the parties, concludes that it has not resolved a claim as covered by the dispute resolution agreement from which the tribunal derives its authority, it must (“shall comply”) issue an additional award that resolves the claim.⁶ Article 33 grants the tribunal a limited time-period within which to issue the additional award—and thus to fulfil its obligation to the parties to resolve their dispute pursuant to their dispute resolution agreement and to diminish the likelihood of set-aside.⁷

12. Determining the scope and effect of a rule like Article 33 cannot be undertaken in a vacuum, but instead must be guided by the specific language of the rule at issue, the *lex arbitri*, and, of course, the dispute resolution agreement defining the tribunal’s mandate. Based on the text and purpose of Article 33, the applicable provisions of the EAA, and the Parties’ dispute resolution

⁵ International Centre for Dispute Resolution, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (1 June 2014) (“**ICDR Rules**”), Art. 33(1); *see* Afiliás’ Rule 33 Application for an Additional Decision and for Interpretation (21 June 2021) (“**Application**”), Sec. II(A).

⁶ Under Article 33(2), “[i]f the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such request within 30 days after receipt of the parties’ last submissions respecting the requested information, correction, or additional award,” except where the parties have agreed otherwise. ICDR Rules, Art. 33(2). Here, the Parties and *Amici* have agreed to waive the 30-day requirement to under Rule 33(2) with respect to the Panel’s determination of Afiliás’ Application. *See* Email from S. Smith (Counsel for ICANN) to Panel (3 July 2021); Email from A. Ali (Counsel for Afiliás) to Panel (5 July 2021); Email from S. Marenberg (Counsel for NDC) to Panel (5 July 2021).

⁷ As Professor Born explains, if a tribunal were unable “to make an additional award addressing a claim that was presented during the arbitral proceedings, then its award will be subject to challenge in an action to annul ... (on grounds of *infra petita*.)” Gary Born, *International Commercial Arbitration* (3rd ed., 2021), **Ex. CA-149**, p. 3409. *See also* Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (2017), **Ex. CA-154**, pp. 354-355 (Article 39 of the UNCITRAL Arbitration Rules “reflects the drafters’ concerns that, in many jurisdictions, an award which does not address all the claims raised in the arbitration may not be recognized or enforced, or possibly even set aside (as opposed to being remitted to the tribunal for reconsideration).”) (citations omitted).

agreement, Afilias explained in its Application that “any omission to decide a properly submitted claim—whether deliberate, inadvertent, or otherwise—is grounds for an additional award.”⁸

13. In their Responses to the Application, ICANN and the *Amici* offer a contrary, baseless, and impossibly narrow interpretation of Article 33 that is unsupported by the text of Article 33 (**Section A**) and inconsistent with the EAA (**Section B**) and the Parties’ dispute resolution agreement incorporating the Bylaws (**Section C**).

A. ICANN’s Interpretation of Article 33 is not Supported by the Provision’s Text

14. According to ICANN, under Article 33, “an additional award may be issued *only* for a claim that was properly raised by a party and *wholly omitted* from the final award *unintentionally*.”⁹ The *Amici* argue for the same standard, but tack on an additional extra-textual requirement that the omission be “*obviously*” unintentional.¹⁰

15. The limitations proposed by ICANN and the *Amici* have no support in Article 33, the EAA, or the Bylaws—or in any relevant authorities construing or applying them. Moreover, they are wholly inconsistent with the salutary purpose of additional-award provisions, *i.e.*, to prevent “the neutralisation of a lengthy, costly arbitration,” where, as here, a tribunal has failed to resolve the dispute as required by the parties’ arbitration agreement and is therefore subject to set-aside at the arbitral seat. The words “wholly omitted,” “unintentionally,” and “obvious” do not appear in Article 33. Article 33(1) allows a panel or tribunal to “make an additional award as to claims ... presented *but omitted from the award*.”¹¹ There is no requirement that the claim be “unintentionally” or “wholly” omitted (let alone “obviously” so). Article 33(2) provides that “[i]f

⁸ Application, ¶ 8.

⁹ ICANN’s Response to Application, ¶ 15 (emphasis added).

¹⁰ *Amici*’s Submission on Afilias’ Article 33 Application (6 Aug. 2021) (“*Amici*’s Response to Application”), ¶ 45 (emphasis added).

¹¹ ICDR Rules, Art. 33(1) (emphasis added).

the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such request” and make an “additional award.” Article 33(2) provides further that any “additional award made by the tribunal ... shall form part of the award.”¹² In short, Article 33 provides nothing more or less. The Panel should not allow itself to be distracted by ICANN and the *Amici’s* extra-textual suggestions and should construe Article 33 in accordance with its plain text, taking into consideration the purposes of the IRP as the sole ICANN accountability mechanism that may be invoked by aggrieved applicants.

B. ICANN’s Interpretation of Article 33 is not Supported by the EAA

16. ICANN and the *Amici’s* interpretation of Article 33 is also not supported by the EAA; that is, the *lex loci arbitri*. Section 57(3) of the EAA (which, in ICANN’s words, “accords” with Article 33 of the ICDR Rules¹³) provides that that a tribunal may either:

- (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, *or*
- (b) make an additional award in respect of *any claim* (including a claim for interest or costs) *which was presented to the tribunal but was not dealt with in the award.*¹⁴

The EAA therefore specifically provides for the tribunal to correct an award to address any omission *or* to make an additional award for “any claim ... not dealt with in the award.”¹⁵ Here,

¹² ICDR Rules, Art. 33(2). The assertion in ICANN’s Response that Afilias has improperly requested an “Amended Final Decision” rather than an “additional decision” is frivolous. ICANN’s Response to Application, ¶ 1. Article 33(2) specifically provides that any “additional award ... shall form part of the award.” For the avoidance of doubt, and putting nomenclature aside, Afilias is requesting, *inter alia*, an “additional award” under Article 33. Whether the Panel styles it as an “additional” or “amended” decision is immaterial to Afilias.

¹³ ICANN’s Response to Application, ¶ 8.

¹⁴ Arbitration Act 1996 (Eng.), Ex. CA-124, c. 23, § 57(3) (emphasis added).

¹⁵ Arbitration Act 1996 (Eng.), Ex. CA-124, c. 23, § 57(3)(b).

too, there is nothing in the EAA to suggest that the failure to deal with a claim must be unintentional or inadvertent (or “obviously” or “wholly” so).

17. Indeed, under the EAA, an award can be set aside, *inter alia*, when the tribunal has failed “to deal with all the issues that were put to it.”¹⁶ Under the EAA, as construed by the English courts:

- “[a]n award *must be final as to all issues decided*”;
- “an award *must be complete as to all issues before the tribunal*”;
- “an award *which leaves any such issues undecided, cannot be maintained*”; and
- “[a]n arbitrator has *no power to reserve a decision on issues before him to others to resolve*.”¹⁷

An award that runs afoul of these requirements—intentionally or not—is subject to annulment.¹⁸

18. Therefore, like the text of Article 33, the EAA does not support the interpretation offered by ICANN and the *Amici*. Moreover, that interpretation would frustrate the purpose of an additional award provision, which, again, is to enable a tribunal to satisfy fully the mandate and function it agreed to perform and thus minimize the possibility of set-aside.

¹⁶ Arbitration Act 1996 (Eng.), **Ex. CA-124**, c. 23, § 68(2)(d).

¹⁷ *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), **Ex. CA-155**, ¶ [23] (emphasis added).

¹⁸ *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), **Ex. CA-155**, ¶¶ [27], [31]. ICANN argues in its Response that *Ronly* is “inapposite” based on factual differences between that case and this one. See ICANN’s Response to Application, ¶ 26. But *Ronly* is relevant not because of its facts, but because (1) it states applicable standards for set-aside under the EAA, including the failure to decide all issues and (2) the arbitrator’s failure to fulfill his mandate was not “unintentional” or “inadvertent.” He misconstrued and therefore failed to satisfy his mandate. Accordingly, his award was set aside. *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), **Ex. CA-155**, ¶ [26].

C. ICANN’s Interpretation of Article 33 is Inconsistent with the Parties’ Dispute Resolution Agreement

19. Article 33 must also be construed and applied with reference to the Parties’ dispute resolution agreement. ICANN and the *Amici’s* interpretation of Article 33 is inconsistent with that agreement. As the Panel is well aware, in order to participate in the New gTLD Program, applicants like Afiliac were required to accept ICANN’s Terms and Conditions set out in the AGB.¹⁹ Those Terms and Conditions included ICANN’s mandated “litigation waiver” and provided applicants with the possibility of using one of ICANN’s accountability mechanisms (including the IRP) to resolve disputes relating to the application:

APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT’S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; **PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING**

¹⁹ See AGB, [Ex. C-3], p. G-2 (“By submitting this application through ICANN’s online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. *Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.*”) (emphasis added).

ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.²⁰

20. Pursuant to the Parties' dispute resolution agreement, ICANN agreed that Afilias had the right to use the IRP "FOR THE PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION."²¹ ICANN has, of course, never alleged that Afilias did not have the right to challenge its decision regarding its Staff's decision to delegate .WEB to NDC in an IRP. Stated differently, ICANN's decision to delegate .WEB to NDC was a "final decision," which would have taken effect and been irreversible (as the Panel recognized) had Afilias not commenced CEP.²² Subsequently, in accordance with the Parties' dispute resolution agreement, Afilias properly invoked the IRP to challenge ICANN's delegation decision—*not as a matter of process but in substance*.²³ By doing so, it invoked the

²⁰ AGB, [Ex. C-3], p. G-2 (capitalization in original; emphasis added). ICANN has convinced the federal courts in California to uphold the litigation waiver, by representing that applicants can effectively pursue the same rights and remedies through ICANN's "robust" (ICANN's descriptor) accountability mechanisms. See *Ruby Glen v. ICANN et al.*, Case No. 16-56890, Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], p. 6 ("Applicants were afforded a robust form of review in which those challenges could be addressed through ICANN's accountability mechanisms, which many applicants – including Ruby Glen and Donuts – have frequently and successfully invoked."). The Panel's Decision in this case, if it stands, would make that representation materially false. Indeed, the arguments that ICANN has asserted to this Panel cannot be reconciled with the representations it has made to the federal courts in California, on which those courts relied in enforcing the litigation waiver.

²¹ AGB, [Ex. C-3], p. G-2 (capitalization in original).

²² Decision, ¶ 337 ("Mr. Disspain was asked by the Panel what would the Board have done had the Claimant, contrary to his and his colleagues' expectation, not initiated an IRP. Might that not have resulted in a registry agreement for .WEB being signed by the Staff on behalf of the Respondent without the Board having the opportunity to address the questions it had chosen to defer in November 2016? Mr. Disspain, understandably, did not want to speculate as to what the Board would have done. However, when shown internal correspondence evidencing that signature of the registry agreement for .WEB on behalf of ICANN had in fact been approved by ICANN's Staff after receipt of the executed copy of the agreement by NDC, he did confirm that Board approval is not required for the execution of a registry agreement by ICANN. Thus, clearly, a registry agreement with NDC for .WEB could have been executed by ICANN's Staff and come into force without the Board having pronounced on the propriety of the DAA under the Guidebook and Auction Rules.") (citations omitted).

²³ In fact, the Panel will recall ICANN's contention that its Board apparently chose to defer consideration of .WEB given that it expected Afilias to initiate an IRP. See Merits Hearing, Tr. Day 5 (7 Aug. 2020), 978:16 – 979:16 (Disspain Cross-Examination) ("Prior to the lifting of the hold on the contention set, the matter was discussed in the Board Accountability Mechanisms Committee, I believe as part of its general litigation update, but I am not certain. In that discussion we were told that the next step in the process was for -- should all of the accountability mechanisms be dealt with, was for it to come off hold, but that Afilias had made it abundantly clear that in the event that it did come off hold, that they would file an IRP."). See also ICANN's Post-Hearing Brief (12 Oct.

dispute resolution standards and procedures set out in the Bylaws (and thereby the ICDR Rules and Supplemental Rules for IRPs), with the result for present purposes that Article 33 must be interpreted and given effect based on the IRP dispute resolution system or framework—and not in the abstract with reference to general arbitral practice and scholarly commentary, on which ICANN and the *Amici* base their interpretation of Article 33. The most important part of that framework for present purposes is an IRP panel’s mandate. Although we have explained this mandate in detail in our Application,²⁴ we briefly summarize it again here as the most direct way of responding to ICANN and the *Amici*’s arguments regarding how Article 33 should be interpreted and their assertions as to what constitutes a “claim” for the purposes of an IRP and Article 33.

21. The Bylaws state an IRP panel’s mandate simply, clearly, and emphatically: an IRP panel is “**charged** with hearing **and resolving the Dispute**, considering the Claim and ICANN’s response (‘Response’) in compliance with the Articles of Incorporation and Bylaws”²⁵

22. “Disputes” are defined, in relevant part, as “Claims that Covered Actions constituted an action **or inaction** that violated the Articles ... or Bylaws.”²⁶ The Bylaws require that each “Dispute” (which may include multiple claims that different actions or inactions by ICANN’s Board or Staff violated different provisions of the Articles or Bylaws) “**shall be decided** in compliance with the Articles ... and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.”²⁷ Thus, an IRP panel cannot simply decline to

2020) (“ICANN’s PHB”), ¶ 194 (“ICANN took these steps knowing full well that Afilias was likely to make good on its written threats to ‘initiate a CEP and a subsequent IRP against ICANN.’”).

²⁴ See Application, Sec. II(A)(2).

²⁵ Bylaws, [Ex. C-1], Sec. 4.3(g) (emphasis added).

²⁶ Bylaws, [Ex. C-1], Sec. 4.3(b)(iii)(A) (emphasis added).

²⁷ Bylaws, [Ex. C-1], Sec. 4.3(i)(ii) (emphasis added).

decide a Dispute absent a clear legal basis to do so. Although an IRP panel may, in limited circumstances, “resolve” a Dispute by declining to decide it based on applicable norms (if, for example, it concludes that it lacks jurisdiction over the Dispute), the panel must still provide a “well-reasoned application of how the Dispute was resolved in compliance with the Articles and Bylaws,” establishing that it was required not to decide based on the norms of applicable law and prior relevant IRP decisions. An IRP panel may not decline to resolve a Dispute based on its own subjective “views” or notions of “appropriate” “deference” to one of the Parties, untethered to any provisions in the applicable legal instruments, the norms of applicable law, or prior relevant IRP decisions.²⁸

23. The defined term “Disputes” is given content with reference to what the ICANN-drafted Bylaws describe as “**Covered Actions.**” These are “any actions or *failures to act* by or within ICANN committed *by the Board ... or Staff members*, that give rise to a Dispute.”²⁹ For each Covered Action alleged to violate the Articles or Bylaws, the panel “*shall* make findings of fact *to determine whether the Covered Action constituted an action or inaction that violated the Articles ... or Bylaws.*”³⁰

24. A “**Claim**” (with a capital “C”) is simply the claimant’s “written statement of a Dispute.” In other words, it is the IRP request that sets forth one or more Disputes presented to the Panel to “resolve.”³¹ The term’s relevance is simply that the claims that must be decided by the Panel are those that are stated in the claimant’s “written statement of a Dispute.”

²⁸ The Panel does not have jurisdiction to decide this case as an *amiable compositeur* or *ex aequo et bono* unless the Parties have expressly authorized it to do so. ICDR Rules, Art. 31(3). The Parties have not done so in this case.

²⁹ Bylaws, [Ex. C-1], Sec. 4.3(b)(iii) (emphasis added).

³⁰ Bylaws, [Ex. C-1], Sec. 4.3(i)(i) (emphasis added).

³¹ Bylaws, [Ex. C-1], Sec. 4.3(d). The *Amici* try to make mischief with this definition by arguing, *inter alia*, that the Bylaws’ reference to a “Claim” in the singular means that a claimant may only assert a single “claim” asking the Panel to decide whether there has been a violation of the Articles and Bylaws. *See Amici’s* Response to

25. Based on the above, a “claim” (with a small “c”) is an allegation that a “Covered Action” (a specific action or inaction by the ICANN Board or Staff) violated one or more provisions of the Articles or Bylaws.³² These claims are included in a “Written statement of Dispute.” The claims so presented, “shall be decided” in accordance with the Articles and Bylaws. And for each Covered Action (i.e., “any actions or failures to act by or within ICANN committed by the Board ... or Staff members, that give rise to a Dispute”³³) upon which a claim is based, the Panel “shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles ... or Bylaws.”³⁴

26. Under ICANN’s interpretation of the Bylaws, the only “remedy” that a claimant can seek for when an action or inaction by the Board of Staff violates the Articles or Bylaws is a *declaration* to that effect; that is, declaratory relief, as opposed to injunctive relief, which ICANN argues (and the Panel accepted) is not available. To state the proposition in ICANN’s own words: “The Panel may declare whether a Covered Action constituted an action or inaction that violated ICANN’s Articles and Bylaws, and ICANN will be bound by that declaration. The Panel does not have authority to order or ‘declare’ that ICANN must engage in particular future actions or inactions.”³⁵ Thus, an IRP panel grants a claim through declaring whether the alleged action or

Application, ¶ 27. But *Amici* make this argument by referring to the definition of “Claim,” which, again, simply means the “written statement of a Dispute.” *See id.* In part for these reasons, Afilias will use the term “claim” and “claims” with a lower case “c” to refer to Afilias’ allegations that ICANN violated its Articles and Bylaws through its actions or inactions, as it did in its Application. *See* Application, ¶ 11, n.22. The exception is when Afilias uses a defined term from its Application to refer to a specific claim (e.g., the “Rules Breach Claim”).

³² As we discuss in **Section III** below, the Covered Actions we alleged included ICANN’s failure to disqualify NDC’s application for .WEB; its failure to reject (or stated differently, its acceptance of) NDC’s auction bids; its refusal to deem NDC ineligible to enter into a registry agreement; and its failure to offer .WEB to Afilias as the next highest bidder—all of which were required by the New gTLD Program Rules. We also presented various Covered Actions supporting our claim that ICANN treated Afilias disparately.

³³ Bylaws, [Ex. C-1], Sec. 4.3(b)(iii).

³⁴ Bylaws, [Ex. C-1], Sec. 4.3(i)(i).

³⁵ *See, e.g.*, ICANN’s Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (1 June 2020) (“**ICANN’s Rejoinder Memorial**”), ¶ 120.

inaction violates the Articles and Bylaws. Therefore, it is critically important for the Panel to identify the action or inaction, and to explain in a well-reasoned decision how the action or inaction violated a specific provision (or provisions) of the Articles and Bylaws, or conversely, why the action or inaction did not violate the Articles and Bylaws.

27. Rather than accept the plain language and simple structure of the Bylaws' definitions, ICANN inserts concepts that do nothing to assist the analysis. In its Response ICANN asserts that "[a] 'claim' refers to 'a head of claim for damages or some other remedy (including specifically claims for interests or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims.'"³⁶ We do not disagree with this general but irrelevant in the present context statement. If anything, this statement supports Afiliás' position. We asserted specific Covered Actions that gave rise to distinct "heads of claim" because those Covered Actions breached different parts of the Articles and Bylaws, including international law. And, as we discuss later in this submission, associated with these different heads of claim, we asked for various forms of remedies or relief. The Panel, as we will explain, did not decide all of our claims based on the Covered Actions we pled, but instead found a breach by ICANN of the Bylaws based on a Covered Action that we did not argue in support of our claims, *viz.*, that ICANN violated its Articles and Bylaws by not "pronouncing upon" whether NDC materially violated the New gTLD Rules, and, if so, what the required consequences are.

28. The outcome of the foregoing discussion for the purposes of the Panel's assessment of how to construe Article 33 in the context of an IRP is as follows: the Panel was obligated to decide any claims for breaches of the Articles and Bylaws, including international law, presented

³⁶ ICANN Response, ¶ 50 (quoting *Torch Offshore LLC v. Cable Shipping Inc.* [2004] EWHC (Comm) 787, [Ex. RLA-99], ¶ [27]).

by Afiliis in its Request for IRP or Amended Request for IRP, based on the Covered Actions alleged. The Panel was required to provide findings of fact in connection with each Covered Action pled to determine whether the Covered Action constituted an action or inaction that violated the Articles or Bylaws. Any claim set out in the Amended Request that the Panel did not decide or explain why it was not decided falls within the purview of Article 33.

29. With that mandate in mind—and with the critically important purposes that this IRP (again, the first under ICANN’s new enhanced rules of accountability) is meant to achieve—the next question is whether the Panel omitted to resolve any of the Disputes before it in the manner required by the arbitration agreement. We say there are three such claims: the Rules Breach Claim, the International Law Claim and the Disparate Treatment Claim, each of which is discussed in the sections that follow.

30. ICANN, supported by the *Amici*, argues that these claims were either never presented, were jurisdictionally barred from decision, or if not so barred, were decided; and, in any event, to the extent that a claim may not have been specifically treated by the Panel, it was disposed of by the Panel’s “catch-all” statement in its *dispositif* dismissing “the Claimants’ other requests for relief in connection with its core claims” or “all other claims.” Within the context of the IRP dispute resolution framework, however, this language does not save ICANN. The Panel was obligated to render a reasoned merits decision on those claims, both as a matter of general principles of international arbitration and as a matter of specific obligations pursuant to the ICANN Bylaws. If the presence of this catch-all clause precludes an additional award pursuant to Article 33, then such additional awards would effectively never be available—it is essentially universal and automatic practice to include a catch-all clause in the *dispositif*. A general dismissal of

“requests for relief” or “claims” in the *Dispositif* neither fulfils the Panel’s mandate nor blocks an Article 33 Application.³⁷

31. We now turn in the following sections to the three claims that the Panel omitted to decide. In this regard, to be clear—and contrary to ICANN’s and the *Amici*’s assertions—Afilias is not asking the Panel to “reverse” or “reconsider” any Dispute that was resolved by the Panel consistent with its mandate. Rather, Afilias is asking the Panel to decide the Disputes that were presented to it, but which the Panel omitted to decide. In the alternative, if there is some actual *legal* basis for the Panel’s declining to resolve a particular Dispute (*e.g.*, because the Panel concluded it did not have jurisdiction to resolve it—as now asserted by ICANN and the *Amici* in their response briefs³⁸), then the Panel is required to state that legal basis in a well-reasoned decision that complies with the Articles and Bylaws, as understood in light of prior IRP decisions and norms of applicable law. As set forth in Afilias’ Application³⁹—and as further explained below in response to the arguments made by ICANN and the *Amici*⁴⁰—the Panel has failed to do

³⁷ That is so not only because of the Panel’s mandate under the Bylaws. A tribunal may not fail to deal with a party’s claim and then proof its award from challenge by including a dismissal of “all other” claims in its *dispositif*. Under English law, the dispositive part of an award must be read “in the context of the written reasons” *Cadogan Maritime Shipping Inc v. Turner Shipping Inc.* [2013] EWHC 138 (Comm), **Ex. CA-165**, ¶ [43]. *See also Union Marine Classification Services LLC v. Gov’t of the Union Comoros* [2015] EWHC 508 (Comm), **Ex. CA-166**, ¶ [16]. Thus, as Afilias explained in its Application (and explains further below), the *dispositif* in the Decision did not resolve Afilias’ Rules Breach Claim, International Law Claim, or Disparate Treatment Claim as required by the Panel’s mandate. Similarly, the assertion by the *Amici*—that “an arbitral tribunal may ‘deliberately elect[] not to address a particular claim or issue in [the] decision because it regards it as unnecessary to do so given [its] decisions on other issues ...’” *Amici*’s Response to Application, ¶ 36 (citing Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (2017), **Ex. CA-154**, p. 355)—is misplaced here, especially if this Panel decides not to issue an additional Decision on Afilias’ Rules Breach Claim. In that event, it will be especially important for the Panel to address Afilias’ International Law Claim and Disparate Treatment Claim, so that there are declarations on these claims to ensure that ICANN’s Board avoids such conduct when it “pronounces upon” Afilias’ complaints “in the first instance.”

³⁸ ICANN’s Response to Application, ¶¶ 26 and 72; *Amici*’s Response to Application, ¶ 11.

³⁹ Application, Sec. II(B).

⁴⁰ *See Section VII.B* below.

so with respect to Afiliás' Rules Breach Claim, as well as its International Law Claim, and its Disparate Treatment Claim.

III. THE RULES BREACH CLAIM

A. The Rules Breach Claim and Relief Requested

32. The Panel repeatedly recognized that in support of its “core claims” Afiliás alleged that ICANN violated its Articles and Bylaws by failing to “enforce” the New gTLD Program Rules.⁴¹ Specifically, Afiliás alleged that ICANN had failed to conclude that NDC materially breached the Rules; to disqualify NDC’s application and bids on that basis; to deem NDC ineligible to enter into a registry agreement for .WEB; and to offer .WEB to Afiliás as the second highest bidder.⁴² These were the “Covered Actions” Afiliás specifically alleged and upon which it based its Rules Breach Claim. Afiliás claimed that under the Articles, Bylaws, and Rules, ICANN was required to take each of those actions to satisfy, *inter alia*, its obligation “to make decisions by applying its documented policies ‘neutrally, objectively, and fairly.’”⁴³ Therefore, the “Dispute” at issue in the Rules Breach Claim is whether ICANN’s failure to enforce the Rules in those respects (*i.e.*, ICANN’s inaction) violated its Articles and Bylaws. As the Panel stated in its Decision, Afiliás described the Rules Breach Claim as its “principal claim.”⁴⁴ It is a claim that

⁴¹ Decision, ¶¶ 127, 215, 363.

⁴² *See, e.g.*, Decision, ¶ 127 (“[T]he Claimant claims that the Respondent has breached its Articles and Bylaws as a result of the Board’s and Staff’s **failure to enforce** the rules for, and underlying policies of, ICANN’s New gTLD Program, including the rules, procedures, and policies set out in the Guidebook and Auction Rules.”) (emphasis added) (citing Amended Request for IRP, ¶ 2); *id.*, ¶ 254 (“The Claimant’s core claims against the Respondent in this IRP arise from the Respondent’s **failure to reject** NDC’s application for .WEB, disqualify its bids at the auction, and deem it ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC’s alleged breaches of the Guidebook and Auction Rules.”) (emphasis added) (citing Afiliás’ PHB, ¶ 247; Afiliás’ Reply Memorial, ¶ 16). Contrary to the assertion by *Amici* (*Amici*’s Response to Application, ¶ 5), “core claims” is the term that Panel (not Afiliás) chose to characterize these claims. *See* Decision, ¶ 26. Afiliás in its Application adopted the Panel’s term.

⁴³ *See* Decision, ¶ 129.

⁴⁴ Decision, ¶ 254, n.233.

crystallized, as the Panel recognized, when ICANN Staff moved to delegate .WEB in June 2018, following their evaluation of Afilias' complaints. This is accordingly the claim that Afilias stated in its Request for IRP and then developed further in its Amended Request for IRP after it had received the DAA.⁴⁵

33. As set out in the application, Afilias asked for two separate types of relief with respect to its Rules Breach Claim. It asked for *declaratory* relief—*i.e.*, for the Panel to declare that ICANN's failure to enforce the Rules violated the Articles, Bylaws, and the Rules themselves—which ICANN has accepted an IRP panel may grant.⁴⁶ It also asked for “affirmative” or “binding declaratory” relief (what ICANN more accurately described as *injunctive* relief)—*i.e.*, for the Panel to *order* ICANN to conclude that NDC materially breached the Rules, to disqualify NDC on that basis, and to offer .WEB to Afilias—which ICANN argued a Panel may not grant.⁴⁷ In short, Afilias asked for a declaration that ICANN failed to enforce the Rules consistent with the Articles and Bylaws (which specifically required the Panel to interpret the contested provisions of the Rules consistent with the Articles and Bylaws), and Afilias asked for injunctive relief ordering ICANN to act accordingly.

⁴⁵ Afilias never asserted a claim based on the Board's or Staff's failure to pronounce; that is, it never alleged the Board's or the Staff's failure to pronounce on Afilias' complaints as a Covered Action. With respect to Staff, a pronouncement (to use the Panel's, not Afilias' language) was made when Staff notified Afilias and other contention set members that .WEB was being taken off hold status, but Afilias saw no need to make the form or content of this pronouncement an element of its claim (*i.e.*, plead it as a Covered Action). With respect to the Board, the issue of Board's alleged decision to defer consideration of .WEB did not become the mainstay of ICANN's defense strategy until only a few weeks before the final hearing. Afilias, therefore, could not have pled this inaction as a Covered Action. But even after learning of the Board's decision to defer, Afilias did not state a claim based on this conduct. It certainly did not amend its Request for IRP to add a claim based on this conduct. Yet, it is this failure to pronounce (which the Panel accepted as proven notwithstanding all of the evidence to the contrary) that formed the centerpiece of the Panel's decision on the Rules Breach Claim.

⁴⁶ Amended Request for IRP, ¶ 89(1); Afilias' Reply Memorial, ¶ 155; Afilias' PHB, ¶ 238.

⁴⁷ Amended Request for IRP, ¶ 89(2)-(3); Afilias' Reply Memorial, ¶ 155; Afilias' PHB, ¶ 239.

34. In its Decision, agreeing with ICANN, the Panel stated that it would not issue the *injunctive* relief Afilias requested:

The Panel therefore *denies* the Claimant’s request for (a) *a binding declaration* that the Respondent *must* disqualify NDC’s bid for violating the Guidebook and Auction Rules, and (b) *an order directing* the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.⁴⁸

However, the Panel omitted to resolve any of Afilias’ requests for *declaratory relief* on the Rules Breach Claim, *i.e.*, that ICANN was required to enforce the Rules as specified by Afilias, and that ICANN’s failure to do so violated the Articles, Bylaws, and Rules. The Panel’s denial of Afilias’ requested injunctive relief did not and could not encompass Afilias’ requested declaratory relief. The Panel thus left Afilias’ principal claim undecided—even though it had been extensively arbitrated by Afilias, ICANN, and the *Amici*, and submitted to the Panel for resolution.⁴⁹

35. Both ICANN and the *Amici* assert in their responses to Afilias’ Application that the Panel “resolved” Afilias’ claims for declaratory relief on the Rules Breach Claim by concluding that it lacked jurisdiction to decide them.⁵⁰ For the reasons stated below, Afilias does not believe that the Panel could have resolved or intended to resolve the Rules Breach Claim on jurisdictional grounds.⁵¹ However, if that is what the Panel intended, then the Panel must say so in a well-reasoned decision consistent with the Bylaws. (**Section 1**). If the Panel did *not* intend to resolve Afilias’ claims for declaratory relief on the Rules Breach Claim on jurisdictional grounds, then the Panel must issue an additional decision resolving them on the merits. (**Section 2**).

⁴⁸ Decision, ¶ 9 (emphasis added). Given that the Panel plainly rejected Afilias’ request for injunctive relief, Afilias limits its Application to the declaratory relief it seeks under the Rules Breach Claim. Thus, when Afilias refers herein to the relief requested on that Claim, it is specifically referring to its request for declaratory relief.

⁴⁹ See Application, ¶¶ 67-70.

⁵⁰ ICANN’s Response to Application, ¶¶ 26 and 72; *Amici*’s Response to Application, ¶ 11.

⁵¹ See **Section III.A.1**.

1. ICANN's Jurisdictional Objection is Untimely and Incorrect

36. In its Response to Afiliás' Application, ICANN asserts:

[T]he Panel *properly refused Afiliás' request to resolve disputes under instruments outside its jurisdiction*, i.e., the Guidebook and Auction Rules. The Panel has jurisdiction only to determine whether ICANN violated its Bylaws and Articles, *not whether NDC violated the New gTLD Program Rules*. ... An IRP Panel *does not have jurisdiction to resolve disputes under the New gTLD Program Rules*.⁵²

Similarly, according to the *Amici*, the Panel rejected Afiliás' claims for declaratory relief under the Rules Breach Claim "based on a recognition that ICANN should decide these complaints in the first instance and that *any other decision by the Panel would exceed its limited jurisdiction* by substituting its judgment for that of ICANN."⁵³

37. These are remarkable propositions—especially on the part of ICANN, which took precisely the opposite position prior to the Panel's Decision.⁵⁴ But even putting aside ICANN's total *volte-face* on this most fundamental of issues, there are significant due process grounds as to why the Panel could not have resolved Afiliás' Rules Breach Claim on jurisdictional grounds (**Section (i)**). In addition, there were no legal or factual bases on which the Panel could have declined to decide the Rules Breach Claim for lack of jurisdiction (**Section (ii)**).

(i) If the Panel Resolved the Rules Breach Claim on Jurisdictional Grounds, Then Afiliás Has Been Deprived of Due Process and its Right to be Heard.

38. If, as ICANN and the *Amici* now argue, the Panel resolved the Rules Breach Claim on jurisdictional grounds, then Afiliás has been deprived of due process and its right to be heard.

39. *First*, as a preliminary matter, Article 19(3) of the ICDR Rules provides:

⁵² ICANN's Response to Application, ¶¶ 26, 72 (emphasis added).

⁵³ *Amici's* Response to Application, ¶ 11 (emphasis added).

⁵⁴ See **Section III.A.1(i)**.

A party must *object* to the jurisdiction of the tribunal or to arbitral jurisdiction respecting the admissibility of a claim, counterclaim, or setoff *no later than the filing of the Answer*, as provided in Article 3, to the claim, counterclaim, or setoff that gives rise to the objection.⁵⁵

ICANN never made any jurisdictional objection to Afilias' claims for declaratory relief in connection with the New gTLD Program Rules at any point in this IRP. Therefore, this Panel could not have resolved the Rules Breach Claim on jurisdictional grounds, because ICANN never objected to the jurisdiction of the Panel to issue the declaratory relief (as opposed to the injunctive relief) that Afilias requested. Given that no objections were made asserting that the Panel lacked jurisdiction to decide Afilias' claims for declaratory relief, Afilias obviously never had the opportunity to respond to them.

40. ***Second***, ICANN not only failed to object to Afilias' claims for declaratory relief in connection with the New gTLD Program Rules. ***ICANN specifically told the Panel that it had jurisdiction over Afilias' claims for declaratory relief.*** Thus, in its Rejoinder, ICANN acknowledged that the Panel had jurisdiction "to ***declare*** that ICANN violated its Articles and Bylaws by:"

(a) failing to disqualify NDC's Application in August 2016; (b) failing to offer the rights to .WEB to Afilias after disqualifying NDC; and (c) proceeding to contract with NDC for a Registry Agreement. ***While ICANN acknowledges that declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority***, each declaration requested by Afilias ***should be denied on the merits.***⁵⁶

⁵⁵ ICDR Rules, Art. 19(3) (emphasis added).

⁵⁶ ICANN's Rejoinder Memorial, ¶ 117 (emphasis added) (citing Afilias' Reply Memorial, ¶ 155); ICANN's PHB, Appendix A (acknowledging Afilias' Rules Breach Claim as a claim). As also noted above, ICANN asserted it was not within the jurisdiction of the Panel to order injunctive (as opposed to declaratory) relief on these claims. *Id.*, ¶ 118.

Although ICANN now asserts that “[a]n IRP Panel does not have jurisdiction to resolve disputes under the New gTLD Program Rules”—and that the Panel “properly refused Afiliás’ request to resolve disputes under instruments outside its jurisdiction, *i.e.*, the Guidebook and Auction Rules”⁵⁷—ICANN took precisely the opposite position prior to the Panel’s issuance of the Decision.

41. Indeed, citing the prior IRP panel decision in *Booking.com*, ICANN in its Rejoinder specifically told this Panel that its “role is **to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws, and Guidebook**.”⁵⁸ Furthermore, ICANN’s own witness, J. Beckwith (Becky) Burr—a member of ICANN’s Board who chaired the IRP-IOT Committee that was responsible for overseeing the enhanced IRP Rules that govern this arbitration—specifically testified to the Panel that one of the purposes of an IRP is to determine whether, “in taking some action or inaction or failing to act, ICANN violated its bylaws,” including “**in its application of the rules of the applicant guidebook.**”⁵⁹ In addition to the IRP decision in

⁵⁷ ICANN’s Response to Application, ¶¶ 26, 72.

⁵⁸ ICANN’s Rejoinder Memorial, ¶ 57 (emphasis added) (quoting *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), **Ex. CA-11**). Other IRP Panels—even before the implementation of the new enhanced IRP Rules—also held that the Panel’s mandate is to assess whether Board’s action or failure to act is consistent with the Articles, Bylaws, and the New gTLD Program Rules. *See, e.g., Corn Lake v. ICANN*, Final Declaration (17 Oct. 2016), **Ex. CA-16**, ¶¶ 8.15-8.18, 8.67-8.68 (“That the Panel is not called upon to revisit or vary the substance of the Articles, Bylaws or **Guidebook** generally does not lessen its charge to analyze the specific Board action or inaction at issue here objectively against the standards contained ***in those instruments***. ... [I]t is appropriate to determine whether the Board acted in conformance with its Articles, Bylaws **and Guidebook**.”) (emphasis added); *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Final Declaration (2016), **[Ex. AA-49]**, ¶ 69 (“In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC’s [(an ICANN Board committee)] decisions. ***The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB)***.”) (emphasis added). *See also Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), **Ex. CA-2**, ¶¶ 123-25 (“In this regard the ICANN Board’s discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board’s conduct must be measured.”).

⁵⁹ Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination) (“Q: ... [T]he IRP gives an applicant, therefore, the ability to have independent third parties evaluate its challenges to ICANN’s actions or inactions under ICANN’s articles and bylaws in addition to claims under the guidebook; is that a fair statement? A: ... [T]he purpose of the IRP is to determine whether or not, in taking some action or inaction or failing to act, ICANN

Booking.com that ICANN cited to this Panel, other IRP Panels have also concluded (even before the implementation of the new enhanced Rules governing this IRP) that:

‘[T]he IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws, *and Guidebook*[.]’ ... That the Panel is not called upon to revisit or vary the substance of the Articles, Bylaws *or Guidebook generally does not lessen its charge to analyse the specific Board action or inaction at issue here objectively against the standards contained in those instruments.*⁶⁰

In light of ICANN’s prior representations to the Panel in this IRP, the testimony of Ms. Burr as presented to this Panel, and prior IRP Panel decisions, ICANN’s post-decision assertion that the New gTLD Program Rules are “instruments outside [the Panel’s] jurisdiction” is the very definition of frivolous (and reflects the bias that ICANN has demonstrated against Afilias throughout this dispute and will no doubt continue to demonstrate under the Panel’s decision as it currently stands).

42. *Third*, the Panel in its Decision repeatedly stated that it had jurisdiction over Afilias’ “core claims.” The Panel specifically recognized that Afilias’ “core claims against the Respondent in this IRP arise from the Respondent’s failure to reject NDC’s application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC’s alleged breaches of the Guidebook and Auction Rules.”⁶¹ According to the Panel: “[t]he *jurisdiction of the Panel to hear the Claimant’s core claims* against the Respondent in relation to .WEB *is not contested.*”⁶²

has violated its bylaws, and that would be including in its -- in its application of the rules of the applicant guidebook if it’s violated the bylaws somehow.”).

⁶⁰ *Corn Lake v. ICANN*, Final Declaration (17 Oct. 2016), Ex. CA-16, ¶¶ 8.18-8.19 (quoting *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), Ex. CA-11, ¶ 111) (emphasis added; internal quotation omitted).

⁶¹ Decision, ¶ 254.

⁶² Decision, ¶ 26 (emphasis added).

43. For the reasons stated above, if, as ICANN and the *Amici* assert, the Panel resolved the Rules Breach Claim on jurisdictional grounds, Afilias was denied due process and its right to be heard as it was not afforded the opportunity to address the Panel on its jurisdiction.

(ii) *There Are No Legal or Factual Bases on which the Panel Could Have Resolved the Claim for Lack of Jurisdiction.*

44. As discussed below in **Section VII.B.1**, Afilias and ICANN (along with the *Amici*) disagree as to what the Panel meant when it remanded Afilias’ Rules Breach Claim to ICANN’s Board to “pronounce upon” “in the first instance.” As Afilias observed in its Application, the ordinary meaning of “pronounce” is “to declare officially or ceremoniously.”⁶³ Legal dictionaries provide a similar definition: “To utter formally, officially, and solemnly; to declare aloud and in a formal matter.”⁶⁴ By contrast, ICANN argues that, as used by the Panel, the words “pronounce,” “decide,” and “determine,” are synonymous.⁶⁵ For the purpose of the jurisdictional question raised by ICANN and the *Amici* in their responses, the distinction does not matter. Even assuming *arguendo* that the Panel intended “pronounce” to mean the same as “decide” or “determine,” that does not help ICANN and the *Amici* on their jurisdictional argument.

45. The explicit jurisdictional argument now made by ICANN and the *Amici* is that ICANN is the “first instance decision-maker” on all matters arising from the New gTLD Program Rules.⁶⁶ Thus, they argue, for an IRP Panel to have jurisdiction on matters concerning the New gTLD Program Rules, ICANN’s Board must make a “first instance decision.” Only then can an IRP panel exercise its review of the Board’s “first instance decision.” ICANN asserts in its

⁶³ Application, ¶ 46 (citing *The Law Dictionary* (on-line version): pronounce, **Ex. CA-156**; *Merriam-Webster Dictionary* (on-line version): pronounce, **Ex. CA-157**).

⁶⁴ Application, ¶ 46 (citing *The Law Dictionary* (on-line version): pronounce, **Ex. CA-156**; *Merriam-Webster Dictionary* (on-line version): pronounce, **Ex. CA-157**).

⁶⁵ ICANN’s Response to Application, ¶ 66.

⁶⁶ ICANN’s Response to Application, ¶¶ 16, 68, 73; *Amici*’s Response to Application, ¶¶ 11, 13.

response to Afilias’ application: “The Panel was correct to reject Afilias’ attempt *to expand the Panel’s jurisdiction so as to become a first instance decision-maker for disputes under the New gTLD Program Rules.*”⁶⁷ This position, the Panel will hopefully recognize, is completely contrary to the positions that ICANN took in the course of these proceedings, as well as in prior IRPs.

46. Neither ICANN nor the *Amici* cite any provision in the Bylaws (or any other applicable instrument) that remotely suggests that the ICANN Board functions as a “first instance decision-maker” on whether alleged conduct by ICANN violates the New gTLD Program Rules—and if so, what the consequences should be. Nor do they cite any such provision for the proposition that the Board’s “first instance decision” is a jurisdictional (or other) prerequisite for “second-instance” review by an IRP Panel. There are no such provisions and no such concepts anywhere in ICANN’s Articles and Bylaws. ICANN and the *Amici* have made them up out of whole cloth. Rather, an IRP Panel is instructed to conduct a *de novo* review of action or inaction on the part of the Board or Staff.⁶⁸

47. Indeed, the prerequisite now urged by ICANN and the *Amici* would rewrite the Bylaws by removing “inaction” and “failure to act” on the part of either the Staff or the Board from the definition of the terms “Disputes” and “Covered Actions.” If a decision or determination or pronouncement of the Board is a jurisdictional (or other) prerequisite for a claimant to be able to bring an IRP, then “Covered Actions” would no longer include “failures to act by or within ICANN committed by the Board ... or Staff members, that give rise to a Dispute” (*i.e.*, “Claims” alleging that “Covered Actions constituted an action *or inaction* that violated the Articles ... or Bylaws”).⁶⁹ By withholding a decision or determination or pronouncement, the Board would

⁶⁷ ICANN’s Response to Application, ¶ 73 (emphasis added).

⁶⁸ Bylaws, [Ex. C-1], Sec. 4.3(i).

⁶⁹ Bylaws, [Ex. C-1], Sec. 4.3(b) (emphasis added).

eliminate ICANN’s accountability under IRPs for inaction by itself or the Staff on contested matters concerning the New gTLD Program.

48. At best, a claimant would have to bring an IRP simply to obtain a recommendation from the Panel that the Board should make a decision, determination, or pronouncement. And if—contrary to ICANN’s prior representations, Ms. Burr’s testimony to this Panel, and numerous prior IRP decisions—it is *not* the role of an IRP panel “to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws *and Guidebook*[.]”⁷⁰ and an IRP Panel “does not have jurisdiction to resolve disputes under the New gTLD Program”—then the Board apparently has unfettered discretion to make whatever decision, determination, or pronouncement it chooses. If ICANN is correct in these post-Decision contentions, then an IRP that merely produces a recommendation for the Board to exercise its supposedly boundless discretion to decide, determine, or pronounce on disputes arising from the New gTLD Program Rules is for all intents and purposes a meaningless exercise. There would effectively be no ICANN accountability. But ICANN is not correct. There is simply no legal basis for the arguments now offered by ICANN and the *Amici* to the Panel. To the contrary, those arguments would do violence to the plain language and express purposes of the IRP accountability mechanism. (That is why, as discussed above,⁷¹ the Bylaws provide for an IRP Panel to resolve requests for declaratory relief such as that sought by Afilias in this case.)

49. In any event, as a matter of fact, at no point in the Decision did the Panel state that they were resolving Afilias’ Rules Breach Claim by finding that they did not have the jurisdiction to determine it.

⁷⁰ ICANN’s Rejoinder Memorial, ¶ 57 (quoting *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), **Ex. CA-11**) (emphasis added).

⁷¹ See **Section II**.

50. Furthermore, the assertions by ICANN and the *Amici* that ICANN never decided or determined Afilias’ complaints cannot be reconciled with the findings of fact and rulings made by the Panel in its Decision. The Panel specifically found that ICANN made a “decision” that Afilias’ “concerns did not stand . . . in the way of the delegation of .WEB to NDC” when the Staff—with knowledge of the Board—proceeded to make that delegation. As the Panel specifically ruled in rejecting ICANN’s time-bar argument:

The Claimant was notified on 6 June 2018 that the Respondent had removed the .WEB contention set from its on-hold status. While the Claimant was still ignorant of *any determination* by the Respondent in respect of the concerns raised in August and September 2016, which were the subject of Respondent’s Questionnaire of 16 September 2016, ***a necessary implication of the Respondent’s decision was that these concerns did not stand—or no longer stood—in the way of the delegation of .WEB to NDC.*** In the Panel’s opinion, this is when the *Claimant’s complaints about NDC’s conduct crystallized into a claim against the Respondent.*⁷²

Similarly, the Panel specifically found ICANN’s assertion that it had not yet “considered” Afilias’ complaints to contradict ICANN’s representations made earlier in the proceedings that “*ICANN ‘ha[d] evaluated these complaints’ and that the ‘time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated to that it can be made available to consumers.*”⁷³

Therefore, even assuming *arguendo* that there was some jurisdictional (or other) requirement that the ICANN Board must make a “first instance” decision or determination concerning a claimant’s complaints about the disposition of its New gTLD Program application (and there is no such

⁷² Decision, ¶ 276 (emphasis added). *See also id.*, ¶ 344 (“A necessary implication of the Respondent’s decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant’s allegations of non-compliance with the Guidebook and Auction Rules. ***This is difficult to reconcile with the submission that ‘ICANN has taken no position on whether NDC violated the Guidebook.’***”) (emphasis added).

⁷³ Decision, ¶ 346 (quoting ICANN’s Opposition, ¶ 3) (emphasis added).

requirement), ICANN represented in this IRP—and this Panel found—that ICANN had evaluated Afilias’ complaints and determined nonetheless to proceed to delegate .WEB to NDC.

51. For the foregoing reasons, Afilias submits that contrary to the assertions by ICANN and the *Amici*, this Panel neither resolved nor intended to resolve Afilias’ requests for declaratory relief under its Rules Breach Claim on jurisdictional grounds. If, however, the Panel believes it resolved Afilias’ requests on jurisdictional grounds—or on non-jurisdictional legal grounds—then the Panel must explain those grounds in a well-reasoned decision consistent with the Articles and Bylaws, in the context of the norms of applicable law and prior relevant IRP decisions, supported by findings of fact. Afilias believes that there are no such grounds, and that the Panel must therefore make an additional decision to resolve Afilias’ requests for declaratory relief on its Rules Breach Claim.⁷⁴

2. The Additional Decision on the Rules Breach Claim

52. As explained above, prior to the briefing on Afilias’ Application, ICANN had consistently taken the position that this Panel has the jurisdiction to issue a declaration that ICANN violated its Articles and Bylaws by failing to conclude that NDC committed material breaches of the New gTLD Program Rules, and, on that basis, failing to disqualify NDC’s application and bids, deeming NDC ineligible to enter into a registry agreement, and offering .WEB to Afilias as the next-highest bidder.⁷⁵ Instead, ICANN argued that the Panel should deny Afilias’ requests for

⁷⁴ If Afilias is correct that the Panel intended the term “pronounce upon” to mean something other than “decide” or “determine,” then, as Afilias stated in its Application, there is also no proper basis for the Panel to require such a “pronouncement” (*i.e.*, an “official” “declaration” or “utterance”) as a jurisdictional or other prerequisite for an IRP Panel to decide Afilias’ request for declaratory relief on the merits. As stated above, this Panel does not have jurisdiction to resolve this dispute as *amiable compositeur* or *ex aequo et bono*, absent the consent of the Parties to do so, which they have not given. ICDR Rules, Art. 31(3). Thus, the Panel cannot decide not to resolve complaints that are squarely raised in the IRP based on its abstract view of the deference to be accorded to one of the Parties, when such deference is not based on any applicable legal instrument or principle relevant to this dispute.

⁷⁵ See Paragraph 40 above.

these declarations “on the merits”—specifically, that Afiliás’ requests were time-barred, and that “even if they were not time-barred, ICANN and the Board acted within the realm of reasonable business judgment in deciding not to address the merits of claims made by Afiliás ... while an Accountability Mechanism was pending”⁷⁶

53. But the Panel did not reject Afiliás’ requests for these declarations on the merits. Instead, the Panel specifically rejected ICANN’s time-bar defense,⁷⁷ and specifically declined to rest any aspect of its decision on the business judgment rule.⁷⁸ Regarding ICANN’s assertion that it properly declined to pronounce upon Afiliás’ complaints while accountability mechanisms (including this IRP) were pending, the Panel’s declaration in its *dispositif* rejected that assertion. Thus, the Panel declared (*inter alia*) that the Board—“having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending”—violated ICANN’s Articles and Bylaws by:

failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which *these complaints were squarely raised*, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program⁷⁹

⁷⁶ ICANN’s Rejoinder Memorial, ¶ 117.

⁷⁷ Decision, ¶¶ 278, 281.

⁷⁸ Decision, ¶ 328. *See also* Application, n. 111.

⁷⁹ Decision, ¶ 413(1) (emphasis added). The Panel further declared that the actions and failures by the Staff and Board “violated [ICANN’s] commitment to make decisions by applying documented policies objectively and fairly.” *Id.*, ¶ 413(2). In addition, the Panel declared that ICANN had violated its Articles and Bylaws in preparing and issuing its 16 September 2016 Questionnaire (which ICANN had represented to be part of its efforts to resolve Afiliás’ complaints), but which were plainly designed to favor Verisign and NDC and to prejudice Afiliás (*see id.*, ¶¶ 307-16); and in failing ever to inform Afiliás (until its Rejoinder in the IRP) that it had supposedly failed to decide Afiliás’ complaints until after all accountability mechanisms had been resolved (*see id.*, ¶¶ 323-32). The Panel declared that those actions and inaction violated ICANN’s “commitment to operate in an open and transparent manner and consistent with procedures to ensure fairness” *Id.*, ¶ 413(3).

54. The Panel therefore issued a declaration that Afilias had never requested (that ICANN violated its Articles and Bylaws by failing to “pronounce” on Afilias’ complaints), based on a Covered Action that Afilias never pled. But the Panel failed to rule on the declaration that Afilias had “squarely raised” in the IRP (that ICANN violated its Articles and Bylaws by failing to enforce the New gTLD Program Rules). This declaration required no “first instance decision” or pronouncement. Again, the Panel plainly denied Afilias’ request for injunctive relief, but never addressed Afilias’ request for declaratory relief. There is no indication that the Panel recognized the distinction between the two forms of relief (declaratory vs. injunctive) that Afilias requested on its Rules Breach Claim.⁸⁰

55. Moreover, the Panel then appeared to recommend as relief the same position that ICANN had advanced in the IRP, but which the Panel in its declaration had just said violated ICANN’s Articles and Bylaws. But the Panel had found that ICANN’s treatment of Afilias’ complaints was repeatedly unfair and non-transparent, including in its conduct of the investigation, its misleading representations to Afilias that it would consider the matter, its failures to communicate, and its decision to proceed with delegating .WEB.⁸¹ It took particular issue with ICANN’s persistent refusal to take any position on Afilias’ complaints, up to and including in the present IRP.⁸² Nevertheless, the Panel inconsistently and illogically recommended that ICANN “stay any and all action or decision that would further the delegation of the .WEB gTLD until such

⁸⁰ See Decision, ¶ 413(7) (dismissing “the Claimant’s other requests for relief in connection with its core claims and, in particular, the Claimant’s request that the Respondent be *ordered* by the Panel to disqualify NDC’s bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant[.]”) (emphasis added). That part of the *dispositif* resolved Afilias’ request for injunctive relief but not for declaratory relief.

⁸¹ Decision, ¶¶ 315, 322, 335, 344, 347.

⁸² Decision, ¶¶ 322, 335, 339, 343-347.

time as [ICANN’s] Board has considered the opinion of the Panel in this Final Decision, and, in particular”:

(a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC’s application for .WEB should be rejected and its bids at the auction disqualified.⁸³

56. But the ICANN Board will find no guidance by “consider[ing] the opinion” of the Panel’s Decision on these questions, given that the Panel declined to address their substance—which the Panel could have done by fulfilling its mandate and issuing the declarations requested by Afilias. Earlier in the Decision’s “analysis” section, the Panel offered the view that it “seems ... reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take.”⁸⁴ The Panel’s language (*i.e.*, “seems”) is tentative. Moreover, it cannot be reconciled with the Panel’s other findings that ICANN had determined that Afilias’ complaints “did not stand” when ICANN proceeded to delegate .WEB to NDC.⁸⁵ Nor can it be reconciled with the Panel’s declaration that the Board breached the Articles and Bylaws when—“having deferred consideration of the Claimant’s complaints about the propriety of the DAA”—it failed “to pronounce on these complaints while taking the position in this IRP ... that the Panel should not pronounce on them out of respect for” the Board.⁸⁶ But simply as a matter of basic logic, it is impossible to grasp why the Board was “reasonable” in awaiting “the outcome of these proceedings” if the Panel was not going to provide

⁸³ Decision, ¶ 413(5).

⁸⁴ Decision, ¶ 328.

⁸⁵ Decision, ¶ 276.

⁸⁶ Decision, ¶ 8.

any guidance on what the Articles, Bylaws, or Rules require—other than the Board must “pronounce upon” Afilias’ complaints in the first instance.

57. In the meantime, ICANN has already told the Panel how it will answer the questions posed in paragraph 410(5) of the Decision. ICANN has asserted, for example, that Afilias’ arguments that NDC materially violated the New gTLD Program Rules are “*unpersuasive*” and “*cannot bear the weight that Afilias puts on them[;]*”⁸⁷ that there was no “change in circumstances” because “*the ‘applicant for .WEB was NDC—not Verisign—both before and after the DAA, and no testimony suggested otherwise[;]*”⁸⁸ that “the Auction Rules *seem to foresee the possibility of ... transactions*” such as the DAA,⁸⁹ and that “*ICANN has never been under a duty to disqualify NDC based on its agreement with Verisign.*”⁹⁰ Thus, even assuming *arguendo* that ICANN did not “pronounce” on these questions prior to the IRP, ICANN has repeatedly “pronounced” on them *in this IRP*—and has consistently belittled or outright rejected Afilias’ positions.

58. To be clear, Afilias is not asking for an additional decision that *orders* ICANN to conclude that NDC committed material violations, or to disqualify NDC’s application on that basis, or to offer .WEB to Afilias as the next highest bidder. Afilias is asking for, first and foremost, an additional decision that declares on Afilias’ requested declaratory relief in connection to the Rules Breach Claim. However, consistent with the Panel’s mandate and the practice of prior

⁸⁷ ICANN’s Rejoinder Memorial, ¶¶ 85, 86 (emphasis added).

⁸⁸ ICANN’s PHB, ¶ 140 (citations omitted) (emphasis added).

⁸⁹ ICANN’s Rejoinder Memorial, ¶ 83 (emphasis added).

⁹⁰ ICANN’s Opposition, ¶ 68 (emphasis added); *see also* ICANN’s Rejoinder Memorial, ¶ 4 (“Afilias overlooks the fact that the violations of the Guidebook and Auction Rules that it alleges *do not require the automatic violation of NDC’s application or rejection of its winning bid for .WEB*”) (emphasis added).

IRP decisions, including the *DCA Trust* panel, the Panel should make recommendations with respect to the Declarations that Afiliias has properly requested.⁹¹

IV. THE INTERNATIONAL LAW CLAIM

A. Introduction

59. In a brazen attempt to redraft pages and pages of briefing and argument in this IRP, ICANN (echoed by the *Amici*) denies that Afiliias presented an International Law Claim at all.⁹² But ICANN (again echoed by *Amici*) then *simultaneously* maintains that the Panel somehow decided the International Law Claim that ICANN says Afiliias never made, while also maintaining that the Panel in any event would have lacked jurisdiction over the claim.⁹³ Notwithstanding ICANN’s legal contortions, the Decision is clear that Afiliias presented a distinct International Law Claim, which the Panel expressly acknowledged, but which it then did not address, directly or indirectly, whether as a matter of jurisdiction or on the merits.

60. As Afiliias argued extensively in its pleadings, international law sets out obligations for ICANN’s conduct of its activities that are established by “relevant principles of international law,” most importantly the obligation of good faith.⁹⁴ The international obligation of good faith imposes demanding requirements on ICANN, including the requirement to respect legitimate expectations. Neither ICANN nor the *Amici* dispute that ICANN is required to observe the international obligation of good faith and the specific facets of that obligation that Afiliias identified

⁹¹ See, e.g., *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 2013 001083, Final Declaration (9 July 2015), Ex. CA-15, ¶¶ 148-49 (declaring that “the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN” and “recommend[ing] that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.”).

⁹² ICANN’s Response to Application, ¶ 37; *Amici*’s Response to Application, ¶ 57.

⁹³ ICANN’s Response to Application, ¶ 17 (“[T]he Final Decision expressly recognizes those arguments and deals with them to the extent necessary and appropriate.”); *Amici*’s Response to Application, ¶¶ 59-60.

⁹⁴ Afiliias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 143.

in its pleadings.⁹⁵ With respect to legitimate expectations, even though the Bylaws do not specifically list this obligation, it falls squarely within the ambit of the international obligation of good faith. As Afiliás explained, it had the legitimate expectation that, acting in good faith, ICANN would disqualify NDC’s application, reject its bids, and otherwise deem it ineligible to enter into a registry agreement for .WEB by applying the plain language of the New gTLD Program Rules as interpreted in accordance with the Articles and Bylaws.⁹⁶

61. The Panel must decide Afiliás’ International Law Claim—which, we submit, must be decided in Afiliás’ favor based on the evidence and submissions already presented in this IRP. The consequence of a finding in Afiliás’ favor would not require the Panel to overturn the decisions that it has already rendered. Rather, it would necessitate that the Panel declare that ICANN failed to interpret and apply the New gTLD Program Rules in accordance with the international principle of good faith, most importantly by failing to respect Afiliás’ legitimate expectations that ICANN would apply the Rules to disqualify NDC’s application, reject its bids and declare it ineligible to enter into a registry agreement for .WEB. That declaration is especially important if the Panel declines to make an additional decision on Afiliás’ Rules Breach Claim, and simply remands Afiliás’ core claims back to the ICANN Board to “pronounce upon”—with no further guidance. (And its importance has grown even further in light of ICANN’s post-decision position that the New gTLD Program Rules fall outside an IRP Panel’s jurisdiction.)

⁹⁵ ICANN’s Response to Application, ¶ 42; *Amici*’s Response to Application, ¶ 60.

⁹⁶ Afiliás’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 161 (“Afiliás, as a participant in ICANN’s New gTLD Program, legitimately expected ICANN to comply with its own rules, policies, and procedures in its Bylaws, the Guidebook and the New gTLD Program Rules. ICANN did not. The plain text of the DAA is in violation of the New gTLD Program Rules when interpreted honestly, fairly, and loyally—*i.e.*, in good faith. Had ICANN actually followed the New gTLD Program Rules, it would have disqualified NDC from the application and bidding process. By allowing Verisign to use NDC as a stalking horse to obtain .WEB for itself, ICANN frustrated Afiliás’ legitimate expectations.”) (citations omitted).

62. ICANN (and the *Amici*) fail to present any serious argument that would support the Panel declining to complete its mandate by issuing an additional decision on Afilias' International Law Claim. ICANN, largely parroted by the *Amici*, asserts four main arguments, each of which is wrong for reasons that are more fully elaborated in the subsections that follow.

- ICANN argues that Afilias never made an International Law Claim. But Afilias not only made such a claim with great supporting detail, it also explicitly requested relief in connection with the claim. The Panel recognized as much. **(Section B)**
- ICANN argues that the International Law Claim is outside of the Panel's jurisdiction. But ICANN's Articles and Bylaws each independently require ICANN to comply with international law, and the Panel has jurisdiction over any and all violations of the Articles and Bylaws. **(Section C)**
- ICANN argues that the Panel in fact did resolve Afilias' International Law Claim. But where? The Panel does not itself so much as use the words international law in its analysis or the Decision's *dispositif*. **(Section D)**
- ICANN also argues that the Panel implicitly resolved Afilias' International Law Claim when it supposedly addressed ICANN's other claims. But those other claims were based on obligations with different and less demanding content than those required under international law. The International Law Claim is entirely independent of those claims. **(Section E)**

B. Afilias Presented a Distinct International Law Claim for the Panel's Determination

63. In Section II(C) of our Application we laid out in detail where and how Afilias stated its International Law Claim. We will not repeat ourselves here but have instead included an Annex with this submission setting out the various instances throughout this IRP where we made it clear that we were presenting an independent claim on the basis that the Covered Actions we alleged breached ICANN's obligations under international law and, in particular, its multifaceted obligation of good faith (Annex A).

64. Even a quick review of Annex A, shows that ICANN's position that Afilias did not present an International Law Claim is simply incorrect. As demonstrated by the Annex, the Panel

repeatedly acknowledged—on six separate occasions—that Afilias had submitted such a claim.⁹⁷ However, even though it recognized that Afilias had made a distinct International Law Claim it omitted to address this claim. There is no mention of the claim anywhere in the body of the Panel’s reasoning nor any reference to it in the Decision’s *dispositif*.⁹⁸

65. What is ICANN’s response? ICANN, first and foremost, complains that Afilias’ International Law Claim was not actually a claim but only an argument. This complaint does not withstand scrutiny. As discussed above, it is ICANN’s position that “[a] ‘claim’ refers to ‘a head of claim for damages or some other remedy (including specifically claims for interest or costs)”⁹⁹ But, even this premise leads to a conclusion that Afilias stated an International Law Claim. In its Request and Amended Request for IRP, Afilias explicitly sought a declaration that ICANN violated international law.¹⁰⁰ It then explicitly restated in its Post-Hearing Brief its request for a declaration that ICANN violated “Article III of ICANN’s Articles of Incorporation and Sections 1.2, 1.2(a), 1.2(c) of the Bylaws by failing to conduct itself in accordance with relevant principles of international law, specifically the obligation of good faith.”¹⁰¹ This is, to use ICANN’s language, plainly “a head of claim ... or some other remedy.”¹⁰²

⁹⁷ *Amici* try to flip the summary on its head and use it to show that the Panel must have decided the claim. *Amici*’s Response to Application, ¶ 62. But, as we explain in Sections D and E below, the Panel itself never so-much as used the term “international law” in its analysis or *dispositif* nor applied obligations to ICANN’s conduct as demanding as those from international law. As such, *Amici*’s argument falls flat.

⁹⁸ For the reasons already discussed, the Panel’s catch-all denial of claims in the *dispositif* is insufficient to satisfy the Panel’s mandate pursuant to the Bylaws. We note again the clear language in the Bylaws that the Panel “shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN’s written response ... in compliance with the Articles of Incorporation and Bylaws.” Bylaws, [Ex. C-1], Sec. 4.3(g).

⁹⁹ ICANN’s Response to Application, ¶ 50.

¹⁰⁰ Amended Request for IRP, ¶ 89(1). *Amici* simply ignore this requested relief when they assert that Afilias requested the same relief in connection with the International Law Claim as it did for other claims. *Amici*’s Response to Application, ¶ 67.

¹⁰¹ Afilias’ PHB, ¶ 238.

¹⁰² ICANN’s Response to Application, ¶ 50.

66. ICANN further asserts that Afilias did little to develop its International Law Claim—immediately before making the contradictory admission that Afilias did indeed set forth the applicable contents of international law in detail.¹⁰³ ICANN attempts to wave away its self-contradiction on the grounds that Afilias supposedly “refers to requirements imposed by ICANN’s Bylaws, not separate obligations imposed by international law.”¹⁰⁴ ICANN should read more carefully. Afilias repeatedly made clear its position that “[t]he requirement that ICANN comply with relevant principles of international law not only guides the interpretation of these terms, *it provides independent (and generally overlapping) substantive and procedural safeguards*”¹⁰⁵ Thus, Afilias explicitly took the position that international law is an independent source of obligation and basis for decision, before developing the contents of those obligations in great detail,¹⁰⁶ specifically the various facets of the international obligation of good faith.

67. ICANN finally complains that Afilias’ International Law Claim based on the international law obligation of good faith was somehow newly introduced in Afilias’ Response to the *Amici* Brief.¹⁰⁷ But that is simply incorrect. Afilias explicitly and repeatedly stated its claim that ICANN “breached its obligations under international and California law to act in good faith” in its Request and the Amended Request¹⁰⁸ and specifically asked for a declaration to that effect.¹⁰⁹ ICANN does not dispute the specific contents that Afilias assigned to the international obligation

¹⁰³ ICANN’s Response to Application, ¶¶ 42-43. *See also Amici’s* Response to Application, ¶ 66.

¹⁰⁴ ICANN’s Response to Application, ¶ 43.

¹⁰⁵ Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 143 (emphasis added); *see also* Amended Request for IRP, ¶ 8.

¹⁰⁶ For Afilias’ extensive discussion of how Afilias developed the content of these obligations in the course of the IRP, *see* Application, ¶¶ 75 *et seq.*

¹⁰⁷ ICANN’s Response to Application, ¶ 43.

¹⁰⁸ Amended Request for IRP, ¶ 5; *see also id.*, ¶¶ 8, 10.

¹⁰⁹ Amended Request for IRP, ¶ 89(1).

of good faith, including the requirement to respect legitimate expectation.¹¹⁰ Given its agreement on the contents of international law, it can hardly complain about how Afilias developed the International Law Claim during the course of the IRP. ICANN’s counterargument is simply a *post hoc* attempt to rewrite the history of this proceeding.

68. In short, Afilias introduced a single International Law Claim in the Amended Request (indeed, in the original Request¹¹¹), developed it across the length of the IRP, and now asks that it be decided. As discussed above, under the IRP framework and the Panel’s mandate pursuant to that framework, the Panel was required specifically to “resolve” each and every distinct claim Afilias presented. This the Panel did not do, and it did not explain with clear reasoning why it chose to proceed in this manner; that is, why, pursuant to the Panel’s mandate under the Bylaws and based on the manner in which the International Law Claim was presented, the Panel was justified in not having to decide the claim on its merits.

C. Afilias’ International Law Claim is Within the Panel’s Jurisdiction

69. ICANN suggests that “Afilias was well advised in not making” an International Law Claim “because the Panel would clearly lack jurisdiction over such a claim.”¹¹² Its conclusory reasoning—if it can be described as such—is that the Panel’s jurisdiction is limited to violations of the Articles and Bylaws.¹¹³

70. ICANN ignores the fact that both the Articles and the Bylaws require ICANN to “carry[] out its activities in conformity with relevant principles of international law” *in addition*

¹¹⁰ ICANN’s Response to Application, ¶ 42; *Amici*’s Response to Application, ¶ 60.

¹¹¹ Request for IRP, ¶¶ 6, 9, 69(1).

¹¹² ICANN’s Response to Application, ¶ 40.

¹¹³ ICANN’s Response to Application, ¶¶ 40-41.

to its obligations under the Articles and Bylaws.¹¹⁴ Instead, ICANN misrepresents Afilias' International Law Claim as being a “freestanding international law claim”¹¹⁵—providing no explanation of what that might mean—even though Afilias has maintained that the international law claim is based in the Articles and Bylaws.¹¹⁶ ICANN, however, provides no explanation as to why ICANN's failure to conduct itself in accordance with international law, a requirement of both the Articles and Bylaws, would fall outside of the Panel's jurisdiction.¹¹⁷ Such a claim is squarely within the jurisdiction of an IRP panel, even on ICANN's own view.

71. In any event, if it was the Panel's view that it did not have jurisdiction over Afilias' International Law Claim, it was required to say so clearly and with sufficient reasoning to support its jurisdictional determination. The Panel never made such a statement, nor did it provide any supporting reasoning. Instead, the Panel proceeded on the basis that it had jurisdiction over Afilias' core claims.¹¹⁸ As reflected by the contents of the Annex, Afilias' International Law Claim was presented as one such claim.¹¹⁹

D. The Panel Did Not Expressly Address Afilias' International Law Claim in its Decision

72. ICANN argues, as an alternative to its jurisdictional argument, that, if the Panel accepts that Afilias presented an independent International Law Claim over which the Panel has

¹¹⁴ Bylaws, [Ex. C-1], Sec. 1.2(a).

¹¹⁵ ICANN's Response to Application, ¶ 40.

¹¹⁶ Amended Request for IRP, ¶ 8; Afilias' PHB, ¶ 238.

¹¹⁷ Bylaws, [Ex. C-1], Sec. 4.3(b)(iii)(A).

¹¹⁸ Decision, ¶¶ 253 *et seq.*

¹¹⁹ Moreover, if the Panel denied the International Law Claim on jurisdictional grounds, then Afilias has been denied due process and its right to be heard, for the same reasons explained in **Section III.A.1** in connection with its Rules Breach Claim. ICANN never raised any objection to the Panel's jurisdiction over the International Law Claim. Accordingly, Afilias never had the opportunity to respond to any such objection.

jurisdiction, the Panel in fact addressed and resolved any such claim.¹²⁰ It makes this argument notwithstanding the fact that the Panel itself does not use the terms “international law” or even “good faith” in the Decision’s reasoning or *dispositif*.¹²¹

73. ICANN, arguing in bad faith, seeks to have it both ways, insisting that a claim is a request for relief but that a claim can be decided without the request for relief being decided. If this proposition is correct (which Afilias does not accept), then even on ICANN’s own view, Afilias’ International Law Claim was not resolved. Afilias repeatedly made an explicit request for a declaration that ICANN violated international law.¹²² The Panel never addressed this requested relief anywhere in its Decision.

74. Afilias’ rebuttal of ICANN’s response could really stop here. Nevertheless, ICANN and the *Amici*’s position that the Panel decided Afilias’ International Law Claim is equally indefensible in its particulars. ICANN argues that, because “the Panel *did* refer to international law” early in the Decision, this necessarily means that the Decision’s *dispositif* resolved the International Law Claim.¹²³ This is pure sophistry.

¹²⁰ ICANN rather cheekily seeks to use the numbering of Section 1.2 of the Bylaws to create the false impression that Afilias invoked the same norms here as it did in its Rule Breach Claim. The International Law Claim rests, in part, on the incorporation of international law into the Bylaws in Section 1.2(a), the obligatory nature of which is confirmed in the chapeaux of Section 1.2 as well as in Section 1.2(c). The specific substantive obligations of the Bylaws are irrelevant here.

¹²¹ It is incontrovertible that, in its requests for relief in its Amended Request for IRP and its Post-Hearing Brief, Afilias sought a declaration that ICANN violated international law:

“Afilias respectfully requests the IRP Panel to issue a binding Declaration: (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law[.]” Amended Request for IRP, ¶ 89 (emphasis added).

“Thus the Panel can indisputably declare that ICANN has breached: ... Article III of ICANN’s Articles of Incorporation and Sections 1.2, 1.2(a), 1.2(c) of the Bylaws by failing to conduct itself in accordance with relevant principles of international law, specifically the obligation of good faith.” Afilias’ PHB, ¶ 238.

¹²² Request for IRP, ¶ 69(1); Amended Request for IRP, ¶ 89(1); Afilias’ PHB, ¶ 238.

¹²³ ICANN’s Response to Application, ¶ 47 (emphasis added).

75. ICANN bases its argument on the Panel’s reference to international law in the Applicable Law section at paragraph 28—where the Panel simply quoted the Articles and Bylaws as requiring ICANN to carry out “its activities in conformity with relevant principles of international law and international conventions *and applicable local law*”¹²⁴ But a mere quoting of language without more in no way establishes that the Panel considered or applied international law or decided the International Law Claim; in fact it demonstrates precisely the opposite. This is because the applicable law section adopted California law as the law applicable to “the Articles and other ‘quasi-contractual’ documents of ICANN”¹²⁵ The Panel did not even mention international law in that regard—an omission which we believe was completely in error and contrary to the plain wording of the Articles and Bylaws.

76. Again, if it is this Panel’s position that international law is irrelevant to ICANN’s obligations (notwithstanding the clear language in the Articles and Bylaws requiring ICANN’s compliance with international law¹²⁶), or that international law imposes no obligations on ICANN beyond those listed in the Bylaws, or that Afilias did not state an independent claim grounded in international law based on the alleged Covered Actions, then it is incumbent upon the Panel to say so and to provide clear reasoning in support of its decision. Otherwise, the Panel is obligated by its mandate under the Bylaws to decide Afilias’ International Law Claim.

¹²⁴ ICANN’s Response to Application, ¶ 47 (quoting Decision, ¶ 28, albeit incorrectly as stating “its activities in conformity with relevant principles of international law and international conventions and local law”) (emphasis added).

¹²⁵ Decision, ¶¶ 28-30.

¹²⁶ Articles, [Ex. C-2], Art. 2(III); Bylaws, [Ex. C-1], Sec. 1.2(a).

E. The Panel Did Not Implicitly Resolve Afilias’ International Law Claim in its Decision.

77. ICANN advances a final, equally fallacious theory as to why the Panel in fact decided Afilias’ International Law Claim: that the Panel did so implicitly because “[a]ny additional examination of international law could not have impacted the Panel’s conclusions and would therefore have been superfluous.”¹²⁷ The *Amici* parrot this theory.¹²⁸ On this basis, ICANN asserts that the Panel decided Afilias’ International Law Claim because “the Panel found it premature to determine whether ICANN would act inconsistently with its Bylaws if it used its discretion to decide that NDC should not be disqualified.”¹²⁹ But this theory too is transparently false. The Decision *did not* assign the substantive commitments from the Articles and Bylaws the same content as parallel protections from international law. It said nothing about international law, even though Afilias, ICANN, and the *Amici* agree that international law applies.¹³⁰

78. In order to defend its contrary position, ICANN does an about face from its long-held position rejecting the relevance of international law to its governing documents.¹³¹ It now proposes that the substantive obligations from the Bylaws have precisely the same content as international law; or stated differently, ICANN’s obligations under the Bylaws and its obligation to conduct its activities in accordance with relevant principles of international law are one and the same. ICANN admits that “[t]o the extent Afilias assigned any content to the duty of good faith under international law, it was wholly duplicative of California law and other express provisions

¹²⁷ ICANN’s Response to Application, ¶ 49.

¹²⁸ *Amici*’s Response to Application, ¶¶ 59-62.

¹²⁹ ICANN’s Response to Application, ¶ 39.

¹³⁰ ICANN’s Response to Application, ¶ 47; *Amici*’s Response to Application, ¶ 64.

¹³¹ *See, e.g., ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, ICANN’s Response to Request for Independent Review (8 Sep. 2008), **Ex. CA-167**, ¶ 6, n.1; *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, ICANN’s Response to ICM’s Memorial on the Merits (8 May 2009), **Ex. CA-61**, ¶¶ 70-75.

of ICANN’s Bylaws.”¹³² The *Amici* elaborate that “[t]hese principles [from the Bylaws]—fairness, impartiality, transparency, and conduct consistent with expected procedures—are the same principles that Afilias sought to invoke with respect to its so-called International Law Claim.”¹³³ Both make this concession to Afilias’ position because they now wish to claim that that a decision on international law is redundant to or subsumed in a decision on ICANN’s other obligations under the Bylaws.

79. But the relevant question is not Afilias’ position nor that of ICANN and the *Amici*, nor even the common position of all the parties and *Amici*. The relevant question is the position of the Panel in the Decision and what it determined about the substance of the Bylaws. It was the Panel’s announced position in the Decision that the law applicable to the “‘quasi-contractual’ documents of ICANN” was California law¹³⁴—no mention was made of international law and Afilias’ arguments in this regard went apparently unconsidered. Because the Panel did not address Afilias’ position that the Bylaws had to be interpreted consistently with international law, or that international law imposes additional obligations on ICANN beyond the other obligations of the Bylaws, ICANN and the *Amici*’s argument that the International Law Claim is redundant fails from the outset.

80. ICANN quibbles with Afilias’ assertion that the Panel decided that California law was the law applicable to ICANN’s Articles and Bylaws. It instead proposes that the Panel found California law to be a parameter for interpretation but certainly nothing more.¹³⁵ This is grasping at straws. The very section of the Decision where the Panel opts for California law (without

¹³² ICANN’s Response to Application, ¶ 42.

¹³³ *Amici*’s Response to Application, ¶ 60.

¹³⁴ Decision, ¶ 29.

¹³⁵ ICANN’s Response to Application, ¶ 75.

considering Afilias’ position on the relevance of international law) bears the title “Applicable Law[;]” it is the rare case indeed where one law serves as the parameter for interpretation but nothing more. More to the point, as noted in the previous section, the Panel certainly did not find international law to be a parameter for interpreting the Bylaws, much less applicable law, as it was not even considered in the “Applicable Law” section of the Decision.

81. Even aside from the formally applicable law, it is crystal clear that the Panel did not consider or apply the specific elements and propositions of international law that Afilias set forth in its pleadings—whether under the rubric of international law or under that of the specific obligations set out in the Articles or Bylaws. Despite this, the *Amici* insist that the Panel applied principles of “fairness, impartiality, transparency, and conduct consistent with expected procedures” from the Bylaws that are supposedly identical to those Afilias invoked from international law.¹³⁶ That is incorrect. As an initial matter, the Panel said nothing about a requirement that ICANN’s conduct must be consistent with expected procedures—that term does not appear anywhere in the Decision. As for the requirements of fairness, impartiality, and transparency, Afilias accepts that they are present both in international law and the Bylaws.¹³⁷ But international law gives them much more specific and demanding content and substance than did the Panel’s interpretation of the Articles and Bylaws.

82. Finally, although ICANN and the *Amici* essentially concede the substance of the international obligation of good faith¹³⁸ that Afilias identified and elaborated, the Panel did not

¹³⁶ *Amici*’s Response to Application, ¶ 60.

¹³⁷ *Amici*’s Response to Application, ¶ 61: “For example, in its submission in response to the *Amici* briefs, Afilias expressly confirmed that principles of international law and the requirements set forth in the Articles and Bylaws provide ‘*generally overlapping*’ safeguards.” (Emphasis added). Overlapping in that they apply to the same actions, not that they have identical content or requirements. This does not mean identical but that they apply to similar conduct.

¹³⁸ ICANN’s Response to Application, ¶ 42; *Amici*’s Response to Application, ¶ 60.

apply or address this principle, even implicitly. As Afilias laid out in its pleadings, the international obligation of good faith includes the following demanding requirements:

- “It requires, *inter alia*, that ICANN adhere to established substantive and procedural rules, provide those affected by its decision with the opportunity to be heard, base its decisions and actions on adequate information, and make decisions that are neither arbitrary nor unreasonable.”¹³⁹
- “Prohibited conduct may take the form of that committed with discriminatory or prejudicial intent (such conduct is also arbitrary and unreasonable)[.]”¹⁴⁰
- “Prohibited conduct may also take the form of that which is discriminatory or prejudicial merely in effect, even when superficially neutral treatment.”¹⁴¹
- “The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and providing reasons for actions taken.”¹⁴²
- “Investor-state arbitral tribunals have, for example, determined that it requires all applicable rules and regulations to be well established and knowable to those regulated by them.”¹⁴³
- “It is uncontroversial that the conduct of one party in any legal relationship may establish reasonable and justifiable expectations on the part of the other party.”¹⁴⁴

83. Stated simply, the Decision does not make even the slightest reference to the foregoing relevant elements of the obligation of good faith. As we have stated elsewhere, if it is the Panel’s position that Afilias did not state an International Law Claim, or that international law does not apply, or that the obligations incumbent upon ICANN under international law and the Bylaws are coterminous, or that the International Law Claim was disposed of part-and-parcel with

¹³⁹ Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 146.

¹⁴⁰ Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 149.

¹⁴¹ Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 149.

¹⁴² Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 155.

¹⁴³ Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 155.

¹⁴⁴ Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020), ¶ 160.

Afilias' other claims, then the Panel must say so in a well-reasoned manner. Otherwise, it must decide Afilias' International Law Claim.

V. THE PANEL MUST MAKE AN ADDITIONAL DECISION TO DECIDE AFILIAS' DISPARATE TREATMENT CLAIM

84. Afilias' Disparate Treatment Claim concerns ICANN's unfair and inequitable treatment of Afilias.¹⁴⁵ There can be no debate that the Panel did not decide the Disparate Treatment Claim.¹⁴⁶ Although the Panel recognized that Afilias stated such a claim,¹⁴⁷ and made a number of factual determinations in support of the claim,¹⁴⁸ the Panel stated that it did "not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims."¹⁴⁹ Moreover, no mention is made of Afilias' Disparate Treatment Claim in the Decision's *dispositif*. This is not only manifestly unfair to Afilias but also completely ignores the Panel's mandate to resolve and redress all of the claims Afilias presented.¹⁵⁰

85. While some of the Covered Actions underlying the claim overlap with those underlying the Rules Breach Claim, the Disparate Treatment Claim is not the same as Afilias' other claims in this IRP. It is based on different Covered Actions and different provisions of the

¹⁴⁵ Decision, ¶¶ 349-50.

¹⁴⁶ Decision, ¶ 350.

¹⁴⁷ Decision, ¶ 349 ("the Claimant has advanced a number of related claims, including that the Respondent violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign").

¹⁴⁸ Application, ¶ 86.

¹⁴⁹ Decision, ¶ 350 (emphasis added).

¹⁵⁰ Bylaws, [Ex. C-1], Sec. 4.3(a) (explaining that the "IRP is intended to hear and resolve Disputes"); *id.*, Sec. 4.3(g) (stating that the "IRP Panel shall be charged with hearing and resolving the Dispute"); *id.*, Sec. 4.3(i)(ii) (asserting that "[a]ll Disputes shall be decided"). The Panel cannot simply state that it "does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims" without providing any justification for the decision. Decision, ¶ 350. If the Panel believes that it lacked jurisdiction to resolve the claim, then the Panel must say that. If not, the Panel must resolve the claim.

Bylaws. Contrary to ICANN’s and the *Amici*’s position, Afilias’ Disparate Treatment Claim therefore was therefore not “sufficiently dealt with through Afilias ‘core claims’”.¹⁵¹

86. As explained in **Section II** above, a “claim” in an IRP is an allegation that a “Covered Action” (an “action[] or failure[] to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”) violated the Articles or Bylaws.¹⁵² Afilias’ Disparate Treatment Claim specifically alleged that ICANN “violated its Articles ... and Bylaws through its disparate treatment of Afilias and Verisign/NDC.”¹⁵³ The ICANN “action or inaction”¹⁵⁴ at issue for the Disparate Treatment Claim is, on its face, different from the Rules Breach Claim, which alleges that “ICANN violated its Articles ... and Bylaws ... by (a) not rejecting NDC’s application, and/or (b) not declaring NDC’s bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement or .WEB because of its violation of the New gTLD Program Rules.”¹⁵⁵

87. The Panel made the following findings in respect of ICANN’s disparate treatment of Afilias:

As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant’s core claims, such as turning to Verisign rather than NDC to obtain information about NDC’s arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias’ letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject

¹⁵¹ *Amici*’s Response to Application, ¶ 73; *see also id.*, ¶ 71 (“The so-called Disparate Treatment Claim was subsumed in the ‘core claims’ relating to ICANN’s alleged and unobjective and unfair conduct and decided by the Panel.”); ICANN’s Response to Application, ¶ 52 (“Thus, to the extent the Amended IRP Request invokes the prohibition on disparate treatment set out in Section 2.3 of the Bylaws, it does so in support of its Rules Breach Claim, which the Panel fully resolved.”).

¹⁵² Bylaws, [Ex. C-1], Sec. 4.3(b)(ii).

¹⁵³ Afilias’ Revised Statement of Issues, p. 1.

¹⁵⁴ *See* Bylaws, [Ex. C-1], Sec. 4.3(b)(ii).

¹⁵⁵ Afilias’ Revised Statement of Issues, p. 1.

of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach.¹⁵⁶

88. These factual findings, as the Panel recognized, are more than sufficient for the Panel to conclude that Afilias was treated disparately. What is lacking is a decision to that effect and a declaration in the Decision's *dispositif*. Having made factual findings establishing the claim, it is incumbent upon the Panel, consistent with its mandate, to include a specific declaration stating that ICANN treated Afilias disparately.

89. Afilias also alleged other facts that support its Disparate Treatment Claim. These include ICANN Staff's interactions with NDC and Verisign regarding the delegation of .WEB in late 2017 and early 2018, even though the .WEB contention set was supposedly on hold;¹⁵⁷ ICANN Staff's failure, in the same time period, to provide Afilias with any information;¹⁵⁸ ICANN Staff's decision, having "evaluated" Afilias' complaints,¹⁵⁹ to determine that Afilias' assertions that NDC had not violated the New gTLD Program Rules or that the violations were immaterial, and therefore to move towards delegating .WEB in June 2018;¹⁶⁰ ICANN Staff's decision to request

¹⁵⁶ Decision, ¶ 350.

¹⁵⁷ See, e.g., Email Jessica Hooper (Verisign) to Karla Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115]; Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018), [Ex. C-182].

¹⁵⁸ ICANN's Response to Afilias' DIDP, Request No. 20180223-1 (24 Mar. 2018), [Ex. R-30], p. 1; Letter from Jeffrey LeVee (Counsel for ICANN) to Arif Ali (Counsel for Afilias) (28 Apr. 2018), [Ex. C-80].

¹⁵⁹ The Panel is well-aware of the representation made by ICANN's counsel to Mr. Ken Reisenfeld, the Emergency Arbitrator and a fellow panelist, in the course of this very same IRP that ICANN had evaluated Afilias' complaints: "After NDC prevailed in a public auction for .WEB, Afilias and other .WEB applicants cried foul, alleging that Verisign's agreement with NDC violated the Guidebook and raised competition concerns. ICANN has evaluated these complains some of which also have been addressed in other fora." ICANN's Opposition, ¶ 3. That the Panel could simply overlook this representation and the other evidence that the Panel itself cited to the effect that ICANN had substantively considered Afilias' complaints is not only irregular but simply quite shocking; all the more so if the Panel had considered that ICANN confirmed multiple times in the early part of this IRP that it had evaluated Afilias' complaints. It was only at the last minute that ICANN came up with its made-for-IRP position regarding the Board's deferral of any consideration of the issues surrounding .WEB.

¹⁶⁰ See Email from Grant Nakata (ICANN) to Christine Willett *et al.* (ICANN) (14 June 2018), [Ex. C-169].

that Afilias respond to the Questionnaire without access to the DAA;¹⁶¹ and ICANN's continued support of NDC and Verisign in this IRP, despite claiming that it "has not taken sides."¹⁶² The Panel's decision must also include these findings, as they are supported by the evidence. It is not sufficient for the Panel to simply state that the few examples it listed demonstrating ICANN's disparate treatment of Afilias is sufficient (while also asserting that it is not "necessary" to add to the findings it already made with respect to Afilias' "core claims" and not to decide the Disparate Treatment Claim one way or the other). The Internet community needs to be made aware of the full extent to which Afilias was treated disparately and unfairly by ICANN. Moreover, the Board needs to be aware of ICANN's violations of its non-discrimination obligations, to ensure that they are not repeated (especially if Afilias' complaints are to be remanded to the Board to "pronounce upon"). Again, this is not a private arbitration, conducted solely to resolve rights and obligations between two private commercial parties. It is an accountability mechanism. If ICANN has violated the non-discrimination provisions of its Bylaws through the disparate treatment of a .WEB applicant (Afilias) in comparison to a non-applicant (Verisign), the only means of holding ICANN accountable is through a declaration to that effect. An IRP panel cannot simply decline to address a request for such a declaration based on its "view" that it is not "necessary" to do so.

90. Accordingly, Afilias requests that the Panel supplement its factual findings regarding ICANN's disparate treatment of Afilias, and also specifically determine whether Afilias prevailed on its Disparate Treatment Claim and to say as much in the *dispositif* of a "Second Final Decision." Such a finding is critical for Afilias in light of the Panel's decision to remand the

¹⁶¹ Decision, ¶ 315 (finding that ICANN's preparation and issuance of the Questionnaire "violated the Respondent's commitment, under the Bylaws, to operate in an open and transparent manner *and consistent with procedures designed to ensure fairness.*") (emphasis added).

¹⁶² ICANN's Response to Amended IRP Request, ¶ 4.

question of the DAA’s compliance back to the very party that treated Afilias unfairly and disparately in the first place.

VI. RESOLVING THE UNRESOLVED CLAIMS IN THIS IRP WILL NOT BE INCONSISTENT WITH THE DECISION.

91. ICANN and the *Amici* argue that any resolution now of the claims that Afilias says the Panel did not resolve would in some way be inconsistent with the *dispositif* of the Decision.¹⁶³ ICANN mischaracterizes Afilias’ Article 33 Application as seeking “reconsideration,” “revocation,” or “reversal” of the Panel’s decisions on the Rules Breach Claim, the International Law Claim, and Disparate Treatment Claim. It asserts that “Afilias would need the Panel to revoke the Final Decision and issue a new one reaching conclusions directly at odds with the reasoning and conclusions of the Final Decision, which the Panel is not at liberty to change.”¹⁶⁴ The *Amici* go still further, outright alleging that Afilias “seeks [the] reversal of the Panel’s decision.”¹⁶⁵

92. To be absolutely clear: Afilias does not seek “reconsideration,” “revocation,” or “reversal” of the decision on the claims that were decided; namely, the claim for injunctive relief asking the Panel to order ICANN to disqualify NDC’s application, reject its bids, and deem it ineligible to enter into a registry agreement for .WEB.

¹⁶³ In any event, even if ICANN is correct and the resolution of the claims will result in an illogical Decision, such illogicality indicates that the Panel failed to deal with Afilias’ claims. *See, e.g., Metropolitan Property Realizations Ltd. v. Atmore Investments Ltd.* [2008] EWHC 2925 (Ch), **Ex. CA-160** (showing how English courts have upheld challenges to arbitral awards (or portions thereof) for failure to resolve all claims where, as here, the award contains a “glaring illogicality”). *Metropolitan Property* still constitutes good law because a decision of the English High Court cannot be overturned by another decision of the English High Court. ICANN suggests that *Metropolitan Property* should be read in such a way that an illogicality is not a free-standing ground to challenge an award, but instead can be indicative of a tribunal’s failure to decide an issue, which can be grounds for challenge. ICANN’s Response to Application, n.16. Afilias agrees. The illogicalities in the Panel’s Decision further indicate that it failed to decide Afilias’ claims.

¹⁶⁴ ICANN’s Response to Application, ¶ 1.

¹⁶⁵ *Amici*’s Response to Application, ¶¶ 5, 7, 13.

93. The aforementioned complaints of ICANN and the *Amici* are nothing more than an attempt to deflect attention from the fact that—as discussed in the previous sections—the Panel did not resolve Afiliás’ Rules Breach Claim, International Law Claim, or Disparate Treatment Claim either in its reasoning or its *dispositif*. If the Panel agrees that it failed to resolve these claims, it must supplement or revise its orders for relief. Otherwise, this would lead to an absurd situation whereby, even though the Panel is in agreement that it failed to decide all of Afiliás’ claims, Afiliás’ only remedy would be from the English courts—which would require even more time and expense for the resolution of this dispute.

94. In any event, it is worth noting that the Panel would not need to alter a single word of the Decision’s existing *dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each. This is hardly surprising given that any supplementary award by the Panel will grant declaratory relief in respect to claims that the Panel omitted to resolve in the Decision.¹⁶⁶ So long as the Panel’s declarations on each of the claims are inserted into the existing *dispositif* prior to the catch-all dismissal of all other matters, no further alterations would be needed.¹⁶⁷ We respectfully submit that if the Panel agrees with us that it did not resolve the

¹⁶⁶ The Panel’s assertion that the Rules Breach Claim is “premature pending consideration by the Respondent” does not preclude declarations concerning whether ICANN’s historic actions breached the Articles and Bylaws. Decision, ¶ 413(7). As we have set out in this submission and our Application, Afiliás sought throughout the IRP, *inter alia*, (a) declarations that ICANN had breached its obligations under the Articles and Bylaws by failing to disqualify NDC’s application and/or bid for .WEB and/or to deem NDC ineligible to enter into a registry agreement for .WEB, and (b) mandatory declarations that ICANN now disqualify NDC’s application and/or bid for .WEB and/or deem NDC ineligible to enter into a registry agreement for .WEB. Afiliás’ claims for declaratory relief in respect of ICANN’s past actions (or inactions) and its claims for a quasi-injunctive declaration requiring ICANN to act in a specified manner going forward were separate claims for relief in the IRP. At all times prior to the publication of the Decision, ICANN accepted and understood that the claims made by Afiliás in this IRP included its claim that ICANN had “violated its Bylaws’ ... by not immediately disqualifying NDC’s application or auction bids in 2016...” (see for example Appendix A to ICANN’s Post Hearing Brief). The Decision however did not address or determine Afiliás’ claim for a declaration that ICANN’s historic actions (or inactions) with regard to NDC’s .WEB application and bid breached its Articles and Bylaws.

¹⁶⁷ With respect to the Panel’s catch-all, as previously discussed, the omnibus dismissal of all claims in the dispositive section of an award does not, without more, preclude an additional award—under English law and/or otherwise. The Panel’s blanket dismissal of “all of the Parties’ other claims and requests for relief” cannot prevent the Panel from considering Afiliás’ Rules Breach, International Law and Disparate Treatment Claims. A bare dismissal of

claims we have identified and resolves those claims in our favor as we believe it must in light of the evidence and submissions before it, the *dispositif* could be amended as set out in Annex B to this submission.

VII. AFILIAS' REQUESTS FOR INTERPRETATION OF THE DECISION

95. ICANN and the *Amici* allege without support that Afiliás' requests for interpretation also constitute requests for reconsideration or re-argument. As we have categorically stated in the previous section Afiliás seeks neither. Unlike ICANN and the *Amici*, Afiliás refrained from proposing how the points of clarification should be resolved. Rather, Afiliás simply seeks clarification of certain of the Panel's statements in its Decision that would permit a clearer understanding of what the Panel decided.

96. As with our decision to ask the Panel to decide those of its claims that it left unresolved, Afiliás did not take lightly its decision to ask the Panel to interpret certain aspects of the Decision. We did so simply because there are core elements of the Decision that struck us as simply inconsistent, incongruous and hard to follow. For example, it is impossible, based on the Panel's reasoning, to reconcile the Panel's ruling regarding when Afiliás' Rules Breach Claim crystallized (set out in paragraph 273) and its determination that ICANN never evaluated and pronounced on Afiliás' complaints.¹⁶⁸ It is equally unclear whether the Panel decided to not rule on the Rules Breach Claim as a matter of jurisdiction or whether it considered that inaction by ICANN may not serve as a basis for a claim. A further example is provided by the Panel's treatment, or lack thereof, of the requirement that ICANN must conduct its activities in accordance

all claims cannot rescue a tribunal from a failure actually to deal with all claims before it. If this were the case, Article 33 of the ICDR Rules and section 68(2)(d) of the EAA (as well as corresponding provisions in other arbitration rules and national statutes) could be rendered ineffective by tribunals simply including the chosen words in the dispositive section of an award. See *Cadogan Maritime Shipping Inc v. Turner Shipping Inc.* [2013] EWHC 138 (Comm), Ex. CA-165, ¶ [43].

¹⁶⁸ Decision, ¶ 335.

with principles of international law. Although there are other examples we could cite and could have included in our request for interpretation, we chose to focus on certain points which we believe, if properly addressed by the Panel, would assist the Parties and all concerned stakeholders in implementing the Panel’s rulings, and guiding future IRPs.

97. The Bylaws expressly provide that an IRP panel’s decision must “*reflect a well-reasoned application* of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws.”¹⁶⁹ A well-reasoned decision, by necessity, requires that the parties to the IRP understand the Panel’s conclusions. Given that the Panel’s decision is *not* clear, Article 33 of the ICDR Rules expressly provides the Parties with a proper method to request formally that the Panel clarify its decision (**Section A**).¹⁷⁰ In accordance with Article 33, Afiliias thereby requested that the Panel “provide an interpretation of several ambiguous and vague points of substance and reasoning contained in the Decision.”¹⁷¹

98. In their Responses to Afiliias’ Application, both ICANN and the *Amici* reinforce the Decision’s ambiguity and thus the need for Afiliias’ requested interpretations (**Section B**). ICANN and the *Amici* allege that Afiliias’ request is unwarranted because the Panel clearly resolved the “ambiguous and vague points.”¹⁷² However, if the Panel clearly resolved those points in the manner that ICANN and the *Amici* propose in their respective Responses, then neither ICANN nor the *Amici* have any basis for their objections—the Panel’s responses to Afiliias’ requests for interpretation should be in accordance with ICANN and the *Amici*’s view of the Decision.

¹⁶⁹ Bylaws, [Ex. C-1], Sec. 4.3(v) (emphasis added).

¹⁷⁰ ICDR Rules, Art. 33(1).

¹⁷¹ Application, ¶ 90.

¹⁷² ICANN’s Response to Application, Sec. IV; *Amici*’s Response to Application, ¶ 76.

99. The Panel’s clarification of those of its rulings that we presented in our request for interpretation is also necessary as a matter of fundamental fairness and due process (**Section C**). The requested clarifications, if provided, will go a long way towards minimizing any future unfair or discriminatory treatment of Afilias by ICANN in the context of ICANN’s implementation of the Panel’s Decision as it currently stands.

A. The Scope of Afilias’ Request for Interpretation Is Proper.

100. ICANN and the *Amici* attempt to narrow the scope of the Panel’s interpretative jurisdiction under Article 33 into a nullity. They argue that interpretation is rarely sought and rarely granted.¹⁷³ But ICANN and *Amici* miss the point. Interpretation is rarely granted *because* it is rarely sought. Furthermore and self-evidently, rarely is not the same as never. In any event, as the Panel is aware, this IRP is the first to be conducted under ICANN’s new (and intended-to-be) “enhanced accountability” rules.¹⁷⁴ Given that critical context, as well as the Panel’s mandate under the Bylaws and English law, and the consequences of the Panel’s ruling for ICANN’s accountability not only pursuant to the IRP framework, but also before courts of law, this case is certainly one that falls within the purview of the “rare” instances where interpretation is warranted.

101. The Panel’s interpretative jurisdiction must also be understood in light of the requirements of the Bylaws, and specifically the requirements that the Panel’s resolution of the Disputes “*reflect a well-reasoned application* of how the Dispute was resolved in compliance with

¹⁷³ ICANN’s Response to Application, ¶ 58 (“Accordingly, ‘it is very rare for interpretations to be either sought or granted.’”); *Amici*’s Response to Application, ¶ 77 (“As we explain below, interpretation under Article 33 is a narrow remedy that is rarely granted at all, let alone expanded to encompass the substantive explanations and analysis contemplated by Afilias’ Application.”).

¹⁷⁴ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], p. 5.

the Articles of Incorporation and Bylaws.”¹⁷⁵ The English courts confirm that interpretation should be afforded even in an ordinary arbitration to clarify “inadequacy or absence of analysis.” In *Buyuk Camlica*, for example, the court held that applications for clarification (the term used in the English Arbitration Act) can

arise in cases where there is doubt as to whether a tribunal has left over for future determination some issue or claim in the reference..., or where a tribunal has come to a decision but there is some inadequacy or absence of analysis in its reasoning that leaves it unclear whether and, if so, how it has dealt with certain issues in order to arrive at its decision.¹⁷⁶

Consequentially, although Afiliás only requests interpretation connected to the *dispositif* (as made clear in the Request for Interpretation), clarifying key elements of reasoning would nevertheless be critical in the IRP context.¹⁷⁷

B. ICANN and the *Amici*'s Responses to the Request for Interpretation Demonstrate that the Decision is Unclear.

102. The ambiguity inherent in the Decision is well-evidenced by ICANN and the *Amici*'s heated responses to Afiliás' interpretation request. Both ICANN and the *Amici* maintain that it is perfectly obvious what the Panel means across the board. If they are correct, then there can be no harm and some benefit in the Panel confirming that meaning. After all, any explanation or confirmation provided by the Panel will shorten the dispute by resolving key issues clear to both

¹⁷⁵ Bylaws, [Ex. C-1], Sec. 4.3(v).

¹⁷⁶ *Buyuk Camlica Shipping Trading & Indus. Co. v. Progress Bulk Carriers Ltd.* [2010] EWHC (Comm) 442, [Ex. RLA-79], ¶ [43].

¹⁷⁷ The *Amici*'s position that Afiliás is seeking clarification of the Panel's factual findings therefore not only incorrectly interprets Afiliás' purpose for submitting the Article 33 Application but also ignores the logical consequences of any interpretation of the Final Decision's dispositive. *Amici*'s Response to Application, ¶ 80 (“In addition, it is not proper to use the interpretation process, as Afiliás attempts to do, to seek (i) ‘clarification of [the Panel’s] factual findings in order to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question’ or (ii) ‘so-called interpretation of the award on the basis that the tribunal did not in its award address all of the parties’ submissions.’”).

the Parties and the *Amici* rather than keeping them ambiguous and ripe for challenge in future IRPs.¹⁷⁸

103. ICANN and the *Amici* really only make two points applied equally to all of our requests for interpretative relief. **First**, they argue that interpretation is irrelevant to the effective execution of the Decision and therefore impermissible.¹⁷⁹ But in all cases, they simply ignore the significance both for this dispute and for all future disputes, as the Decision is binding precedent for ICANN and for other IRP panels. **Second**, they argue that the relevant parts of the Decision are perfectly clear and subject to no reasonable disagreement.¹⁸⁰ But the very fact that the ICANN and the *Amici* are so vigorously opposing the requests shows that these arguments are misguided. If the answer to Afilias' Requests is so obvious, as ICANN and the *Amici* so claim, then there is no need for them to resist Afilias' requests—the IRP Panel will of course adopt their apparent position as the obvious interpretation of its Decision.

104. Afilias nonetheless addresses below ICANN and the *Amici*'s positions regarding each issue identified in the interpretation requests to provide the Panel with even further basis for responding to the requests in a “well-reasoned” and clear manner.

1. Meaning of Pronounce

105. In its Article 33 Application, Afilias requested an interpretation of the term “pronounce” as used in the Decision (covering its process, form, and substance), including the meaning of the decision that ICANN had failed to “pronounce,” the recommendation that ICANN

¹⁷⁸ The *Amici*'s claim that Afilias' Requests for Interpretation is, for the same reason, simply illogical. *Amici*'s Response to Application, ¶ 87 (“Rather, Afilias' Article 33 Application confirms only that Afilias will seize every opportunity to prolong this years-long dispute, even without a legitimate basis to do so, thereby adding time and expense to the proceeding and continuing to injure *Amici*.”).

¹⁷⁹ ICANN's Response to Application, ¶ 63; *Amici*'s Response to Application, ¶ 101.

¹⁸⁰ ICANN's Response to Application, ¶¶ 64-68; *Amici*'s Response to Application, ¶ 84.

now “pronounce,” and the basis for those decisions in the Articles and Bylaws.¹⁸¹ This request for interpretation concerned the use of that term throughout the Decision, but particularly in the Panel’s recommendation “that the Respondent stay any and all action or decision ... until such time as the Respondent’s Board *has ... considered and pronounced* upon the question of whether the DAA complied with the New gTLD Program Rules ...”¹⁸²

106. As discussed in **Section II**, absolute clarity on the source of this term in the Bylaws, and the effect of this standard or requirement is necessary so that Afiliias and future IRP applicants may understand whether there is a jurisdictional pre-requisite requiring some form of formal Board pronouncement before an IRP may be commenced; what form such a pronouncement must take; and what the interrelationship is between the requirement of a pronouncement and the fact that the Bylaws provide a clear jurisdictional basis for an IRP based on Board *or* Staff inaction as well as action. That is especially so given that the term “pronounce upon” is nowhere to be found in the Articles, Bylaws, New gTLD Program Rules, or any other applicable legal instrument of which we are aware. As stated in our Application, it does not appear to be a word that the Parties or the *Amici* ever used in their extensive submissions in this IRP. Neither ICANN nor the *Amici* dispute that fact in their responses to the Application.

107. Moreover, the Panel’s assertion that the Board should “pronounce upon” these issues “in the first instance” is explicitly “predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate review of an IRP Panel, will take a position as to whether the conduct as to conduct complained of complies with the Guidebook and the Auction Rules.”¹⁸³ The term “take ownership” is also nowhere to be found

¹⁸¹ Application, ¶ 98.

¹⁸² Decision, ¶ 413(5) (emphasis added).

¹⁸³ Decision, ¶¶ 299, 322.

in any of the applicable legal instruments governing these proceedings. It would be easy enough for the Board simply to adopt all the positions stated by the *Amici* in this case—along with the numerous arguments that ICANN itself has made adverse to Afilias—and incorporate them in a “pronouncement” rejecting Afilias’ complaints. Based on its conduct to date, that is very likely what the Board will do unless this Panel provides some content to these otherwise vague and undefined terms.

108. ICANN and the *Amici* do not, in fact, seek to dispute that the requested interpretation is directly relevant to the effective execution of the Decision. Indeed, the *Amici* directly concede that this request for interpretation is “conceivably appropriate under Article 33” because it “concerns the clarification of an allegedly ambiguous term used by the Panel in the *Dispositif*.”¹⁸⁴ Their acceptance of its relevance is hardly surprising given that the term “pronounce” is the centerpiece of the Panel’s sole attempt at fulfilling, however imperfectly, its mandate to resolve fully the dispute over .WEB.¹⁸⁵ Given that the Panel elected, contrary to its mandate, not to resolve the entirety of the dispute between ICANN and Afilias, it must make its sole remedy effective (or as effective as possible under the circumstances) by providing a comprehensive interpretation.

109. Nevertheless, ICANN and the *Amici* each resist the request for interpretation on the supposed grounds that it is *entirely* clear what the Panel meant with the term “pronounce.”¹⁸⁶ However, ICANN and the *Amici* do not agree upon the meaning of the term. This fact alone shows that the *dispositif* is vague and ambiguous. ICANN, for its part, alleges that the term “pronounce”

¹⁸⁴ *Amici*’s Response to Application, ¶ 83.

¹⁸⁵ Bylaws, [Ex. C-1], Sec. 4.3.

¹⁸⁶ ICANN’s Response to Application, ¶¶ 64-68; *Amici*’s Response to Application, ¶¶ 83-85.

“is used interchangeably with ‘decide,’ ‘determine,’ or ‘resolve.’”¹⁸⁷ The *Amici*, in turn, allege that the term “pronounce” “in this context is a transitive verb meaning to declare officially or authoritatively.”¹⁸⁸ It goes almost without saying that these are not equivalent definitions and, in the context of the Panel’s recommendation, demand different actions from ICANN. Indeed, ICANN’s proposal is not even supported by dictionary definitions—only ICANN’s bare assertion that it is unambiguous—and the dictionary definitions that both Afilias and the *Amici* have put forward are flatly inconsistent with ICANN’s proposal. As such, the Panel’s use of the term “pronounce” stands in serious need of interpretation.

110. ICANN and the *Amici* finally complain that the requested interpretation lies outside of the Panel’s jurisdiction. ICANN argues that the interpretation would amount to an advisory opinion and the *Amici* argue that it lies outside of the Panel’s Section 4.3(o) remedial authority.¹⁸⁹ Neither argument makes any sense in the context of the Decision.¹⁹⁰ The Panel accepted it had the authority to recommend that ICANN “consider” and “pronounce upon” the DAA’s compliance with the New gTLD Program Rules.¹⁹¹ If the Panel had the authority to recommend that ICANN consider and pronounce, then it clearly has the authority under Article 33 to clarify precisely what it meant by that recommendation.

2. Requirement to Pronounce

111. In its Article 33 Application, Afilias requested an interpretation of the Panel’s determination that ICANN’s Board must first pronounce upon Afilias’ challenge to ICANN Staff’s

¹⁸⁷ ICANN’s Response to Application, ¶ 66. Bizarrely enough, *Amici* are not even capable of consistently defining the term “pronounce” throughout their brief. See *Amici*’s Response to Application, .

¹⁸⁸ *Amici*’s Response to Application, ¶ 84.

¹⁸⁹ ICANN’s Response to Application, ¶ 68; *Amici*’s Response to Application, ¶¶ 88-90.

¹⁹⁰ Even putting aside that Afilias denies the assumed restrictions on the Panel’s authority.

¹⁹¹ Decision, ¶ 413(5).

decision to move forward with the delegation of .WEB, and specifically whether or not this prerequisite applies to all IRP challenges as well as its factual and legal basis.¹⁹²

112. It is critical that the Panel interpret this holding for the effective execution of its Decision in this case and beyond. What is in question is the scope of that holding. However, ICANN responds (or does not) to the Decision, it is nearly inevitable that either Afilias or Verisign/NDC will be aggrieved and will pursue a second IRP regarding .WEB (given the absence of a decision by the Panel on ICANN's failure to disqualify NDC's application, reject its bids and deem NDC ineligible to enter into a registry agreement). The scope of the Panel's holding will inevitably be at issue as to whether ICANN complied with its supposed obligation to "pronounce" and whether that supposed prerequisite to an IRP was satisfied.

113. And there can be little doubt that the Panel has left the scope and, relatedly, the basis for its holding acutely vague and ambiguous. This is underscored by the reactions of ICANN and the *Amici* to that holding. Both ICANN and the *Amici* deny that the Panel's prerequisite that the Board pronounce on Staff action or inaction prior to an IRP has any general application even while celebrating its application to the present dispute.¹⁹³ Although these contradictory positions are opportunistic in their origins, they nevertheless raise a critical question of principle. If "pronouncement" is a requirement in this case but not in general, in precisely which cases must this prerequisite of Board pronouncement be satisfied, and in what form must it be provided, before an IRP? The Decision provides no answer to this question—not even by illuminating the basis for

¹⁹² Application, ¶ 103.

¹⁹³ ICANN's Response to Application, ¶ 69; *Amici*'s Response to Application, ¶¶ 91-92. *Amici* seem also to have lost the plot here. They criticize Afilias' request for interpretation on the grounds that the Panel "does not have authority to 'declare' that ICANN must take some specific action in the future" and "[y]et that is what Afilias now seeks through the guise of interpretation." *Amici*'s Response to Application, ¶ 92 (quoting ICANN's Rejoinder Memorial, ¶ 119). Although Afilias is not challenging the Panel's decision on the prerequisite, Afilias takes the position that this prerequisite should never be applied to claims regarding ICANN Staff action and inaction.

the supposed prerequisite—and yet its holding will inevitably be invoked by ICANN in every future IRP regarding Staff action and inaction.

114. Indeed, the problem is amply demonstrated even by ICANN’s own attempt to show that the Panel created no broad requirement. ICANN argues that the Panel elected to decide upon Staff actions and inactions upon which the ICANN Board never pronounced.¹⁹⁴ And yet the Panel failed to decide other claims that Afilias submitted regarding Staff action and inaction precisely on the basis that the ICANN Board never pronounced.¹⁹⁵ The Panel has left the claimant in an IRP to guess as to when this supposed prerequisite applies. Whenever the claimant in an IRP guesses wrong, it will run the risk of pursuing a lengthy and extremely expensive IRP (that nominally imposes no such prerequisite) only to have its claims left undecided on this basis. This is inefficient and wasteful and runs directly contrary to the requirements in the Bylaws that an IRP panel decide all claims submitted to it in a clear and well-reasoned manner.

3. ICANN’s Knowledge, Expertise, and Experience

115. Afilias requested an interpretation of the basis for the Panel’s finding that ICANN has unique “knowledge, expertise, and experience” that supports “pronouncement” as a prerequisite to an IRP.¹⁹⁶ ICANN, followed by the *Amici*, objects that there can be no “contention that an additional explanation on this point is necessary for the parties to execute the Final Decision.”¹⁹⁷ This is simply mistaken.

116. It was on the basis of ICANN’s (and specifically the Board’s) supposedly unique “knowledge, expertise, and experience” that the Panel rejected Afilias’ injunctive relief and instead

¹⁹⁴ ICANN’s Response to Application, ¶ 70.

¹⁹⁵ Most importantly, the Panel denied Afilias’ claim that ICANN must disqualify NDC’s bid for .WEB for violating the Guidebook and Auction Rules (*see* Decision, ¶ 9), something on which the ICANN Board never pronounced.

¹⁹⁶ Application, ¶ 111.

¹⁹⁷ ICANN’s Response to Application, ¶ 81; *Amici*’s Response to Application, ¶¶ 95-98.

remanded the matter to the Board.¹⁹⁸ The Panel thus (apparently) assumed that the ICANN Board’s “knowledge, expertise, and experience” were in some way grounds supporting the remand. But unless the Panel specifies the grounds for its conclusion regarding these qualifications, Afilias, ICANN, and the *Amici* will be unable to determine when a future panel addressing .WEB might decline to decide claims otherwise properly before it. This same uncertainty will also plague future claimants in an IRP, as the Decision is both precedent and highly likely to be invoked by ICANN on this particular point.

117. ICANN tellingly asserts simply that it is “self-evident” that ICANN, and not an IRP panel, has the relevant “knowledge, expertise and experience”¹⁹⁹ whereas the *Amici* point to ICANN’s development of the New gTLD Program Rules. However, both ignore the fact that the Panel undertook no examination of the knowledge, expertise and experience of the current Board members as a whole and indeed had no evidence before it on that subject. The only sitting Board member whose qualifications it considered was Becky Burr,²⁰⁰ who actually affirmed in her testimony to the Panel that an IRP panel *has the expertise* to determine whether, “in taking some action or inaction or failing to act, ICANN violated its bylaws,” including “in *its application of the rules of the applicant guidebook.*”²⁰¹

118. The Panel also invokes the “deference” it has decided to afford to ICANN based on its requisite knowledge, expertise and experience. That is also puzzling (if not inexplicable), given that the Panel is required to resolve Disputes consistent with the Articles and Bylaws, in the context of prior IRP decisions. Yet prior IRP decisions (issued prior to the enhanced Rules under which

¹⁹⁸ Decision, ¶ 362.

¹⁹⁹ ICANN’s Response to Application, ¶ 82.

²⁰⁰ Chris Disspain has left the Board.

²⁰¹ Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination) (emphasis added).

this Panel is required to make its Decision) have consistently held that “[n]othing in the Bylaws specifies that the IRP Panel’s review must be founded on a deferential standard,” and that “[s]uch a standard would undermine the Panel’s primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN’s commitment to maintain and improve robust mechanisms for accountability ...”²⁰² This Panel explicitly declined to base any deference given to ICANN on the business judgment rule.²⁰³ Especially given that the Panel has apparently created a new rule of deference to be afforded to ICANN—in the context of the first IRP decided under ICANN’s enhanced accountability rules, and which appears to contradict every prior IRP decision to have considered the issue—it is at the very least incumbent upon the Panel to articulate the basis for this “discretion,” and how it believes such discretion should be exercised by future IRP Panels (including the one that may have to resolve the disputes that this Panel may eventually leave unresolved depending on the outcome of Afiliás’ Application).

119. Finally on this point, if the premise of the Panel’s decision is that it is ICANN Staff that has the requisite knowledge, expertise and experience, then, as recognized by the Panel, and admitted by ICANN in the course of this IRP, Staff exercised that knowledge, expertise and experience—but in our view, did so incorrectly and unfairly; hence, our Rules Breach Claim.

²⁰² *Corn Lake v. ICANN*, Final Declaration (17 Oct. 2016), **Ex. CA-16**, ¶ 8.16 (quoting *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), **Ex. CA-2** ¶ 124); *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), **Ex. CA-11**, ¶ 111.

²⁰³ Decision, ¶ 328. *See also* Application, n.111.

4. Applicable Law

120. Afilias requested an interpretation of the Panel’s decision on the applicable law, including whether California law applied exclusively, what law applied to ICANN’s Articles and Bylaws, and whether international law imposes obligations on ICANN.²⁰⁴

121. Although ICANN, followed by the *Amici*, would have the Panel believe that the law applicable to ICANN, its Articles, and Bylaws is of no practical relevance,²⁰⁵ this position at best reflects ICANN’s lack of serious commitment to compliance with its obligations. Removing uncertainty regarding the applicable law is obviously necessary for the effective execution of the Decision. The applicable law determines the content of ICANN’s legal obligations. If international law is applicable to ICANN, then ICANN’s execution of the Decision—including the recommendation to “pronounce”—must be in full accord with international law. ICANN’s obligations under international law would be particularly critical because the Decision provides a paucity of detail as to precisely what actions ICANN should now take—international law would provide significant additional constraints, most importantly the obligation for ICANN to respect legitimate expectations.

122. Although ICANN has long maintained that international law is entirely irrelevant to its legal obligations,²⁰⁶ it now opportunistically concedes Afilias’ position on international

²⁰⁴ Application, ¶ 107.

²⁰⁵ ICANN’s Response to Application, ¶ 79.

²⁰⁶ *See, e.g.*, ICANN’s PHB, Appendix A, n.1 (“if Afilias were to assert such a claim it would be outside the Panel’s jurisdiction, which is limited to determining if a Covered Action violated the Articles and Bylaws.”). *See also* ICANN’s Response to Application, ¶ 40 (“Afilias was well advised in not making a separate ‘International Law Claim’ because the Panel would clearly lack jurisdiction over such a claim. The Panel had jurisdiction to determine whether ‘Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]’ Section 1.2(a) of the Bylaws commits ICANN to ‘carrying out its activities in conformity with relevant principles of international law and international conventions.’ Thus, the Panel could properly consider principles of international law in determining whether an action or inaction by ICANN violated Section 1.2(a). However, the Panel did not have jurisdiction to adjudicate a freestanding international law claim.”).

law.²⁰⁷ Indeed, it insists that the Panel left the question of the applicable law vague: “[t]he Panel stated only that the Interim Supplementary Procedures, Articles and Bylaws are to be interpreted in accordance with California law in case of ambiguity.”²⁰⁸ However, it relies on its concession regarding international law in order to maintain that no interpretation of the applicable law is needed.²⁰⁹

123. This is nothing more than a litigation tactic and one that ICANN will almost certainly reverse once Afilias’ Article 33 Application is resolved—just as it has made inconsistent assertions about the remedial authority of IRP panels before different adjudicators.²¹⁰ Whatever ICANN’s announced view may be on international law, the Panel quite obviously left it vague and ambiguous as to whether it applies to ICANN, both as an interpretative framework for its Bylaws and as independent obligations. The only clear decision that the Panel made on the applicable law was that it includes California law—the Panel otherwise left the status of international law vague and ambiguous in the Applicable Law section of the Decision and elsewhere.²¹¹ To prevent ICANN from denying the application of international law the second the Panel becomes *functus officio*, the Panel must now confirm that international law is indeed applicable to ICANN, its Articles, and its Bylaws, how and to what effect.

5. Standard of Proof

124. Afilias sought an interpretation of the standard of proof, including precisely where the Panel applied a heightened standard and the significance for the resolutions of the issues in

²⁰⁷ See **Section IV.E**.

²⁰⁸ ICANN’s Response to Application, ¶ 75.

²⁰⁹ ICANN’s Response to Application, ¶¶ 40-42.

²¹⁰ See *Ruby Glen v. ICANN et al.*, Case No. 16-56890, Appellee’s Answering Brief (30 Oct. 2017), [Ex. C-187].

²¹¹ Decision, ¶ 29.

dispute.²¹² This request is critical to the effective execution of the Decision, particularly the Panel’s decision to remit the question of NDC’s compliance with the New gTLD Program Rules to the ICANN Board, since the standard applied by the Panel will necessarily guide any analysis performed by the ICANN Board (and any future IRP panels).

125. Both ICANN and the *Amici* repeatedly emphasize that there is no doubt regarding the standard applied by the Panel. Both decisively affirm that the Decision “applies the ‘balance of probabilities’ in the normal manner” and that allegations of fraud require more scrutiny.²¹³ Yet, ICANN and the *Amici* only make broad assertions; neither even attempt to identify which of these standards the Panel applied to each issue in the *dispositif*, which were expressly identified as part of Afiliás’ Requests, even though the Panel’s application of those standards was apparently clear.²¹⁴

126. Nor do ICANN and the *Amici* explain why they are opposing Afiliás’ request that the Panel clarify the standard of proof that it employed. Afiliás notably did not argue in its Requests for Interpretation that the Panel used or should have used a certain standard of proof in its Decision.²¹⁵ Afiliás simply requested that the Panel clarify which issue (if any) received greater scrutiny (*i.e.*, a heightened standard of proof). If, as ICANN and the *Amici* allege, the standard of proof applied in the Decision is unambiguous, then there is no reason for them to oppose Afiliás’ request because the Panel’s response will fall in line with their Responses.

²¹² Application, ¶ 114.

²¹³ ICANN’s Response to Application, ¶ 87; *Amici*’s Response to Application, ¶ 99.

²¹⁴ Application, ¶ 114.

²¹⁵ Application, ¶¶ 112-14.

C. Fairness and Due Process Require the Panel to Interpret and Clarify its Decision

127. The ambiguities and contradictions in the Decision require clarification for an additional reason: fairness and due process. As it stands, the Panel’s incomplete Decision (*i.e.*, not definitively deciding the claims that Afilias actually presented for decision), and its decision to give ICANN’s Board a second chance to consider and “pronounce” upon whether NDC’s conduct and the DAA are in accord with the New gTLD Program Rules—notwithstanding the fact that ICANN never requested this specific relief²¹⁶—but without any clear guidance on important issues such as those mentioned in **Section B**, have given ICANN free hand. At least that is how ICANN will see it.

128. But ICANN’s hands are by no means clean, and ICANN should not be allowed to use the Panel’s opaque reasoning to wash them clean. As this Panel recognized—but did not rule—Afilias was treated unfairly and disparately by ICANN throughout the process leading up to the IRP. Its Staff already considered Afilias’ complaints and proceeded with the delegation of .WEB, which necessarily entailed a decision on the merits of Afilias’ complaints. ICANN has also consistently sided with the *Amici* throughout these proceedings and been harshly critical of Afilias from the outset of this IRP. It is hardly likely that Staff, which determines what information

²¹⁶ ICANN did argue that the Panel could not decide certain issues which are allegedly reserved to the ICANN Board. *See, e.g.*, ICANN’s PHB, ¶ 170 (“The Board’s decision not to make any material decisions regarding .WEB while an Accountability Mechanism was pending was undoubtedly a reasonable business judgment made in the exercise of the Board’s fiduciary duties. Accordingly, that decision is entitled to deference. The Bylaws are clear that where, as here, ‘Claims aris[e] out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable [business] judgment with its own.’”) (internal citations omitted). *See id.*, at 23 *et seq.*; ICANN’s Rejoinder Memorial, ¶ 120. But ICANN never specifically requested the Panel for any form of affirmative relief, including the relief that the Panel ultimately granted—sending the issue of NDC’s compliance with the New gTLD Program Rules back to ICANN. As ICANN and the *Amici* correctly state, an argument is not the same as a claim or request for relief. Having been hyper-technical throughout this IRP regarding pleading requirements, ICANN cannot now be allowed to retrospectively fashion arguments into requests for relief.

the Board receives,²¹⁷ will reconsider the position that it already took with respect to NDC's conduct and the DAA, particularly given the absence of any guidance from the Panel on how ICANN must now proceed. The Panel's questions, regarding which ICANN must now take "ownership," hardly constitute guidance and, as we have demonstrated, ICANN has already taken a position on these questions; positions that are contrary to those espoused by Afilias.

129. We respectfully submit, therefore, that it is imperative that, in addition to ruling on the unresolved claims, the Panel must clarify its decisions in a sufficient manner to ensure that as the question of .WEB's disposition proceeds, it does so on the basis of a level playing field.

VIII. ICANN'S CLAIM FOR ITS COSTS IS BASELESS

130. ICANN's request to be awarded its costs and attorneys' fees in connection with the Application is without merit, based on a mischaracterization of the Panel's rulings in the Decision regarding the allocation of costs and must be rejected.

131. Afilias accepts that the Panel has, in principle, the power to allocate the costs of the Application between the Parties. However, this power is subject to the provisions of ICANN's Articles and Bylaws, and must be exercised in accordance with the Panel's rulings in the Decision regarding its power to allocate costs. In particular, the Panel held that "The cost-shifting authority of IRP Panels is contingent upon two (2) findings. First, that the party claiming its costs be the prevailing party; and second, that the IRP Panel identify the losing party's Claim or defense as

²¹⁷ In this regard, the Panel will recall that Staff apparently did not include in the briefing materials that were provided to the Board in advance of the November 2013 meeting—at which the Board apparently decided to defer considering .WEB—any information about Afilias' complaints, the responses to the Questionnaire, or the DAA itself.

frivolous or abusive.”²¹⁸ The Panel went on to confirm that costs could be shifted in relation to part of a Claim or defense, provided that said part was frivolous or abusive.²¹⁹

132. Thus, if Afiliás succeeds in this Application (which it must, for all the reasons given above), ICANN clearly has not prevailed in the Application, and the question of allocating costs in favor of ICANN does not arise.

133. Even if Afiliás does not prevail in whole or in part on this Application, ICANN is not entitled to its costs and attorneys’ fees. The Panel clearly identified in its Decision that its power to shift costs was contingent upon a Claim or defense (or a part thereof) being identified as frivolous or abusive.²²⁰ In its Response, ICANN mischaracterizes the Panel’s decision on its cost-shifting power, omitting the requirement that a Claim or defense (or a part thereof) be found frivolous or abusive:

In the Final Decision, the Panel rejected ICANN’s argument that Article 4.3(r) allows shifting of costs and fees only when a Claim or defense is found as a whole to be frivolous or abusive. The Panel found instead that, read in light of Article 4.3(t) and the general “practice of international arbitration,” Article 4.3(r) allows for cost shifting separately for “each part of a Claim.”²²¹

ICANN’s omission of the requirement that a part of a Claim be frivolous or abusive is ironic, given that ICANN previously argued that the Panel could only shift costs if an *entire* Claim or defense was deemed to be frivolous or abusive.²²²

134. Furthermore, it bears emphasizing that the Panel may only award costs in relation to the *parts* of the Application, if any, which it deems to be frivolous or abusive. However, ICANN

²¹⁸ Decision, ¶ 392.

²¹⁹ Decision, ¶¶ 393-95.

²²⁰ Decision, ¶¶ 392-95.

²²¹ ICANN’s Response to Application, ¶ 88.

²²² ICANN’s Response to Afiliás’ Costs Submission (13 Oct. 2020), ¶ 5.

does not even attempt to identify which parts of Afilias' Application are (allegedly) frivolous and/or abusive; rather, its position appears to be that the entire Application is frivolous and abusive (which is absurd for the reasons given below). Therefore, on ICANN's own case, the Panel may only award ICANN its costs if the *entire* Application is deemed to be frivolous or abusive.

135. In any event, Afilias' Application is clearly not frivolous and/or abusive. The Panel defined these standards in its Decision,²²³ and applied them strictly.²²⁴ Only one element of ICANN's defense was found to be frivolous or abusive, namely its response to Afilias' Request for Emergency Interim Relief.²²⁵ Most notably, it was not deemed to be frivolous or abusive for ICANN to argue in the IRP that the Panel could not determine certain matters which were (according to ICANN) reserved to the ICANN Board, while simultaneously refusing outside of the IRP to decide those same matters because they were before the Panel.

136. Rather than being frivolous, the Application is necessary for many reasons, in particular the need to determine whether all of Afilias' claims have been decided and, if not, to have them now determined. This is the fundamental essence of any arbitration or dispute resolution procedure—to present claims and have all of them decided in a final and binding manner. The Application is also essential to clarify the meaning and effect of certain parts of the Decision, and to understand the powers that are available to the supervisory Court in respect of any review by the Court of the Decision. These matters are clearly of great concern to Afilias, but

²²³ Decision, ¶ 401 (“In the opinion of the Panel, the terms ‘frivolous’ and ‘abusive’ as used in the Bylaws and Interim Procedures should be given their ordinary meanings. According to the Merriam-Webster Dictionary, ‘frivolous’ means ‘of little weight or importance,’ ‘having no sound basis (as in fact or law)’ or ‘lacking in seriousness.’ According to Black’s Law Dictionary, ‘[a]n answer or plea is called ‘frivolous’ when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff.’ For its part, the term ‘abusive’ is defined by the Merriam-Webster Dictionary as ‘characterized by wrong or improper use or action,’ while the term ‘abuse’ is defined in Black’s Law Dictionary as a ‘misuse of anything.’”).

²²⁴ Decision, ¶¶ 402-404, 411.

²²⁵ Decision, ¶¶ 405-407.

they also raise matters relevant to the proper governance of the global Internet community and therefore the interests of all its members. Whatever decision the Panel makes in relation to these matters and this Application, it was not frivolous for Afilias to seek to resolve the apparent omissions and ambiguities in the Decision.

137. Nor is the Application abusive. As explained above, Afilias does not seek a reconsideration or reversal of any elements of the Decision. Afilias seeks to use Article 33 of the ICDR Rules for exactly the purpose it was intended—to resolve claims not decided in the original award (or receive confirmation that the tribunal considers those claims to be decided) and to resolve apparent ambiguities in the original award. Indeed, as already shown, the Panel may grant the relief requested by Afilias in this Application without changing one word of the existing *dispositif* in the Decision. Again, ICANN mischaracterizes when it alleges that “Afilias implicitly acknowledges that its Application is improper by contending that it should be granted even though it does not fall ‘strictly’ within Article 33.”²²⁶ For the avoidance of doubt, Afilias’ position was and remains that the entirety of its Application falls strictly within Article 33. ICANN has isolated and taken out of context one authority on which Afilias relied as an alternative argument, and which in any event relates only to its request for interpretation and not for an additional award.

138. Therefore, ICANN’s claim for its costs and attorneys’ fees is baseless and must be rejected.

IX. RELIEF REQUESTED

139. Afilias reiterates the relief requested at paragraph 124 of its Application.

²²⁶ ICANN’s Response to Application, ¶ 91 (citing Application, ¶ 92).

Respectfully submitted,



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