

**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 RULE 33 APPLICATION FOR AN
ADDITIONAL DECISION AND FOR INTERPRETATION**

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I. INTRODUCTION

1. Pursuant to Article 33 of the ICDR Arbitration Rules (the “**ICDR Rules**”), as informed by the standards for the challenge (*i.e.*, set aside) of arbitral awards under the English Arbitration Act (“**EAA**”) and the requirements for the Independent Review Process (“**IRP**”) set out in ICANN’s Bylaws, Claimant Afilias Domains No. 3 Limited n/k/a Altanovo Domains Ltd. (“**Claimant**” or “**Afilias**”¹) submits this application (the “**Application**”) requesting an additional decision² and interpretation of the Panel’s Final Decision dated 20 May 2021 (the “**Decision**”).³

Article 33 provides in relevant part:

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.

2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties’ last submissions respecting the requested information, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.⁴

2. By failing to resolve all of the claims and issues Afilias presented to the Panel for decision, the Panel has not only failed to satisfy its mandate; it has also undermined the very

¹ As the Panel described in its Decision, Claimant’s former parent company, Afilias, Inc. merged with Donuts, Inc. (“**Donuts**”) in late 2020. *See* Final Decision (20 May 2021) (“**Decision**”), ¶¶ 11, 244-49. However, Claimant and its .WEB application were carved out of the transaction. Claimant remains part of a group of companies that is now separate from Afilias, Inc. and Donuts. *Id.*, ¶ 245. Although Claimant is now known as Altanovo Domains Ltd., for the sake of consistency and ease of reference, we will refer to Claimant as “Afilias” throughout this Application. ICANN has been properly notified of the transaction and the resulting corporate changes.

² While the ICDR Rules use the term “award,” in the context of an IRP and the Bylaws, the word “award” should be understood to apply to an IRP panel’s “decision.” Both terms are used interchangeably in this submission.

³ The Claimant and Respondent are separately filing a joint application under Article 33 to request typographical and similar corrections to the Decision.

⁴ ICDR Rules (2014), Art. 33(1) and (2).

Purposes of the IRP (as set out in Section 4.3(a) of the Bylaws)—especially, but not exclusively, by its decision to refer Afiliás’ claim arising from Nu Dot Co’s (“NDC”) violation of the New gTLD Program Rules back to the ICANN Board and Staff to “pronounce” upon “in the first instance.”

3. The purpose of this application is to provide the Panel with an opportunity to address those claims and issues presented to it that the Panel did not decide or resolve, render such additional decisions as may be warranted, and otherwise provide more comprehensive reasoning that would allow the Parties and the global Internet community to understand the logic underlying the Panel’s decisions and the consequences thereof for ICANN accountability.

4. This application is organized as follows:

- **Section II** addresses the applicable legal standards (**Section II(A)**), including the purposes of an additional decision and the Panel’s mandate in this IRP insofar as it pertains to Claimant’s application. It then addresses Claimant’s request for an additional decision addressing three of Claimant’s claims which the Panel did not decide and resolve in accordance with its clear mandate per the Bylaws. These are:
 - (1) Claimant’s claim that ICANN breached its Articles and Bylaws by not rejecting NDC’s application, and/or not declaring NDC’s bids at the ICANN auction invalid, and/or not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and not offering .WEB to Afiliás as the next highest bidder (**Section II(B)**);⁵
 - (2) Claimant’s claim that ICANN breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC despite NDC breaches of the Rules (**Section II(C)**); and
 - (3) Claimant’s claim that ICANN breached its Articles and Bylaws by treating Afiliás inequitably and disparately when compared to the

⁵ Afiliás’ Revised Statement of Issues (12 Oct. 2020) (“**Afiliás’ Revised Statement of Issues**”), Breaches 1; Afiliás’ Amended Request by Afiliás for Independent Review Process (21 Mar. 2019) (“**Amended Request for IRP**”), Sec. 4.

manner in which it treated NDC and non-applicant Verisign (**Section II(D)**).

- **Section III** addresses Afiliás’ request for an interpretation of certain of the Panel’s findings and rulings. It first discusses how the term “interpretation” should be understood in light of international arbitral practice and the requirement in the Bylaws that all IRP panel decisions must be “well-reasoned” (**Section III(A)**). It then sets out each of the specific points on which an interpretation is requested (**Sections III(B)-(E)**).
- **Section IV** addresses, with reference to the specific purposes intended to be achieved by the IRP, the implications of the deficiencies in the Panel’s Decision and reasoning for Claimant and the global Internet community.
- **Section V** sets out the relief Afiliás is requesting pursuant to this application.

II. CLAIMANT’S REQUEST FOR AN ADDITIONAL AWARD

A. The Applicable Legal Standard

1. The Purpose of an Additional Award

5. Article 33 of the ICDR Rules authorizes the Panel to “make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.”⁶ The purpose of an additional award is to ensure that an arbitral tribunal (here the Panel) fulfills its mandate and avoids rendering an award that is *infra petita* and thus subject to set-aside.⁷ As Professor Gary Born has stated, “[t]he arbitrator’s obligations include *deciding all of the disputes which are presented to*

⁶ ICDR Rules (2014), Art. 33(1). The Panel may make such an additional award at the request of either party or *sua sponte*. See ICDR Rules (2014), Arts. 33(1) and 33(3). See also Martin F. Gusy and James M. Hosking, *A Guide to the ICDR International Arbitration Rules* (2nd ed., 2019), [Ex. CA-148], ¶ 33.16 (citation omitted) (“As noted by a reviewing court, the key question as to whether a claim, counterclaim, or set-off may be the subject of an additional award is whether or not the claim, counterclaim, or set-off was originally ‘presented’ during the arbitration such that the tribunal should have addressed it.”).

⁷ See Gary Born, *International Commercial Arbitration* (3rd ed., 2021), [Ex. CA-149], pp. 3406-409 (observing that many leading arbitral regimes and rules—including the ICDR, LCIA, ICSID, and UNCITRAL Rules—provide for the making of additional awards by the tribunal, following the issuance of its “final” award).

him or her.”⁸ An award is *infra petita* if—as with the Panel’s Decision in this case—it fails to resolve all claims presented to it as required by the arbitration agreement.⁹

6. An award that is *infra petita* is subject to annulment under the vast majority of national arbitration laws—including specifically, under the EAA.¹⁰ As Professor Born notes: “[i]f a tribunal fails to, or is 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 or subject to non-recognition (on grounds of *infra petita*).”¹¹ Indeed, the requirement that arbitrators must resolve all claims and issues presented to them—in a manner that fulfills their mandate—is not only a matter of national arbitration laws, including the EAA,¹² it is also a basic principle of arbitrator ethics. The AAA/ABA Code of Ethics for Arbitrators¹³ underscores the duty of a tribunal to decide all submitted issues. Canon V(A) provides that “[t]he arbitrator should, after careful deliberation, *decide all issues submitted for determination*.”¹⁴ Because the “arbitrator’s

⁸ Gary Born, *International Commercial Arbitration* (3rd ed., 2021), [Ex. CA-149], p. 2137 (emphasis added).

⁹ Gary Born, *International Commercial Arbitration* (3rd ed., 2021), [Ex. CA-149], p. 2137.

¹⁰ English law is of course the *lex arbitri* of this case given that the arbitration is seated in London. Section 68(2)(d) of the EAA provides that an award may be set aside where there is a “failure by the tribunal to deal with all the issues that were put to it.” English Arbitration Act 1996, [Ex. AA-50], Sec. 68(2)(d).

¹¹ Gary Born, *International Commercial Arbitration* (3rd ed., 2021), [Ex. CA-149], p. 3409.

¹² See, e.g., *The Secretary of State for the Home Department v. Raytheon Systems Ltd.* [2014] EWHC 4375 (TCC), [Ex. CA-150], ¶¶ [41]-[61] (the High Court set aside an award under section 68(2)(d) of the EAA because the tribunal had not considered all the issues that were essential to the resolution of the parties’ claims).

¹³ The ICDR is the international division of the AAA. As Born observes, “These codes should be regarded as expressing the reasonable expectations of commercial parties and most arbitrators, and the arbitrator’s contractual obligations can therefore also be said to include a duty to comply generally with any applicable rules of ethical responsibility, at least insofar as these are directed towards the protection of the parties and are consistent with the parties’ arbitration agreement.” Gary Born, *International Commercial Arbitration* (3rd ed., 2021), [Ex. CA-149], pp. 2138-39.

¹⁴ American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes* (1 Mar. 2004), [Ex. CA-151], Canon V(A). See also *id.*, Canon I(F) (“An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.”).

authority is derived from the agreement of the parties,” he or she must “neither exceed that authority *nor do less than is required to exercise that authority completely*.”¹⁵

7. A failure to resolve a claim properly presented to the panel is not only manifestly unjust to the party that has presented the claim—who, as here, was required to give up its right to have that claim resolved by a court, based on the promise that the claim will instead be resolved as required by the arbitration agreement, *i.e.*, the Bylaws. It also violates the arbitrators’ obligation to both parties, and, moreover, constitutes an enormous waste of both parties’ time and resources. As the late Professor David Caron explained, an additional award “provides the arbitrators a mechanism for completing their mandate, when necessary, by making an award that resolves all remaining claims.”¹⁶ In the words of Professor Jan Paulsson, the “corrective mechanism” of an additional award “prevents the neutralisation of a lengthy, costly arbitration....”¹⁷

8. The relevant authorities on set aside and annulment confirm that any omission to decide a properly submitted claim—whether deliberate, inadvertent, or otherwise—is grounds for an additional award. Under English law, that is true even where, as here, the Panel purported to “resolve” at least some of the claims at issue in a manner that fails to fulfill its mandate. In *Ronly Holdings v. JSC Zestafoni*, the English High Court stated the following principles regarding the arbitrator’s mandate:

- i) An award must be final as to all issues decided (save exceptionally and irrelevant here, when the arbitrator is empowered by the parties

¹⁵ American Arbitration Association, *The Code of Ethics for Arbitrators in Commercial Disputes* (1 Mar. 2004), [Ex. CA-151], Canon I(E) (emphasis added). Here, as the Panel well appreciates, the “agreement of the parties” is reflected in the Bylaws and the New gTLD Program Rules.

¹⁶ David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), [Ex. CA-152], pp. 821-22. See also Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (4th ed., 2019), [Ex. CA-153], pp. 439-40 (“The tribunal may, upon request by a party, make an additional award as to claims presented in the proceedings but omitted from the award. This consequence seems logical in light of the fact that clearly, in the given case, the tribunal acted *infra petita* and did not entirely fulfill its mandate.”).

¹⁷ Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (2017), [Ex. CA-154], p. 354.

to grant relief on a provisional basis pursuant to [Section 39 of the EAA].

ii) Subject to (iv) below, *an award must be complete as to all issues before the tribunal; an award which leaves any such issues undecided, cannot be maintained.*

iii) *An arbitrator has no power to reserve a decision on issues before him to others to resolve.*

iv) An arbitrator only has power to reserve issues to himself for later decision if he proceeds by way of an “interim” award [under Section 47 of the EAA].¹⁸

Based on these principles, the High Court concluded that the arbitrator had failed to fulfill his mandate, when he did not resolve all of the claims that were within his mandate to decide under the contract at issue, referring some of those claims back to the parties to resolve by other means.¹⁹

9. Here, too, the Panel must resolve all of the claims and issues before it in a manner consistent with its mandate—a mandate that is plainly set out in the Bylaws. Otherwise, Afiliás, whose claims the Panel failed to resolve in the proper exercise of its mandate, will suffer substantial injustice, and the time and resources of both Parties will have been wasted on an arbitration that failed to resolve claims put to the Panel for final resolution.

2. The Panel’s Mandate in this Arbitration

10. Afiliás has previously addressed in considerable detail the sources and scope of the Panel’s mandate in this IRP—*i.e.*, what this Panel was *required* to do, but summarizes below the key principles and provisions to provide the necessary context for this application.²⁰

¹⁸ *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), [Ex. CA-155], ¶ [23] (emphasis added; citations omitted).

¹⁹ *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), [Ex. CA-155], ¶ [26].

²⁰ *See, e.g.*, Afiliás’ Post-Hearing Brief (12 Oct. 2020) (“**Afiliás’ PHB**”), ¶¶ 207 (citation omitted) (“It is a well-established principle of international arbitration that a tribunal, or in this case a panel, has an obligation to exercise the full extent of its jurisdiction. This principle has been recognized by no less an authority than L. Yves Fortier in his decision as part of the *Vivendi v. Argentina* annulment proceeding. A tribunal must consider and decide all matters falling within its jurisdiction[.]”), 210 (citation omitted) (“This Panel must not accept ICANN and the

11. The Panel’s mandate is clearly set forth in Section 4.3 of ICANN’s Bylaws. Section 4.3(g) provides that once an IRP Panel is constituted:

[The] IRP Panel *shall be charged* with hearing *and resolving* the Dispute, considering the Claim and ICANN’s response (‘Response’) in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.²¹

The term “Claim” (with a capital “C”) refers to a claimant’s “written statement of a Dispute;”²² that is, the document or documents describing the Covered Actions that the claimant considers has given rise to a Dispute. The Bylaws define “Disputes” as including “Claims that Covered Actions constituted an action *or inaction* that violated the Articles of Incorporation or Bylaws[.]”²³ The Bylaws define “Covered Actions” as “any actions or *failures to act* by or within ICANN committed *by the Board*, individual Directors, Officers, *or Staff members*, that give rise to a Dispute.”²⁴ As the Panel will also recall—a point which bears emphasizing in the context of the Dispute that it was called upon to resolve—the Bylaws were specifically amended to include Staff action and inaction as Covered Actions.²⁵ Furthermore and as significantly, the Bylaws were

Amici’s invitation to exercise anything less than its full jurisdiction granted under the Bylaws. The IRP was designed to provide full accountability for ICANN in the absence of *any other* external form of accountability.”). See Afilias’ Response to the Amicus Curiae Briefs (24 July 2020) (“**Afilias’ Response to the Amici’s Briefs**”), Sec. IX; Afilias’ PHB, Sec. V. See also Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination).

²¹ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) (“**Bylaws**”), [Ex. C-1], Sec. 4.3(g) (emphasis added).

²² Bylaws, [Ex. C-1], Sec. 4.3(d). Accordingly, we use “claims” with a lower case “c” to refer to Afilias’ assertions that ICANN violated its Articles and Bylaws through its actions or inactions.

²³ Bylaws, [Ex. C-1], Sec. 4.3(b)(iii)(A) (emphasis added).

²⁴ Bylaws, [Ex. C-1], Sec. 4.3(b)(ii) (emphasis added).

²⁵ Bylaws, [Ex. C-1], Sec. 4.2(c); Decision on Phase I (12 Feb. 2020), ¶ 132 (“To the extent that Afilias’ Rule 7 claim impugns the actions of ICANN’s Staff and asserts that these actions violated the Articles of Incorporation or Bylaws, it falls within both the definition of Covered Actions and the jurisdiction of the Panel in this IRP.”).

amended to put in place an “enhanced accountability mechanism” to address the ICANN Board’s and Staff’s actions and failures to act.²⁶ As ICANN’s own witness, J. Beckwith Burr, testified to this Panel: “[T]he purpose of the IRP is to determine whether or not, in taking some action or inaction or failing to act, ICANN has violated its [B]ylaws, and that would be including in its -- in its application of the rules of the applicant guidebook if it violated the bylaws somehow.”²⁷

12. Under Section 4.3(i), in discharging its mandate to resolve the Dispute (*i.e.*, Claims regarding Covered Actions as presented by the claimant), “[e]ach IRP Panel shall conduct an objective, *de novo* examination of the Dispute.” Section 4.3(i) further provides:

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes ***shall be decided*** in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.²⁸

13. Section 4.3(v) requires that in deciding the Disputes presented to it, the Panel’s decision “shall reflect ***a well-reasoned application of how the Dispute was resolved*** in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided

²⁶ Afilias’ Response to the *Amici*’s Briefs, Sec. IX(B); Afilias’ PHB, Sec. V(A). Further, as the Panel is aware, the purpose of the revised IRP system was to satisfy the U.S. government’s demand that ICANN improve its accountability mechanisms. *See, e.g.*, CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], p. 5.

²⁷ Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination).

²⁸ Bylaws, [Ex. C-1], Sec. 4.3(i)(i) and (ii) (emphasis added). As discussed further below, ICANN asserted as a defense in the later stages of this IRP that it had decided not to decide Afilias’ complaints until after the conclusion of this IRP proceeding, and that the Panel should consider that defense under Section 4.3(i)(iii) (“For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.”). However, the Panel expressly declined “to rely on the provisions of Section 4.3(i)(iii) of the Bylaws” or to determine “whether or not that decision [not to decide] involved the Board’s exercise of its fiduciary duties.” Decision, ¶ 328.

under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.”²⁹

14. In addition, “[t]he IRP is *intended as a final, binding arbitration process*.”³⁰ Under the Bylaws, IRP Panel decisions “are intended *to be enforceable* in any court with jurisdiction over ICANN without a de novo review of the decision of the IRP Panel . . . with respect to factual findings or conclusions of law.”³¹ In other words, the Panel’s decisions resolving the Dispute and its declarations in this regard must yield an outcome that is capable of enforcement—in this case, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Panel’s Decision in this IRP has yielded nothing that would be so enforceable.

15. In its Final Decision, the Panel failed to fulfill its mandate, as plainly stated in Article 4.3, with respect to three claims that Claimant squarely put to the Panel to hear *and resolve*.

16. *First*, the Panel did not resolve Afilias’ claim regarding the following specifically pled Covered Actions: 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 for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder (the “**Rules Breach Claim**”). In omitting to decide Afilias’ claim that ICANN breached its Articles and Bylaws through its inaction—and instead referring the claim back to the ICANN

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

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

³¹ Bylaws, [Ex. C-1], Sec. 4.3(x)(ii) (emphasis added).

Board to “pronounce” on it “in the first instance”—the Panel failed to resolve the claim, as required by Article 4.3(g) of the Bylaws, and thus acted *infra petita*.³²

17. In addition to its failure to resolve the claim, the Panel also failed to make “findings of fact *to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws*” as required by Article 4.3(i) of the Bylaws. The Panel’s findings of facts cannot be reconciled with its referral of the claim back to the ICANN Board for “pronouncement” “in the first instance.” Nor can this referral be reconciled with other rulings the Panel made in the Decision’s *Dispositif*. Furthermore, the Panel failed not only to “decide” Afilias’ claim; it failed to decide it “in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.”³³ The Panel must therefore issue an additional decision to satisfy its mandate in this case (**Section II(B)**).

18. *Second*, the Panel failed to resolve—or even to mention in its assessment of the claims—Afilias’ claim that ICANN violated its obligation to conduct its activities in accordance with relevant principles of international law, and thereby breached its Articles and Bylaws (the “**International Law Claim**”). There is no indication that the Panel gave any consideration whatsoever to this claim. The Panel’s failure to hear and resolve this claim is also *infra petita*, thus requiring the Panel to issue an additional decision (**Section II(C)**).

19. *Third*, the Panel did not resolve Afilias’ claim that ICANN violated its Articles and Bylaws through its inequitable and disparate treatment of Afilias as compared to its treatment of

³² As discussed further below, the Panel also acted *extra petita* in referring Afilias’ Claim for declaratory relief back to the ICANN Board for to “pronounce” upon “in the first instance.” Decision, ¶ 410. There is nothing in the Bylaws that allows the Panel to refer a claim for a declaration back to the ICANN Board instead of resolving the claim as plainly required by its mandate. Nor is there anything in ICANN’s constitutive documents that use the word “pronounce.” The Panel appears to have invented the term “pronounce” in this context and has also left it entirely undefined. *See Section III(B)(2)*.

³³ Bylaws, [Ex. C-1], Sec. 4.3(i)(ii).

NDC and Verisign (the “**Disparate Treatment Claim**”). Although making findings of fact establishing the validity of Afilias’ Disparate Treatment Claim, the Panel declined to decide the claim, instead stating that “the Panel 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.”³⁴ The Panel then failed to grant or deny or further address Afilias’ Disparate Treatment Claim. Again, the Bylaws require the Panel to hear *and resolve* the claim, *i.e.*, to grant or reject it—and *to make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws*. The Bylaws do not provide the Panel with discretion to determine that it is not “necessary” to decide a claim that has been squarely put before it—or to make findings of fact but then decline “to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.” Here, too, the Panel acted *infra petita* and must issue an additional decision to fulfill its mandate (**Section II(D)**).

20. Accordingly, and for reasons more fully stated below, the Panel must issue an additional decision resolving those claims that were presented to it but which the Panel failed to resolve.

B. The Panel Must Issue an Additional Decision To Resolve Afilias’ Rules Breach Claim.

1. The Rules Breach Claim Was Properly Submitted and Fully Arbitrated Before the Panel.

21. Simply stated, the Rules Breach Claim Afilias submitted to the Panel for decision is as follows: ICANN violated its Articles and Bylaws by not enforcing the New gTLD Program Rules to disqualify NDC’s application and bids, determine that NDC is ineligible to enter in to a

³⁴ Decision, ¶ 347.

registry agreement for .WEB, and offer .WEB to Afilias as the second highest bidder.³⁵ Afilias' complaint was *not* that ICANN failed to “decide” or to “pronounce” on the propriety of the DAA and NDC's and Verisign's other conduct. As the Panel well knows, ICANN did not assert that it had made any “decision not to decide” until long after the IRP was underway. Rather, Afilias alleged that ICANN's *inaction*—its failure to act as it was required to act—in not enforcing the New gTLD Program Rules is inconsistent with the Articles and Bylaws.³⁶ ICANN's failure to disqualify NDC's application and bids, determine that NDC is ineligible to enter in to a registry agreement for .WEB, and offer .WEB to Afilias as the second highest bidder is the Covered Action presented to the Panel for assessment and resolution. The Panel must decide whether that inaction violated the Articles and Bylaws. As discussed below, the question of whether the DAA and NDC's other conduct³⁷ violated the New gTLD Program Rules—regardless of whether ICANN ever “pronounced” on it—was a threshold issue for Afilias' Rules Breach Claim and was also thoroughly arbitrated in this IRP.

³⁵ There has never been any question as to whether Afilias' Rules Breach Claims is within the Panel's jurisdiction. As the Panel confirmed in its Decision, “the jurisdiction of the Panel to hear the Claimant's core claims [which include the Rules Breach Claim] against the Respondent in relation to .WEB is not contested.” Decision, ¶ 26. As the Panel also recognized, “[t]he 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 NDC ineligible to enter a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules.” *Id.*, ¶ 251.

³⁶ See Amended Request for IRP, Sec. 4 (ICANN's Failure to Disqualify NDC Breaches ICANN's Obligation to Apply Documented ICANN Policies Neutrally, Objectively, and Fairly); Reply Memorial in Support of Amended Request by Afilias for Independent Review (4 May 2020) (Revised, 6 May 2020) (“**Afilias' Reply Memorial**”), Sec. III (ICANN Violated Its Bylaws and Articles by Not Disqualifying NDC's Application and Bid and in Proceeding to Contract with NDC (and Therefore Verisign) for the .WEB Registry Agreement); Afilias' PHB, Sec. III(A) (ICANN Staff Failed to Make Decisions by Applying Documented Policies Consistently, Neutrally, Objectively, and Fairly). Afilias alleged in its Rules Breach Claim that ICANN violated, *inter alia*, its obligation to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling any particular party for discriminatory treatment.” Afilias' Reply Memorial, ¶ 16 (quoting Bylaws, [Ex. C-1], Sec. 1.2(a)(v)); Afilias' PHB, ¶ 126.

³⁷ In its Decision, the Panel often refers to the propriety of the DAA under the New gTLD Program Rules. For the avoidance of doubt, Afilias alleged that NDC's other conduct (including, for example, its misrepresentations and omissions made to ICANN Staff concerning its application) also constituted violations that warranted disqualification. See, e.g., Afilias' Reply Memorial, Sec. III(A)(2); Afilias' Response to the *Amici's* Briefs, Sec. IV(B).

22. As the Panel recognized in its Decision, Afiliias initiated this IRP by alleging that under the Articles, Bylaws, and New gTLD Program Rules, ICANN was required to “disqualify NDC’s bid for .WEB, and, in exchange for a bid price to be specified by the Panel, proceed with contracting the registry agreement for .WEB with the Claimant.”³⁸ As described by the Panel:

In its Amended Request for IRP dated 21 March 2019, the Claimant claims that the Respondent had *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.³⁹

23. As set forth in the Decision, Afiliias maintained and arbitrated the Rules Breach Claim throughout the IRP, asserting in its Post-Hearing Brief that “the two fundamental questions before the Panel are whether the Respondent *was required* to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant.”⁴⁰

24. Both ICANN and the *Amici* also recognized from the outset of this case that the question posed by Afiliias’ Rules Breach Claim is whether ICANN’s *failure* to disqualify NDC and to offer .WEB to Afiliias is consistent with the Articles, Bylaws, and New gTLD Program Rules. At the outset of Phase II, the Panel directed the Parties “to develop a joint list of agreed issues *to be decided in Phase II*[.]”⁴¹ The Parties ultimately submitted separate lists of issues, with the *Amici* flagging the issues that they wished to address in their *Amici* submissions. Given Afiliias’ Rules Breach Claim, the Parties’ lists of issues “*to be decided*” in Phase II included the following:

³⁸ Decision, ¶ 4.

³⁹ Decision, ¶ 124 (emphasis added) (citing Amended Request for IRP, ¶ 2).

⁴⁰ Decision, ¶ 201 (emphasis added).

⁴¹ Letter and First Procedural Order (5 Mar. 2020), p. 2 (emphasis added).

AFILIAS' LIST OF PHASE II ISSUES (INCLUDING ISSUES THAT <i>AMICI</i> ASKED TO ADDRESS) (13 MARCH 2020) ⁴²	ICANN'S LIST OF PHASE II ISSUES (INCLUDING ISSUES THAT <i>AMICI</i> ASKED TO ADDRESS) (13 MARCH 2020) ⁴³
<p>1. Whether ICANN violated its Articles of Incorporation and Bylaws and/or the applicable rules and policies governing the .WEB application, auction, and delegation process (as stated <i>inter alia</i> in [the New gTLD Program Rules]), including (without limitation) its obligation to apply its policies neutrally, objectively, fairly, transparently, and in accordance with international law...:</p> <p>...</p> <p>(d) by failing to remove NDC from the .WEB contention set and/or deny NDC's application and/or invalidate NDC's bids for .WEB as a result of NDC's alleged Rules violations;</p> <p>...</p> <p>(f) by failing to award the .WEB registry agreement to Afiliass, who submitted the second-highest bid, at the bid price required by the [New gTLD Program Rules][.]</p>	<p>1. Whether ICANN violated its Articles of Incorporation, Bylaws, the gTLD Applicant Guidebook and/or the Auction Rules for New gTLDs: Indirect Contention Edition by its:</p> <p>a. Failure 'to 'disqualify' NDC because it [allegedly] 'fail[ed] to provide ICANN with the identifying information necessary to confirm the identity' of the true applicant,' who Afiliass contends is Verisign...;</p> <p>b. Failure 'to 'reject' NDC's application for the [alleged] omission of material information from its application, namely that it was [allegedly] obligated to assign .WEB to VeriSign'[.]...;</p> <p>c. Failure 'to 'deny' NDC's application for [allegedly] 'fail[ing] to notify ICANN of any change in circumstances that would render any information provided in its application false or misleading'...;</p> <p>...</p> <p>g. Failure to disqualify NDC from the .WEB auction on the ground that its auction bids were invalid because NDC allegedly did not bid on its own behalf...;</p> <p>h. Failure to disqualify NDC for its alleged 'sale, assignment, and/or transfer of rights and obligations in its .WEB application to VeriSign'[.]</p>

25. Thus, Afiliass' Rules Breach Claim has always been at the heart of this IRP. Afiliass made extensive submissions to the Panel in support of its Rules Breach Claim.⁴⁴ Afiliass provided

⁴² Joint Email and enclosures to the Panel regarding List of Phase II Issues (13 Mar. 2020), Afiliass' List of Phase II Issues.

⁴³ Joint Email and enclosures to the Panel regarding List of Phase II Issues (13 Mar. 2020), ICANN's Proposed Joint Issues List.

⁴⁴ Amended Request for IRP, Secs. 3-5; Afiliass' Reply Memorial, Sec. III; Afiliass' PHB, Secs. III(A) and (C).

detailed argumentation and analysis on the specific provisions of the AGB, Auction Rules, and other New gTLD Program Rules, and extensive evidence and explanation as to why ICANN was required to conclude that NDC's and Verisign's conduct violated the terms of New gTLD Program Rules, therefore requiring disqualification of NDC's application and bids, determining that it is ineligible to enter in to a registry agreement, and offering .WEB to the next highest bidder.⁴⁵ Afilias also provided detailed submissions explaining why—based on the text of the New gTLD Program Rules as well as the Articles and Bylaws—ICANN was required to disqualify NDC's bids and offer .WEB to Afilias as the next highest bidder.⁴⁶ Afilias' claims on these matters were fully presented to the Panel at the merits hearing through oral submissions and the cross-examination of both ICANN's and the *Amici*'s witnesses on these precise points, including on the documentary evidence submitted by both Parties and the *Amici*. Afilias also presented detailed argumentation and analysis as to why ICANN's *inaction*—*i.e.*, its *failure* to disqualify NDC's application and bids, its *failure* to find NDC ineligible to enter into a registry agreement, and its *failure* to offer .WEB to Afilias as the next highest bidder, as required under the plain terms of the New gTLD Program—breached its Articles and Bylaws under (*inter alia*) the norms of applicable law and prior relevant IRP decisions. Afilias also addressed the issues extensively, based on the evidence presented at the hearing, in its post-hearing brief.⁴⁷

26. As the Panel observed in its Decision, ICANN asserted in its Rejoinder that “[a] true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists,

⁴⁵ Amended Request for IRP, Secs. 3-5; Afilias' Reply Memorial, Sec. III; Afilias' PHB, Secs. III(A) and (C). *See also* Afilias' Reply Memorial, ¶ 99 (“Therefore, the New gTLD Program Rules plainly required ICANN to declare NDC's bids in default and award the .WEB TLD to Afilias as the next highest bidder.”).

⁴⁶ Amended Request for IRP, Secs. 3-5; Afilias' Reply Memorial, Sec. III; Afilias' PHB, Secs. III(A) and (C).

⁴⁷ *See, e.g.*, Afilias' PHB, Secs. III(A) and (C) (and sources cited therein).

how ICANN has similar situations, and the terms of the DAA.”⁴⁸ That is exactly what Afiliias provided in this IRP. Afiliias more than discharged its burden on the Rules Breach Claim, which was properly before the Panel for resolution. The same cannot be said for ICANN, whose core defense to the Rules Breach Claim (*i.e.*, the alleged decision to defer) was not raised until the late stages of this IRP, and which was, in any event, completely contrary to an express representation made to another panelist in these very same proceedings, as well as to findings made by this Panel in its Decision.

27. Moreover, ICANN had every opportunity to respond to Afiliias’ Rules Breach Claim “on the merits”—and did so by presenting the arguments and evidence of its choosing.⁴⁹ Thus, ICANN also submitted hundreds of pages of legal and factual argument—and presented extensive oral argument, witness testimony, and documentary evidence before and at the merits hearing—in an effort to rebut Afiliias’ Rules Breach Claim.⁵⁰

28. In addition, ICANN fully supported—and this Panel granted—the *Amici*’s request to participate in these proceedings *for the specific purpose* of responding substantively to Afiliias’ Rules Breach Claim. As ICANN stated in its Response to Afiliias’ Amended IRP Request:

NDC and Verisign have responses to Afiliias’ allegations of Guidebook violations.... Thus, it is important that NDC and

⁴⁸ Decision, ¶ 315 (quoting ICANN’s Rejoinder Memorial in Response to Amended Request by Afiliias for Independent Review (1 June 2020) (“**ICANN’s Rejoinder Memorial**”), ¶ 82).

⁴⁹ *See, e.g.*, ICANN’s Response to Amended Request for Independent Review Process (31 May 2019) (“**ICANN’s Response to Amended IRP Request**”), ¶ 64 (emphasis omitted) (“the alleged Guidebook violations identified by Afiliias do not call for the automatic disqualification of NDC”); ICANN’s Rejoinder Memorial, ¶ 23 (citations omitted) (“the Guidebook states that ICANN’s ‘decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion.’ ... And other materials related to the Guidebook, such as the Auction Rules and New gTLD Auction Bidders Agreement (“Bidders Agreement”), state that ICANN’s interpretation of the rules ‘shall be final and binding’ and that ICANN has the discretion to select an appropriate remedy, if any, for violation of the rules.”); ICANN’s Post-Hearing Brief (12 Oct. 2020) (“**ICANN’s PHB**”), Sec. III.

⁵⁰ *See, e.g.*, ICANN’s Response to Amended IRP Request, Argument, Secs. I-II; ICANN’s Rejoinder Memorial, Argument, Secs. II-IV; ICANN’s PHB, Secs. III-VI; Witness Statement of Christopher Disspain (1 June 2020); Witness Statement of Christine A. Willett (31 May 2019).

Verisign be permitted to participate in this IRP *so that the Panel will have the benefit of their evidence and submissions, in addition to the views of Afilias and ICANN, before rendering any final decision.*⁵¹

ICANN vigorously argued for *Amici* participation through Phase I of this IRP. And, as a result of the Panel’s Phase I Decision, the *Amici* participated in Phase II for the purpose of presenting “their evidence and submissions” on Afilias’ Rules Breach Claim, so that the Panel could have the benefit of their views, as well as of Afilias and ICANN, to enable the Panel to render a final decision. (Indeed, the *Amici* participated in arbitrating the merits of this Dispute more fulsomely than any other *amici* in any international arbitration of which we are aware.)

29. Thus, the *Amici* also submitted hundreds of pages of legal and factual argument—and presented extensive oral argument, documentary evidence, and the testimony of their own witnesses before and at the merits hearing—in an effort to rebut Afilias’ claim that ICANN was required to determine that their conduct violated the New gTLD Program Rules. The *Amici* addressed these issues in 200 pages of combined briefing in Phase II, including post-hearing briefs in which they, too, were able to address all the evidence and make all the arguments of their choosing.⁵² It is difficult to understand why the Panel would have permitted the *Amici*’s broad participation in this IRP, and to do so on matters addressing the substance of their conduct insofar as ICANN’s obligations are concerned, but for the Panel to then (deliberately or inadvertently) fail to consider the substance of that conduct and its necessary consequences. The Panel’s approach in this regard strikes Afilias as flatly contradictory of the Panel’s ruling in Phase I of the IRP.

⁵¹ ICANN’s Response to Amended IRP Request, ¶ 10 (emphasis added).

⁵² *Amicus Curiae* Brief of Nu Dotco, LLC (26 June 2020); Verisign, Inc.’s Pre-Hearing Brief (Phase II) (26 June 2020); *Amici*’s PHB.

30. Moreover, while ICANN asserted that it was “neutral” on the question of whether the DAA and NDC’s other conduct violated the New gTLD Rules (an assertion that was entirely inconsistent with ICANN’s conduct since the .WEB auction, as well as with its conduct and arguments throughout the IRP), the Panel plainly stated that it was not an option for ICANN to refuse to comment on the *Amici*’s position, given that Afilias’ Rules Breach Claim was before the Panel for final resolution. In Procedural Order No. 5—which the Panel described in its Decision as laying “the foundations to the Panel’s approach to the issues in dispute in this IRP”—the Panel ruled:

[T]he Guidebook and Auction Rules originate from ICANN. That being so, in this Accountability Mechanism in which Respondent’s conduct is being impugned, *the Respondent should be able to say whether or not the position being defended by the Amici in relation to these ICANN instruments is one that ICANN is prepared to endorse and, if not, to state the reasons why.*⁵³

31. Indeed, while ICANN certainly relied on and supported the *Amici* in their arguments countering Afilias’ assertions that the DAA and NDC’s other conduct violated the New gTLD Program Rules, ICANN throughout this IRP repeatedly attacked Afilias’ positions on its Rules Breach Claim as having no merit—going so far as to tell the Panel that Afilias was wrongfully trying to use these IRP proceedings “to seize control of .WEB for itself.”⁵⁴

32. ICANN asserted to the Panel, for example:⁵⁵

- “As the party that made a significant financial investment in .WEB over two years ago, Verisign is determined to proceed pursuant to its agreement with NDC so that it can operate .WEB. *Afilias, on the other hand, is determined to*

⁵³ Procedural Order No. 5 (14 July 2020), ¶ 22 (emphasis added) (quoted in Decision, ¶ 62).

⁵⁴ ICANN’s Response to Amended IRP Request, ¶ 10.

⁵⁵ Even leaving aside the evidence of ICANN’s disparate treatment of Afilias prior to the IRP, given the positions ICANN took in the IRP, including the lengths to which ICANN went to secure the *Amici*’s participation, it is simply incomprehensible that the Panel could assume that ICANN’s evaluation of NDC’s and Verisign’s conduct, and the consequences flowing therefrom, will be transparent, objective, fair and impartial.

*use this proceeding to seize control of .WEB for itself – at a bid price set by this Panel – even though it did not prevail in the auction.”*⁵⁶

- “Afilias overlooks the fact that the violations of the Guidebook and Auction Rules that it alleges *do not require the automatic disqualification of NDC’s application or rejection of its bid for .WEB.*”⁵⁷
- “[T]he Guidebook and Auction Rules provide ICANN with significant discretion to determine what the penalty or remedy should be, *if any*, for a potential breach of their terms.”⁵⁸
- “Afilias argues that ICANN’s discretion can only be exercised consistent with ICANN’s Articles and Bylaws by disqualifying NDC’s application. *This is not the case for a number of reasons.*”⁵⁹
- “[A]s set forth in ICANN’s IRP Response, as well as the witness statements of Paul Livesay and Jose Rasco, there have been a number of arrangements that appear similar to the DAA in the secondary market for new gTLDs, including transactions involving Afilias, Donuts and other registry operators. *Indeed, the Auction Rules seem to foresee the possibility of such transactions.*”⁶⁰
- “*The provisions of [the Auction Rules] that Afilias cites cannot bear the weight Afilias puts on them.* For example, Afilias repeatedly cites the statement in Section 12 of the Auction Rules that a ‘Qualified Applicant may designate a party to bid on its behalf’ But Section 12 does not seem concerned with that issue and does not address it.”⁶¹
- “Moreover, the Auction Rules violations alleged by Afilias appear to be based on a strained interpretation of the text of the rules.”⁶²
- “Likewise, *Afilias’ argument that NDC’s bids were invalid* because NDC did not fit within the Auction Rules’ definition of a ‘Bidder’ or ‘Qualified Applicant’ *are unpersuasive.*”⁶³

⁵⁶ ICANN’s Response to Amended IRP Request, ¶ 10 (emphasis added).

⁵⁷ ICANN’s Rejoinder Memorial, ¶ 4 (emphasis added).

⁵⁸ ICANN’s Rejoinder Memorial, ¶ 79 (emphasis added).

⁵⁹ ICANN’s Rejoinder Memorial, ¶ 82 (emphasis added).

⁶⁰ ICANN’s Rejoinder Memorial, ¶ 83 (citations omitted) (emphasis added).

⁶¹ ICANN’s Rejoinder Memorial, ¶ 85 (citations omitted) (emphasis added).

⁶² ICANN’s Rejoinder Memorial, ¶ 85 (emphasis added).

⁶³ ICANN’s Rejoinder Memorial, ¶ 86 (emphasis added).

- “And as set forth above, the Auction Rules, as well as the Bidders Agreement, both seem to suggest the possibility of a ‘post-Auction ownership transfer arrangement’ being in place prior to an auction.”⁶⁴
- “Also left unrebutted by Afiliias at the Hearing is the principle that *the unambiguous provisions* of the Guidebook and Auction Rules *vest in ICANN substantial discretion to determine whether an applicant has violated the terms of either and, if so, what action to take.*”⁶⁵
- “Afiliias alleges that the Guidebook required ICANN to disqualify NDC for failing to provide ICANN with ‘identifying information necessary to confirm the identity’ of the true applicant – which Afiliias contends was Verisign, not NDC – and for failing to notify ICANN of NDC’s ‘change in circumstances.’ But *the ‘applicant’ for WEB was NDC—not Verisign—both before and after the DAA, and no testimony suggested otherwise.*”⁶⁶

As discussed further below, the premise on which the Panel has referred Afiliias’ Rules Breach Claim back to the ICANN Board for “pronouncement”—adopting ICANN’s belated (and self-contradictory) assertion that it never considered or addressed Afiliias’ complaints—cannot be reconciled with the record before the Panel, or with the findings of the Panel that amply support Afiliias’ claims that ICANN violated its obligation of good faith to Afiliias, and subjected Afiliias to disparate treatment compared to NDC and Verisign (which claims the Panel also failed to resolve, in violation of its mandate).

33. After the merits hearing, the Panel requested the Parties to “update their respective lists of issues *to be decided* by taking into account the pleadings filed subsequently [to their original lists of issues submitted on 13 March 2020] and the evidence elicited at the hearing.”⁶⁷ In their updated lists, the Parties continued to recognize that Afiliias’ Rules Breach Claim required a determination by the Panel as to whether ICANN’s failure to disqualify NDC’s application and

⁶⁴ ICANN’s Rejoinder Memorial, ¶ 87.

⁶⁵ ICANN’s PHB, ¶ 89 (emphasis added).

⁶⁶ ICANN’s PHB, ¶ 140 (citations omitted) (emphasis added).

⁶⁷ Email to the Parties from the Panel (15 Sept. 2020), p. 1 (emphasis added).

bids, determine NDC’s ineligibility to enter in to a registry agreement and offer .WEB to Afilias breached ICANN’s Articles and Bylaws. Thus, Afilias’ updated list of issues to be decided by the Panel included the following alleged breaches:

Whether ICANN violated its Articles of Incorporation and Bylaws, including (without limitation) its obligation to apply its policies consistently, neutrally, objectively, and fairly and in good faith 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’s ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules[.]

...

Whether ICANN violated its Articles of Incorporation and Bylaws, including (without limitation) its obligation to apply its policies consistently, neutrally, objectively, and fairly and in good faith by failing to award the .WEB registry agreement to Afilias, the second-highest bidder, at the bid price required by the New gTLD Rules[.]⁶⁸

34. Similarly, ICANN’s updated list of issues to be decided, under the heading of “Merits Issues,” included:

Whether ICANN violated its Bylaws’ provision stating that ICANN should “[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,” by *not* immediately disqualifying NDC’s application or auction bids when ICANN became aware of NDC’s arrangement with Verisign regarding .WEB.⁶⁹

35. Thus, from the commencement of this IRP on 14 November 2018, through the submissions of Post-Hearing Briefs on 12 October 2020, Afilias’ Rules Breach Claim was squarely

⁶⁸ Afilias’ Revised Statement of Issues, Breaches 1 and 2 (emphasis added).

⁶⁹ ICANN’s List of Issues (12 Oct. 2020), ¶ 7 (emphasis added) (citing Amended Request for IRP, ¶¶ 68 & 78 (bullets 1-3, 7)). ICANN’s use of the word “immediately” is a distortion of Afilias’ claim. While Afilias submits that ICANN had sufficient information to require NDC’s disqualification when it received the DAA in August 2016, ICANN in fact had nearly two years to consider whether the New gTLD Program Rules required disqualification. ICANN failed to act on the information it had in its possession consistent with the New gTLD Program Rules, and instead decided to proceed toward contracting with NDC in June 2018.

before the Panel for resolution. The Parties and *Amici* extensively briefed and argued the Rules Breach Claim—presenting detailed written and oral submissions and voluminous evidence (both documentary and testimonial) on that claim and the issues underlying it. A significant portion of the hearing testimony—including all or nearly all the testimony provided by ICANN’s witnesses Christine Willett and Christopher Disspain, and the *Amici*’s witnesses, Jose Rasco and Paul Livesay—was devoted to the Rules Breach Claim.

36. In sum, the Rules Breach Claim was properly submitted and fully arbitrated before this Panel. As explained in the following section, however, the Panel inexplicably and impermissibly failed to resolve the claim as required by its mandate.

2. The Panel Failed To Resolve the Rules Breach Claim as Required by Its Mandate.

37. Again, the Panel’s mandate concerning Afiliias’ Rules Breach Claim is perfectly clear under the Bylaws. The Panel is “*charged with hearing and resolving the Dispute.*”⁷⁰ Furthermore, “[a]ll Disputes *shall be decided* in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.”⁷¹ In particular, the “Panel *shall make findings of fact to determine* whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”⁷²

38. The Dispute at issue (as the Panel acknowledged elsewhere in its Decision) is whether the Covered Action identified by Afiliias—ICANN’s *failure* to disqualify NDC’s application and bids, determine NDC’s ineligibility to enter in to a registry agreement, and offer

⁷⁰ Bylaws, [Ex. C-1], Sec. 4.3(g) (emphasis added).

⁷¹ Bylaws, [Ex. C-1], Sec. 4.3(i)(ii) (emphasis added).

⁷² Bylaws, [Ex. C-1], Sec. 4.3(i)(i) (emphasis added).

.WEB to Afiliás—complied with the Articles, Bylaws, and New gTLD Program Rules. That is Afiliás’ Rules Breach Claim. As ICANN itself acknowledged in its Rejoinder (citing the decision of the IRP Panel in *Booking.com*), the Panel’s “role” (*i.e.*, its mandate) “is to assess whether the Board’s action [or inaction] was consistent with applicable rules found in the Articles, Bylaws and Guidebook.”⁷³

39. Here, however, the Panel did not decide or resolve the question of whether the inaction that Afiliás put at issue was consistent with the applicable rules found in the Articles, Bylaws, and New gTLD Program Rules. Instead, the Panel ruled, *inter alia*, that both ICANN Staff and the ICANN Board violated the Articles and Bylaws when they:

[F]ail[ed] **to pronounce** on the question of whether the Domain Acquisition Agreement entered into between [NDC and Verisign] on 25 August 2015, as amended and supplemented by the ‘Confirmation of Understanding’ executed by these same parties on 26 July 2016..., complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules[.]⁷⁴

40. The Panel then fashioned a “remedy” that neither Afiliás nor ICANN formally requested and that is not within the Panel’s authority to make. The Panel recommended that:

[T]he Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent’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.⁷⁵

⁷³ *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), [Ex. CA-11], ¶ 115.

⁷⁴ Decision, ¶ 410(1).

⁷⁵ Decision, ¶ 410(5) (emphasis added).

41. The Panel’s recommendation on that point was based on its assertion earlier in the Decision that it had come to the “firm view” that:

[I]t is for the Respondent, that has the requisite knowledge, expertise, and experience, *to pronounce in the first instance* on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC’s application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.⁷⁶

42. Earlier in its Decision, the Panel stated that its view that ICANN should pronounce on this issue in the first instance is “necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules.”⁷⁷ The Panel even set forth questions for the ICANN Board to consider (which the Panel “merely cite[d] as examples”), including:

- “Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an ‘Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application’.”
- “Whether the execution of the DAA by NDC constituted a ‘change in circumstances that [rendered] any information provided in the application false and misleading’.”
- “Whether by entering into the DAA after the deadline for the submission of applications for new gTLDs, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, Verisign impermissibly circumvented the ‘roadmap’ provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules.”⁷⁸

⁷⁶ Decision, ¶ 359.

⁷⁷ Decision, ¶ 296.

⁷⁸ Decision, ¶ 317.

43. The problem is that all these questions (and many others that the Panel did not specifically mention) were arbitrated extensively in this IRP and were *put to the Panel* for final resolution. These were threshold questions that the Panel was required to answer in order to determine whether the “Covered Action” put at issue by Afilias violated the Articles, Bylaws, and New gTLD Program Rules. The Panel need only review the Parties’ updated list of issues, which the Panel specifically asked the Parties to submit, to confirm the foregoing.

44. Instead of resolving the issues that were squarely before it, the Panel seems to have invented a prerequisite for a claimant to assert a claim that ICANN failed to act as required based on a violation of the New gTLD Program Rules—*i.e.*, the ICANN Board must “pronounce in the first instance” on whether there has been such a violation, and if so, what the appropriate remedy is. Having concluded that this newly invented prerequisite had not been met—because ICANN had declined to “pronounce” on these matters “in the first instance”—the Panel then excused itself from addressing the Dispute that Afilias had actually put before it. Thus, the Panel left Afilias’ Rules Breach Claim to be resolved by another IRP Panel, after the ICANN Board has “pronounced” on the threshold issues that were fully arbitrated before it and that this Panel was mandated to resolve.

45. The Panel cited no legal or factual basis to support the existence of any such prerequisite—and indeed, there is none.⁷⁹ The term “pronounce” does not appear anywhere in the Articles or Bylaws; nor does it appear anywhere in the submissions of the Parties or the *Amici*. Nor does the Panel give any definition of the term.

⁷⁹ Thus, the Panel not only failed to “resolve” the Dispute by referring these issues back to the Board for pronouncement; it also failed to “resolve” the dispute “in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions ... and norms of applicable law.” Bylaws, [Ex. C-1], Sec. 4.3(g).

46. According to Black’s Law Dictionary, the term “pronounce” means:

To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to “pronounce” judgment or a sentence.⁸⁰

Non-legal dictionaries of the English language define “pronounce” in much the same way:

[T]o declare officially or ceremoniously[;] the minister *pronounced* them husband and wife.⁸¹

The Panel did not identify any legal basis as to why ICANN must “pronounce in the first instance” as to whether it believes that there has been a violation of the New gTLD Program Rules, as a prerequisite for a claimant to allege that ICANN’s failure to undertake necessary action on the violation is inconsistent with the Articles, Bylaws, or New gTLD Program Rules. The Panel did not cite any legal authority or other foundation to support such a prerequisite, but simply stated that it is the Panel’s “firm view” that such a prerequisite exists.

47. At another point in its Decision (not in the *Dispositif*), the Panel uses the words “decide” and “determine” instead of “pronounce” (*i.e.*, “the Panel is of the opinion that it is for the Respondent to *decide*, in the first instance, whether NDC violated the Guidebook and Auction Rules and, assuming the Respondent *determines* that it did, what consequences should follow”⁸²). “Decide” and “determine” are words that are typically defined differently from “pronounce.”⁸³ But even if the Panel views the terms as interchangeable, the Panel still has failed to provide any

⁸⁰ *The Law Dictionary* (on-line version): pronounce, available at <https://thelawdictionary.org/pronounce>, [Ex. CA-156].

⁸¹ *Merriam-Webster Dictionary* (on-line version): pronounce, available at <https://www.merriam-webster.com/dictionary/pronounce?src=search-dict-box>, [Ex. CA-157].

⁸² Decision, ¶ 349.

⁸³ *Merriam-Webster Dictionary* (on-line version): decide, available at <https://www.merriam-webster.com/dictionary/decide?src=search-dict-box>, [Ex. CA-158] (“[T]o make a final choice or judgment about”; to select as a course of action”; “to infer on the basis of evidence”); *Merriam-Webster Dictionary* (on-line version): determine, available at <https://www.merriam-webster.com/dictionary/determine?src=search-dict-box>, [Ex. CA-159] (“[T]o fix conclusively or authoritatively”; “to decide by judicial sentence”; “to settle or decide by choice of alternatives or possibilities”).

basis for its ruling that ICANN must pronounce/decide/determine whether there has been a violation of the New gTLD Guidebook Rules, *before* a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failing to act as required based on that violation. We refer again to J. Beckwith Burr’s hearing testimony quoted above, *i.e.*, that the purpose of an IRP is to determine whether, “in taking some action or inaction or failing to act, ICANN has violated its bylaws,” including “in its application of the rules of the applicant guidebook”.⁸⁴ Nor is there any basis for the Panel’s apparent ruling that ICANN must “decide,” “determine,” or “pronounce” *on the appropriate remedy* for a violation before a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failure to act on such violation. The Panel also failed to explain what it means by its “assumption that the Respondent will take ownership of these issues when they are raised.”⁸⁵ It failed to state on what that “assumption” is based, given that the factual record of ICANN’s conduct in this matter demonstrates (as discussed below) ICANN’s failure to act in good faith and its disparate treatment of Afilias as compared to Verisign/NDC.⁸⁶ Nor did the Panel state what, in the Panel’s view, the ICANN Board needs to do to take “ownership of these issues.”

48. However, by their plain language, all these terms purport to require that the ICANN Board must take some sort of *action* before a claimant can bring an IRP. Thus, the Panel’s ruling (or more accurately, its failure to rule) on ICANN’s Rules Breach Claim has effectively written the terms “inaction” and “failure to act” out of the Bylaws. In so doing, the Panel has significantly—and impermissibly—rewritten its mandate in this IRP proceeding. It has also excluded the possibility of the direct right of action that was specifically included in the amended

⁸⁴ Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination).

⁸⁵ Decision, ¶ 296.

⁸⁶ See **Section III(C)**.

Bylaws insofar as Staff action or inaction underlies a claim. Indeed, as the Panel’s Decision stands, ICANN will always be able evade accountability for Staff or Board inaction, so long as the Board has not “pronounced” on the basis for the inaction.

49. The Panel’s omission to decide and resolve whether the Covered Action before it—*i.e.*, ICANN’s failure to disqualify NDC and offer .WEB to Afilias—cannot be reconciled with its mandate and is therefore *infra petita*. In addition, the Panel’s referral of the threshold questions back to the ICANN Board—thus allowing the Panel to avoid deciding and resolving the Dispute that has been placed before it—is *extra petita*. There is nothing in any of the documents governing this arbitration (*i.e.*, the Bylaws, the Interim Procedures, or the ICDR Arbitration Rules) that allows this Panel to refer such threshold questions to the ICANN Board to “pronounce [on] in the first instance.”⁸⁷ Thus, the Panel failed not only to “decide” the Dispute presented to it. The Panel also failed to decide it “in compliance with the Articles ... and Bylaws, *as understood in the context of the norms of applicable law and prior relevant IRP decisions*.”⁸⁸

50. As stated above, the ICANN Bylaws not only require IRP Panels to “resolve” the Disputes that have been put before them. They also require a “*well-reasoned*” decision.⁸⁹ And they require an IRP Panel to “*make findings of fact to determine whether the Covered Action*

⁸⁷ It is sometimes the case that an arbitral tribunal—instead of resolving the dispute in the manner required by the arbitration agreement (and thus acting *infra petita*)—will instead purport to dispose of the dispute in a manner that is not permitted by the arbitration agreement (thus acting *extra petita*). For example, in *Ronly v. Zestafoni*, the English High Court observed that where the arbitrator failed to resolve all of the claims submitted to him—instead referring some of those claims back to the parties to resolve amongst themselves—his award could be considered both *infra petita* (because it did not fulfill the mandate to resolve all of the claims before him) and *extra petita* (because it made a referral that was not permitted by the mandate. Here, the Panel can issue an additional decision that will address the problem that its decision is both *infra petita* and *extra petita* in its referral of Afilias’ Rules Breach Claim back to the ICANN Board to “pronounce [on] in the first instance”—simply by resolving the claim that it was *required* to resolve under its mandate.” *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), [Ex. CA-155]. An award that is *extra petita* can be challenged under section 68(2)(b) of the EAA on the grounds of “the tribunal exceeding its powers....” English Arbitration Act 1996, [Ex. AA-50], Sec. 68(2)(b).

⁸⁸ Bylaws, [Ex. C-1], Sec. 4.3(i)(ii) (emphasis added).

⁸⁹ Bylaws, [Ex. C-1], Sec. 4.3(v) (emphasis added).

constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”⁹⁰ Most modern arbitration legislation and arbitral rules—including the EAA and the ICDR Rules⁹¹—require “reasoned awards.” As explained by Professor Born: “[A] reasoned decision, explaining how legal rules apply to factual determinations, is the essence of adjudication, distinguishing it from legislative, executive and other forms of decision-making.”⁹² The Bylaws, in requiring a *well-reasoned* decisions and *findings of fact* to determine whether the Covered Action constituted an action or inaction that violated the Articles and Bylaws, go significantly beyond the requirement of a reasoned award.

51. As stated above, the Panel has failed to provide any reasoned basis to support its assertion that the ICANN Board must “pronounce upon” or “decide” or “determine” the threshold questions of whether NDC violated the New gTLD Program Rules—and, if so, what the appropriate remedy should be—before Afilias can bring an IRP alleging that ICANN’s failure to disqualify NDC and offer .WEB to Afilias violates ICANN’s Articles and Bylaws. Indeed, not only does the Panel’s ruling lack any legal or factual basis, it also is directly contradicted by the Panel’s factual findings and other substantive rulings in the case.

52. Thus, in its *Dispositif*, the Panel concluded that the ICANN Board breached ICANN’s Articles and Bylaws by, *inter alia*:

[F]ailing itself to pronounce on [Claimant’s complaints about the propriety of the DAA] while taking the position in this IRP, an accountability mechanism *in which these complaints were squarely*

⁹⁰ Bylaws, [Ex. C-1], Sec. 4.2(i)(i) (emphasis added).

⁹¹ EAA, Article 52(4); ICDR Rules, Article 30(1).

⁹² Gary Born, *International Commercial Arbitration* (3rd ed., 2021), [Ex. CA-149], p. 3293. As explained by Professor Born, a “reasoned award” is “necessary in order to constrain the power of the decision-maker (reducing the risk of arbitrary, corrupt, whimsical, or lazy decisions), to enhance the quality of the decision-making process (by requiring thoughtful, diligent analysis) and to provide the parties with the opportunity not only to be heard, but to hear and see that their submissions have been considered and how they have been disposed of.” *Id.*, p. 3292.

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 Program*[.]⁹³

53. In other words, the Panel ruled that the ICANN Board breached its Articles and Bylaws by taking the positions that (1) the Panel “should not pronounce” on Afiliias’ complaints that were “squarely raised” in the IRP and (2) the Panel should “give priority to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program.” And yet the Panel—while holding that the ICANN Board breached its Articles and Bylaws by taking these positions—adopted these very same positions as its own, ruling that the Panel should not pronounce on Afiliias’ complaints that were “squarely raised” in the IRP, but should instead defer to the Board’s supposed expertise. By essentially ordering “relief”—which ICANN never formally requested—reflecting the very same conduct that the Panel concluded breached the Articles and Bylaws when taken by the ICANN Board, the Panel plainly failed to satisfy its mandate to decide this Dispute “in compliance with” the Articles and Bylaws.⁹⁴

54. In addition, as noted above, at Paragraph 349 of the Decision, the Panel stated its “opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook and Auction Rules....”⁹⁵ As explained above, there is no legal or factual basis for the Panel to conclude that ICANN must first decide or pronounce that there has been such a violation,

⁹³ Decision, ¶ 410 (1) (emphasis added).

⁹⁴ Similarly, at paragraph 328 of its Decision, the Panel stated that “it seems to the Panel reasonable for the Board to have decided to wait the outcome of these proceedings before considering and determining what action, if any, it should take.” That statement is difficult, if not impossible to reconcile with the Panel’s ruling in its *Dispositif* that the Board violated the 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” the Board, “and in order to give priority to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program.” Decision, ¶ 410(1).

⁹⁵ Decision, ¶ 349.

in order for a claimant to assert that ICANN failed to act on the violation consistent with the Articles, Bylaws, and New gTLD Program Rules. Furthermore, the notion that ICANN has not yet “decided” or “pronounced” on these issues “in the first instance” cannot be reconciled with the Panel’s other rulings, or for that matter, the record in this case. Indeed, the Panel itself recognized that ICANN’s assertions that it had “taken no position on whether NDC violated the Guidebook” cannot be reconciled with either its earlier representations in the IRP or its other conduct during and before the IRP.⁹⁶

55. Thus, as the Panel found in Paragraph 273 of its Decision, when ICANN proceeded toward delegation of .WEB to NDC in June 2018, “*a necessary implication* of the Respondent’s decision was that [Afilias’] concerns *did not stand - or no longer stood - in the way of the delegation of .WEB to NDC.*”⁹⁷

56. Similarly, as the Panel stated in Paragraph 341 of its Decision:

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.”*⁹⁸

57. And according to Paragraph 343 of the Decision:

The Panel also finds it *contradictory for the Respondent to assert in pleadings before this Panel that the Respondent has not yet considered the Claimant’s complaints*, having represented to the Emergency Panelist earlier in these proceedings that ICANN “*ha[d] evaluated these complaints*” and that the “*time ha[d] therefore*

⁹⁶ Decision, ¶ 341.

⁹⁷ Decision, ¶ 273 (emphasis added).

⁹⁸ Decision, ¶ 341 (emphasis added) (quoting ICANN’s Rejoinder Memorial, ¶ 81).

*come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers”.*⁹⁹

58. The Panel thus recognized that ICANN’s assertion that it had taken “no position” on Afiliás’ complaints was contradicted by ICANN’s prior representations to a panelist and pleadings *in this IRP* (all of which ICANN made public), as well as by its conduct both during and prior to this IRP. Yet the Panel nonetheless based its “referral” back to the ICANN Board on the basis of this assertion by ICANN—even as the Panel made findings showing the assertion to be *false* (or, at best, highly dubious). The English courts have set aside arbitral awards (or portions thereof) for failure to resolve all claims where, as here, the award contains a “glaring illogicality.”¹⁰⁰

59. In candor, given the Panel’s other findings and rulings, Afiliás is not particularly sympathetic to the Panel’s complaint that:

[T]he Panel finds itself in the unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and decline[d] to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP.¹⁰¹

60. *First*, when an arbitral tribunal unquestioningly adopts one party’s unsubstantiated assertion as a basis for its ruling—here, that ICANN “has made no first instance determination of these allegations, whether through actions of its Staff or Board”—even though that assertion is

⁹⁹ Decision, ¶ 343 (emphasis added) (quoting ICANN’s Opposition to Afiliás’ Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3).

¹⁰⁰ *See, e.g., Metropolitan Property Realizations Ltd. v. Atmore Investments Ltd.* [2008] EWHC 2925 (Ch), [Ex. CA-160].

¹⁰¹ Decision, ¶ 345.

contradicted by the Panel’s specific factual findings, that tribunal has failed to provide a “reasoned” (let alone a “well-reasoned”) award with respect to that ruling.

61. *Second*, the Panel’s statement that ICANN has “decline[d] to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP” (an assertion offered by ICANN after the IRP was well underway, and one that cannot be reconciled with ICANN’s prior representations to the Emergency Panelist) is also inconsistent with the Panel’s factual findings, as well as with ICANN’s own submissions to the Panel (as shown, *inter alia*, by the examples from ICANN’s submissions set forth above at Paragraph 32 above).

62. *Third*, as the members of this experienced Panel must surely know, even assuming *arguendo* that ICANN did “decline[] to take a position as to the propriety of the DAA under the [New gTLD Program Rules] in this IRP,” ICANN’s failure to engage on the issues that Afiliis properly raised in support of its Rules Breach Claim in this IRP does not excuse the Panel from its mandate to decide and resolve the claim. ICANN’s failure to “take a position as to the propriety of the DAA” certainly cannot justify the Panel’s *extra petita* act of referring these issues back to the ICANN Board to “pronounce [on] in the first instance.”

63. *Fourth*, the assertion that ICANN “is the entity with primary responsibility for [the New gTLD] Program” is irrelevant to the Panel’s mandate in this case. The notion that ICANN or its Board has the “requisite knowledge, expertise, and experience, to pronounce in the first instance”¹⁰² on issues that have been squarely presented to this Panel—so that the Panel should refer these issues back to the ICANN Board if the Board has not yet made any such pronouncements—has no legal or factual basis whatsoever and is entirely inconsistent with this Panel’s mandate. Apart from ICANN’s unsupported assertion, there is nothing in the record before

¹⁰² Decision, ¶ 359.

this Panel—and certainly nothing in the Panel’s Decision—to support the notion that the Board has the “requisite knowledge, expertise, and experience” (but this Panel does not) to decide the Dispute submitted to this Panel, in which the Board is accused of having failed to follow its own Articles, Bylaws, and New gTLD Program Rules. To the contrary, there are numerous findings in the Panel’s Decision to support Afiliias’ claim that ICANN has acted in bad faith and a manner that afforded disparate treatment to Afiliias as compared to Verisign and NDC. Those findings seriously compound the Panel’s lack of adequate reasoning in “referring” Afiliias’ Rules Violation Claim back to the Board to “pronounce [on] in the first instance.”

64. This IRP is an ICANN *accountability* mechanism. It is the only means—per ICANN—by which ICANN’s Staff and Board can be held accountable for actions *or inactions* relating to the New gTLD Program that breach the Articles or Bylaws. The purposes of this IRP include providing “meaningful, affordable and accessible *expert* review of Covered Actions...”¹⁰³ This Panel has failed to provide that review. Its deference to the Board’s supposed “knowledge, expertise, and experience”—such that the Panel has refused to resolve a Dispute alleging that the Board’s failure to act as required by the New gTLD Program Rules violates its Articles and Bylaws, instead referring that Dispute back to the Board to “pronounce” on—eliminates ICANN’s accountability. As stated by the IRP Panel in *Vistaprint v. ICANN*:

[T]he IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third-party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel’s review must be founded on a deferential standard.... Such 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

¹⁰³ Bylaws, [Ex. C-1], Sec. 4.3(a)(ii).

robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.¹⁰⁴

65. That is why the Panel's mandate is to "conduct an objective, de novo examination of the Dispute;" to "make findings of fact to determine whether the Covered Action constituted an action or inaction that violated" the Article and Bylaws; and to ensure that "[a]ll Disputes 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."¹⁰⁵

66. The Panel has failed to fulfill that mandate. Accordingly, the Panel should issue an additional decision in which it decides and resolves Afilias' Rules Breach Claim as required by the Parties' arbitration agreement.

3. The Issue of Remedy for the Rules Breach Claim Has Also Been Properly Submitted and Fully Arbitrated Before the Panel.

67. Because the Panel did not resolve Afilias' Rules Breach Claim, it also did not reach the issue of the remedies requested by Afilias. The proper remedies for this breach, however, were also properly submitted and fully arbitrated for the Panel. Consistent with the Panel's mandate, the Panel must resolve them—especially if the Panel agrees with Afilias and issues an additional decision resolving the Rules Breach Claim on the merits.

68. Afilias sought both declaratory relief and affirmative declaratory relief (what ICANN more accurately called "injunctive" relief) for its Rules Breach Claim in the IRP. As a preliminary matter, there is no dispute that if a breach is found, the Panel has the authority to make a declaration to that effect. As ICANN stated in its Rejoinder Memorial:

¹⁰⁴ *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. Notably, the *Vistaprint* IRP was decided under the prior Bylaws, *i.e.*, before the amendments in 2016 provided that IRPs must result in a final resolution of claims that can be enforced in a court of law.

¹⁰⁵ Bylaws, [Ex. C-1], Sec. 4.3(i)(i) and (ii).

Afilias seeks two types of relief [(i.e., declaratory and injunctive) on its Rules Breach Claim]. First, it asks the Panel *to declare* that ICANN violated its Articles and Bylaws by (a) failing to disqualify NDC’s Application [after receiving the DAA]; (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.*¹⁰⁶

69. The Panel indeed ruled that ICANN had breached its Articles and Bylaws by “moving to delegate .WEB to NDC in June 2018”—at least so long as Afilias’ complaints “remained unaddressed”—and issued a declaration to that effect.¹⁰⁷ With respect to Afilias’ request for a declaration that ICANN breached its Articles and Bylaws with respect to items (a) and (b), ICANN offered three defenses “on the merits.”¹⁰⁸ *First*, ICANN argued that the claim was time-barred, which argument the Panel rejected.¹⁰⁹ *Second*, ICANN argued that “ICANN and the Board acted within the realm of reasonable business judgment in deciding not to address the merits of claims made by Afilias and others while an Accountability Mechanism was pending”¹¹⁰ an argument that the Panel declined to reach.¹¹¹ *Third*, ICANN argued that “even if Afilias’ allegations against NDC were found by ICANN to have merit, nothing mandates automatic disqualification of NDC’s application or rejection of its auction bids.”¹¹²

¹⁰⁶ ICANN’s Rejoinder Memorial, ¶ 117 (emphasis added) (footnotes omitted).

¹⁰⁷ Decision, ¶ 410(1).

¹⁰⁸ ICANN’s Rejoinder Memorial, ¶ 117 (setting forth the three merits defenses to the claim).

¹⁰⁹ Decision, ¶¶ 278, 281.

¹¹⁰ ICANN’s Rejoinder Memorial, ¶ 118.

¹¹¹ As discussed above, while the Decision stated that “it seems to the Panel reasonable for the Board to have decided to wait the outcome of these proceedings before considering and determining what action, if any, it should take,” (Decision, ¶ 328), that assertion is difficult, if not impossible, to reconcile with the Panel’s *Dispositif* as set forth in paragraph 410(1)(b)(ii). Moreover, the Panel specifically stated in paragraph 328 that it reached its conclusion “without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board’s exercise of its fiduciary duties.”

¹¹² ICANN’s Rejoinder Memorial, ¶ 117.

70. On this last point, it is unclear as to what the Panel ruled. Although the Panel stated that it accepted ICANN’s “submission that it would be improper for the Panel to dictate what should be the consequence of NDC’s violation of the New gTLD Program Rules, assuming a violation is found,” the Panel also said that it was “mindful of the Claimant’s contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent’s obligation to enforce the New gTLD Program Rules objectively and fairly.”¹¹³ But Afilias specifically put before the Panel the question of whether the New gTLD Program Rules—construed and applied within the parameters of ICANN’s Articles and Bylaws—required disqualification of NDC’s application and bids, and offering .WEB to Afilias as the next highest bidder, and explained why the question must be answered in the affirmative.¹¹⁴ Afilias therefore satisfied its burden of demonstrating that it is entitled to a declaration that ICANN breached its Articles and Bylaws by failing to disqualify NDC’s application and bids and to offer .WEB to Afilias as the second highest bidder. Afilias also fully briefed and argued the issue of why it was entitled to injunctive relief—*i.e.*, relief from the Panel ordering ICANN to disqualify NDC’s application and bids and to offer .WEB to Afilias as the second highest bidder.¹¹⁵ ICANN fully

¹¹³ Decision, ¶ 360.

¹¹⁴ Amended Request for IRP, Secs. 3-5; Afilias’ Reply Memorial, Sec. III; Afilias’ PHB, Secs. III(A) and (C).

¹¹⁵ Amended Request for IRP, ¶ 89 (“Afilias respectfully requests the IRP Panel to issue a binding Declaration: . . . (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC’s bid for .WEB for violating the AGB and Auction Rules; (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules”); Afilias’ Reply Memorial, ¶ 155 (“the Panel’s mandate necessarily requires the Panel to issue a final decision declaring that ICANN breached its Articles and Bylaws by: (a) failing to disqualify NDC’s application and bid upon receiving the DAA in August 2016; (b) failing to offer Afilias the rights to .WEB, as the next highest bidder, as provided for in the New gTLD Program Rules; and (c) following a biased, superficial and self-serving investigation, proceeding to contract with NDC (and hence Verisign) for the .WEB registry agreement, notwithstanding NDC’s disqualifying violations.”); Afilias’ Response to the *Amici*’s Briefs, ¶ 66 (“the Panel’s task with respect to Afilias’ principal claim is straightforward: by reviewing the terms of the DAA against the New gTLD Program Rules, applied in accordance with ICANN’s Articles and Bylaws, the Panel should conclude that ICANN violated its Articles and Bylaws by failing to disqualify NDC’s application and bid, and by failing to award .WEB to Afilias as the next highest bidder.”); Afilias’ PHB, ¶ 240 (“Specifically, as injunctive relief, in addition to granting such other relief as the Panel considers appropriate in the circumstances of this case, the Panel should order and recommend that ICANN: Reject NDC’s application for the .WEB gTLD; Disqualify NDC’s bids at the ICANN auction for the .WEB gTLD;

briefed and argued its position to the contrary. Accordingly, if the Panel issues an additional decision resolving the merits of Afiliás' Rules Breach Claim (as it must to fulfill its mandate)—and rules in Afiliás' favor—then the Panel should also finally resolve the Dispute by addressing Afiliás' requested relief.

C. The Panel Must Issue an Additional Decision Resolving Afiliás' International Law Claim.

1. Afiliás Presented a Claim to the Panel that ICANN Violated International Law.

71. Afiliás claimed from the very outset of this IRP that ICANN violated its obligation to conduct its activities in conformity with relevant principles of international law by failing to enforce the New gTLD Program Rules and by proceeding to delegate .WEB to NDC. We refer to this claim as the **International Law Claim**. The Panel, however, failed to decide this claim, and there is no substantive assessment whatsoever of Afiliás' extensive submissions on ICANN's international law violations in the Decision. Here again, the Panel failed to fulfill its express mandate under the Bylaws.

72. Afiliás laid out its position on ICANN's international law obligations clearly and distinctly from the first statement of its claims in the Request for IRP and the Amended Request for IRP.¹¹⁶ In the latter, Afiliás set forth its position that, pursuant to the Articles and Bylaws, “ICANN is required to carry out its activities *‘in conformity with relevant principles of international law and international conventions* and applicable local law[.]”¹¹⁷ Afiliás further alleged that “ICANN has also breached its obligations under international and California law to

Deem NDC ineligible to execute a registry agreement for the .WEB gTLD; Offer the registry rights to the .WEB gTLD to Afiliás, as the next highest bidder in the ICANN auction”).

¹¹⁶ Afiliás' Request for Independent Review Process (14 Nov. 2018) (“**Request for IRP**”), ¶ 9; Amended Request for IRP, ¶ 8.

¹¹⁷ Amended Request for IRP, ¶ 8 (quoting Bylaws, [Ex. C-1], Sec. 1.2(a)(v)).

act in good faith.”¹¹⁸ Based on this position, Afiliias submitted to the Panel its request for a binding declaration that “ICANN has ... *violated international law*[.]”¹¹⁹ None of the foregoing is controversial.

73. Indeed, in its recitation of the Parties’ arguments, the Panel properly acknowledged that Afiliias had submitted a claim for ICANN’s violation of international law and good faith:

The Claimant contends that the Respondent has breached its obligation, under its Bylaws, to make decisions by applying its documented policies ‘neutrally, objectively, and fairly,’ in addition to breaching its obligations under international law and California law to act in good faith.¹²⁰

The Panel further recognized in that recitation that Claimant’s request for relief explicitly sought a determination on its claim of an international law violation:

By way of relief, the Claimant requested the 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*[.]¹²¹

74. Afiliias set out the particulars as to what international law and the principle of good faith required of ICANN. Afiliias explained that:

The guiding substantive and procedural rules in ICANN’s Articles and Bylaws—including the rules involving procedural fairness, transparency, and non-discrimination—are so fundamental that they appear in some form in virtually every legal system in the world, and, as discussed below, are given definition by numerous sources of international law. *They arise from the general principle of good*

¹¹⁸ Amended Request for IRP, ¶ 5.

¹¹⁹ Amended Request for IRP, ¶ 89(1) (emphasis added).

¹²⁰ Decision, ¶ 126.

¹²¹ Decision, ¶ 128 (emphasis added).

*faith, which is considered to be ‘the foundation of all law and all conventions’.*¹²²

75. Afilias then elaborated, including with volumes of supporting authority, as to what the four following specific facets of the international law principle of good faith required of ICANN in the circumstances of the present case:¹²³

- Procedural fairness and due process: Response, ¶¶ 145-147; Authorities CA-66 through CA-73.
- Impartiality and non-discriminatory treatment: Response, ¶¶ 149-150; Authorities CA-74 through CA-91.
- Openness and transparency: Response, ¶¶ 155-156; Authorities CA-92, CA-85 through CA-89, and CA-93 through CA-98.
- Respect for legitimate expectations: Response, ¶ 160; Authorities CA-66, CA-78, and CA-99 through CA-103.

76. Afilias further explained that, “[a]s determined by the first-ever IRP panel (Schwebel, Paulsson, Trevizian), [international law] includes the obligation of good faith.”¹²⁴ As the Panel itself recognized in its recitation of arguments, Afilias specified that its international law claim included allegations that ICANN had violated various threads of its international law obligation of good faith.¹²⁵ The Bylaws provide that the Panel is required to decide the dispute between ICANN and Afilias “in the context of the norms of applicable law and prior relevant IRP decisions.”¹²⁶ This, the Panel failed to do.

¹²² Afilias’ Response to the *Amicus Curiae* Briefs (24 July 2020) (“**Afilias’ Response to the Amici’s Briefs**”), ¶ 144 (emphasis added) (quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), [Ex. CA-3(bis)], p. 105).

¹²³ Afilias’ Response to the *Amici’s* Briefs, ¶¶ 141-44.

¹²⁴ Amended Request for IRP, ¶ 8.

¹²⁵ Decision, ¶ 126.

¹²⁶ Bylaws, [Ex. C-1], Sec. 4.3(i)(ii); *see also id.*, Sec. 4.3(v).

77. Nevertheless, the Panel never denied that obligations under international law apply to ICANN. To the contrary, the Panel directly quoted from Article 2, paragraph III of the Articles, which states that ICANN “shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions...”¹²⁷ It also directly quoted from Section 1.2(a) of the Bylaws, which restates that ICANN shall carry “out its activities in conformity with relevant principles of international law and international conventions and applicable local law”.¹²⁸ Nonetheless, the Panel did not expressly address and decide Afiliat’s International Law Claim or provide any reasoning for its failure to do so.¹²⁹

78. While the general applicability of international law to ICANN’s conduct was not addressed, the Decision does contain the following erroneous statement regarding Claimant’s position on the applicable law—one that Claimant has never taken expressly or in which it has acquiesced:

At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.¹³⁰

79. With all due respect to the Panel, this statement should never have been included in the Decision. It is a word-for-word copy-paste of an identical statement from the Phase I

¹²⁷ Decision, ¶ 287 (quoting Articles, [Ex. C-2], Art. 2(III)).

¹²⁸ Decision, ¶ 289 (quoting Bylaws, [Ex. C-1], Sec. 1.2(a)).

¹²⁹ The Panel’s general boilerplate dismissal in the *Dispositif* of “all of the Parties’ other claims and requests for relief” is insufficient to satisfy that the requirements that an IRP panel must make findings of fact and issue a well-reasoned decision resolving all of the claims presented to it. Decision, ¶ 410(14).

¹³⁰ Decision, ¶ 29.

Decision¹³¹ that simply ignores the extensive briefing that Afiliás provided on the application and relevance of international law to the issues presented for decision in Phase II of this IRP. Clearly no actual deliberation or analysis by the Panel in Phase II could have supported this passage, which constitutes a plain abdication of the Panel’s obligation to hear and resolve the issues before it in the IRP.¹³² One of the most critical issues for decision in any arbitration is that of the applicable law, rising to a ground for set aside or annulment in most systems of arbitration, including under the EAA.¹³³ We return to the issue of the Panel’s findings on the applicable law in our requests for interpretation (*see* Paragraphs 97 to 107).

2. The Panel Must Resolve Afiliás’ International Law Claim regarding ICANN’s Failure to Disqualify NDC.

80. Despite the uncontestable fact that ICANN is subject to obligations under international law and that Afiliás submitted a claim regarding the breach of those obligations, the Panel’s Decision failed entirely to consider or decide the substance of Afiliás’ International Law

¹³¹ Decision on Phase I (12 Feb. 2020), ¶ 27 (“At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles of Incorporation and other ‘quasi-contractual’ documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.”).

¹³² It is equally the case that this statement should never have been included in the Phase I Decision. Even at that stage, it was abundantly clear that Afiliás had taken the position in its Amended Request for IRP—submitted long before the Phase I Hearing and Decision—that:

ICANN is required to interpret and enforce the New gTLD Program Rules strictly in accordance with its Articles and Bylaws, which, pursuant to ***the requirement that ICANN ‘carry]] out its activities in conformity with relevant principles of international law,]]’ requires ICANN to interpret and apply them in good faith.***

Amended Request for IRP, ¶ 10 (emphasis added). Afiliás’ counsel in fact stated on the record during the Phase I hearing that ICANN’s Article and Bylaws require it to act in conformity with principles of international law and that “past panels have held that the relevant principles of international law include the obligation of good faith.” Phase I Hearing, Tr. (2 Oct. 2019), 54-55.

¹³³ A decision by a tribunal to apply a law to which the parties had not agreed is an excess of powers under section 68(2)(b) of the EAA. It was stated in *B v A* that a challenge may be sustained where there is a “conscious disregard” of the parties’ chosen law. *B v. A* [2010] EWHC 1626 (Comm), [Ex. CA-161], ¶ [25]; *see also* English Arbitration Act 1996, [Ex. AA-50], Sec. 46(1)(a) (“The arbitral tribunal shall decide the dispute . . . in accordance with the law chosen by the parties as applicable to the substance of the dispute.”).

Claim. This failure amounts to a striking violation of the Panel’s obligation to hear and resolve all of the claims submitted to it. Among other considerations of international law,¹³⁴ Afilias put forward the key claim that ICANN violated its international obligations of good faith, transparency, and respect for legitimate expectations when it failed to disqualify NDC’s application and bid pursuant to a good faith application of the New gTLD Program Rules.¹³⁵

81. Afilias clearly set out in its pleadings the claim that ICANN’s failure to act against NDC’s application was in violation of principles of international law, including good faith, transparency, and respect for legitimate expectations. Afilias made the following key submissions to describe its claim regarding ICANN’s violations of international law:

Instead, ICANN simply proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the .WEB Auction. *A good faith application of the New gTLD Program Rules to NDC’s conduct—carried out consistent with ICANN’s Articles and Bylaws—required ICANN to disqualify NDC’s application and bid.*

...

Afilias, as a participant in ICANN’s New gTLD Program, legitimately expected ICANN to comply with its own rules,

¹³⁴ Afilias alleged that ICANN violated its international obligations, including of good faith, because “[e]ven in this IRP, ICANN has taken diametrically opposed positions as to whether or not it evaluated [Afilias’] concerns” about NDC’s application. Afilias’ Response to the *Amici*’s Briefs, ¶ 147. It further observed that ICANN failed to provide “any serious explanation of why—despite its Board’s alleged decision not to take any action on .WEB until accountability mechanisms were concluded—ICANN nonetheless took the contention set off-hold and proceeded to delegate .WEB to NDC in June 2018.” *Id.*, ¶ 157. In light of its own findings as described above (*see* Paragraphs 53 to 63), it was therefore also incumbent on the Panel to make the determination that ICANN had violated its international obligations—including of good faith, procedural fairness, and transparency—by adopting inconsistent positions regarding its decisions about Afilias’ complaints and, indeed, by falsely insisting that it never resolved those complaints.

¹³⁵ Indeed, the Panel in its recitation of the parties’ arguments expressly acknowledged that Afilias had presented a claim that ICANN violated international law by failing to disqualify NDC’s application and bid:

The Claimant further claims that the Respondent failed to respect its legitimate expectations despite its commitment to make decisions by applying documented policies consistently, neutrally, objectively and fairly. According to the Claimant, had the Respondent followed the New gTLD Program Rules, it would necessarily have disqualified NDC from the application and bidding process.

Decision, ¶ 193 (emphasis added) (citation omitted).

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.¹³⁶

82. Afilias further underscored in its Revised Statement of Issues that this claim was squarely before the Panel for decision. There, Afilias put to the Panel the following issue:

To the extent ICANN had discretion within its Articles and Bylaws to proceed to finalize a .WEB registry agreement with NDC despite NDC’s violations of the New gTLD Rules, *whether ICANN exercised such discretion consistently with* its Articles and Bylaws, including, without limitation, its Competition Mandate and *the international law obligation of good faith.*¹³⁷

83. The claims that Afilias undisputedly presented on ICANN’s violations of international law in its resolution of .WEB were never rebutted by ICANN or the *Amici*. To the contrary, ICANN accepted at the final hearing that “international law and norms of international arbitration ... are also concepts that are baked into Section 4.3” of the Bylaws.¹³⁸

84. For the reasons set out above, it is not open to the Panel to refuse to decide claims that are properly before it. Afilias’ International Law Claim was squarely before the Panel, as the Panel itself acknowledged, and no action was taken by the Panel to resolve this claim. The Panel must now issue an additional decision addressing in a well-reasoned fashion Afilias’ International Law Claim.

¹³⁶ Afilias’ Response to the *Amici*’s Briefs, ¶¶ 156, 161 (emphasis added) (citations omitted).

¹³⁷ Afilias’ Revised Statement of Issues, ¶ 2 (p. 3) (emphasis added).

¹³⁸ Merits Hearing, Tr. Day 1 (3 Aug. 2020), 128:17-19.

D. The Panel Must Issue an Additional Decision Resolving Afilias’ Disparate Treatment Claim.

85. The Panel also failed to resolve Afilias’ claim—one that is distinct from the Rules Breach Claim—that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias vis-à-vis Verisign and NDC. We refer to this claim as the **Disparate Treatment Claim**. Afilias argued to the Panel that “ICANN has applied its standards, policies, procedures, and practices inequitably and in a manner that has singled out parties for disparate treatment—*i.e.*, Afilias for less favorable treatment, and NDC and Verisign for more favorable treatment” in violation of ICANN’s Articles and Bylaws.¹³⁹ Based on this submission, Afilias explicitly requested that the Panel decide “[w]hether ICANN violated its Articles of Incorporation and Bylaws through its disparate treatment of Afilias and Verisign/NDC[.]”¹⁴⁰ In its Decision, the Panel expressly acknowledged that Afilias had advanced this claim, noting that “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[.]”¹⁴¹ However, the Panel determined, without providing adequate reasoning, that a decision on Afilias’ Disparate Treatment Claim was “unnecessary.” In so doing, the Panel again failed to discharge its mandate.

86. Consistent with Afilias’ submissions, the Panel made several factual findings in its Decision that support Afilias’ Disparate Treatment Claim. The Panel found that:

- “the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.”¹⁴²

¹³⁹ Afilias’ PHB, ¶ 5; *id.*, ¶ 238 (seeking a declaration that ICANN violated Sections 1.2(a)(v) and 2.3 of the ICANN Bylaws “by the arbitrary, capricious, disparate, and discriminatory manner in which it treated Afilias”).

¹⁴⁰ Afilias’ Revised Statement of Issues, ¶ 3 (p. 1).

¹⁴¹ Decision, ¶ 346.

¹⁴² Decision, ¶ 297.

- Afiliias sent ICANN two letters raising concerns about NDC’s conduct on 8 August and 9 September 2016, and “in the meantime the Respondent had initiated a dialogue directly with Verisign[.]”¹⁴³
- “the Respondent, NDC and Verisign had knowledge of the terms of the DAA at that time [16 September 2016], [but] Afiliias and Ruby Glen did not. It seems to the Panel evident that this asymmetry of information put Afiliias and Ruby Glen at a significant disadvantage in addressing the topics listed in the Questionnaire in the context of ‘ICANN’s evaluation of the issues raised’.”¹⁴⁴
- “the Respondent could have, and ought to have requested Verisign and NDC for authorization to disclose the DAA to the other addressees of its Questionnaire, be it on an ‘external counsel’s eyes only’ basis.”¹⁴⁵
- “the Respondent’s decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett’s letter of 16 September 2016, the text in the introduction to the attached Questionnaire, and Mr. Atallah’s letter of 30 September 2016.”¹⁴⁶
- “the Respondent was once again adopting a position that could have resulted in .WEB being delegated to NDC without the Board having determined whether NDC’s arrangements with Verisign complied within the New gTLD Program Rules.”¹⁴⁷
- “from a due process perspective, the retroactive application of a time limitations provision is inherently problematic. ... The fact that only a single case, the Claimant’s IRP, was in fact affected by the retroactive application of the Interim Procedures only heightens the due process concern.”¹⁴⁸
- “[a]s 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 Afiliias’ letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing

¹⁴³ Decision, ¶ 302.

¹⁴⁴ Decision, ¶ 308; *id.*, ¶ 309 (explaining how “[o]ther topics in the Questionnaire would attract very different answers depending on whether the responding party had knowledge of the terms of the DAA.”).

¹⁴⁵ Decision, ¶ 311.

¹⁴⁶ Decision, ¶ 332 (citations omitted).

¹⁴⁷ Decision, ¶ 342.

¹⁴⁸ Decision, ¶¶ 280-81.

public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach."¹⁴⁹

Taken together, these determinations directly affirm the factual support for Afilias' Disparate Treatment Claim, which were identified in Afilias' Revised Statement of Issues.¹⁵⁰

87. Yet, despite all of the facts evidencing ICANN's inequitable and disparate treatment of Afilias, the Panel did not resolve Afilias' claim. The Panel instead concluded that it *“does not consider it necessary, based on the allegations of disparate treatment, to add to its findings in relation to the Claimant's core claims.”*¹⁵¹ The Panel's failure to address and resolve Claimant's Disparate Treatment Claim—on the grounds that on the Panel's view that it was not “necessary” for the Panel to deal with it—is manifestly unfair to Claimant. This is especially so because the Panel has improperly remanded to the Respondent for decision the fundamental issue of NDC's compliance with the New gTLD Program Rules—as well as the consequences of any violations that Respondent now finds (assuming it finds any)—even while making factual findings demonstrating the Respondent's bias against the Claimant and in favor of Verisign and NDC. Here, as elsewhere, there is a “glaring illogicality” to the Panel's assertion that it is not “necessary” to resolve Afilias' Disparate Treatment Claim, even as the Panel blithely (and, for the reasons explained above, improperly) referred critical issues before it back to the ICANN Board to “take ownership of” and “pronounce” on.

88. The Panel, however, cannot simply decide not to resolve a claim that was presented to it. While Claimant certainly appreciates that the Panel has made findings that it was subject to inequitable and disparate treatment at the hands of ICANN, it is not an option for an IRP panel to

¹⁴⁹ Decision, ¶ 347.

¹⁵⁰ See Afilias' Revised Statement of Issues, pp. 1-2.

¹⁵¹ Decision, ¶ 347 (emphasis added).

determine that it is not “necessary” to decide a claim that has been squarely put to it, and then fail to resolve the claim on that basis. As explained in **Section II(A)(1)**, the Panel is obligated to “decide all issues submitted [to it] for determination” under the basic principle of arbitrator ethics and national arbitration laws.¹⁵² Further, pursuant to ICANN’s Bylaws (*i.e.*, the “rules applicable to the present IRP”),¹⁵³ the Panel must *resolve all Disputes*.¹⁵⁴ The Bylaws do not provide the Panel with discretion to determine that it is not “necessary” to resolve a claim for a declaration that has been squarely put before it—or to make findings of fact but then decline “to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”¹⁵⁵

89. In the event that the Panel believes there is a legal basis for its choice to simply opine that it is not “necessary” to decide the Disparate Treatment Claim, then, consistent with its obligation to provide a “well-reasoned” decision, the Panel must identify its reasoning for its decision. The ICANN Bylaws, after all, require that “all IRP decisions shall be written and made public, *and shall reflect a well-reasoned application* of how the Dispute was resolved in compliance with the [Articles] and Bylaws, as understood in light of prior IRP decisions ... and norms of applicable law.”¹⁵⁶ Otherwise, the Panel must issue an additional decision addressing Afiliis’ Disparate Treatment Claim.

¹⁵² American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (1 Mar. 2004), [Ex. CA-151], Canon V(A).

¹⁵³ Decision, ¶ 27.

¹⁵⁴ Bylaws, [Ex. C-1], Sec. 4.3(a), (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”).

¹⁵⁵ Bylaws, [Ex. C-1], Sec. 4.3(i)(i).

¹⁵⁶ Bylaws, [Ex. C-1], Sec. 4.3(v) (emphasis added).

III. REQUESTS FOR INTERPRETATION

90. In addition to completing its mandate under the Bylaws by issuing an additional decision addressing the undecided claims set out in the previous section, Afiliias requests the Panel to provide an interpretation of several ambiguous and vague points of substance and reasoning contained in the Decision.

91. The clear import of the Panel’s Decision is that the Dispute has not yet been brought to a full and final resolution. In fact, the Panel has all but invited a future IRP panel to be convened to address whether the DAA and NDC’s other conduct complied with the New gTLD Program Rules and determine whether “NDC’s application for .WEB should be rejected and its bids at the auction disqualified[.]”¹⁵⁷ Thus, depending on how the Panel rules on Afiliias’ request for an additional decision on the undecided claims discussed in the previous section, the precise meaning and scope of certain aspects of the Decision is required for any future resolution of the Dispute; and indeed, for the “pronouncement” by the Respondent. An interpretation is also called for in light of various other parts of the Decision that appear to be directly contradictory and otherwise illogical and, therefore, of no benefit to the Parties, to future IRP panels, or to the Internet Community.

92. Article 33 of the ICDR Rules provides that, “[w]ithin 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award....”¹⁵⁸ The purpose of such a provision is to provide “a vehicle for one or both parties to secure clarification of the award where necessary” including regarding “its exact meaning and

¹⁵⁷ Decision, ¶ 410(1), (5); *id.*, ¶ 360 (“Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.”).

¹⁵⁸ ICDR Rules (2014), Art. 33(1).

scope.”¹⁵⁹ A commentary on the ICDR Rules specifies that “the interpretation process ... is to provide ‘clarification of the award by *resolving any ambiguity and vagueness in its terms*’.”¹⁶⁰ It is also accepted that, even where a request for interpretation “does not fall” strictly within the scope of the interpretation provision, it may nevertheless “do no harm and possibly some good if [the tribunal] were to address certain of the points” albeit outside the formal confines of the provision.¹⁶¹

93. Critically, the scope of a request for interpretation of an IRP panel’s decision must also be understood within the framework of the Panel’s mandate to provide well-reasoned decisions for the purpose of guiding and informing future decision-making. The Bylaws provide that IRP decisions “shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions*....”¹⁶² Well-reasoned decisions are necessary because the central purpose of ICANN accountability through the IRP is advanced by “creating precedent to guide and inform the Board, Officers ..., Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.”¹⁶³ An IRP is no mere commercial arbitration where awards are confidential and of significance for only the direct

¹⁵⁹ Report of the Secretary General: Revised Draft Set of Arbitration Rules for Optional Use in *Ad Hoc* Arbitration relating to International Trade (UNCITRAL Arbitration Rules) (addendum), Commentary on the Draft UNCITRAL Arbitration Rules, U.N. Doc. A/CN.9/112/Add.1 (12 Dec. 1975), *reprinted in* 7 Y.B. UNCITRAL 166 (1976), [Ex. CA-162], Commentary on Article 30, ¶¶ 1-2 (at 180). It should be noted that the ICDR Rules originally derive from the 1976 UNCITRAL Rules and Article 33 remains materially similar on the availability of a request for interpretation. *Compare* ICDR Rules (2014), Art. 33(1) *with* UNCITRAL Arbitration Rules (1976), [Ex. CA-163], Art. 35(1).

¹⁶⁰ Martin F. Gusy and James M. Hosking, *A Guide to the ICDR International Arbitration Rules* (2nd ed., 2019), [Ex. CA-148], ¶ 33.13 (emphasis added) (citation omitted).

¹⁶¹ *Methanex Corp. v. United States of America*, UNCITRAL, Letter to Parties from Tribunal (25 Sept. 2002), [Ex. CA-164], ¶ 3 (at p. 3).

¹⁶² Bylaws, [Ex. C-1], Sec. 4.3(v) (emphasis added).

¹⁶³ Bylaws, [Ex. C-1], Sec. 4.3(a)(vi).

parties to a dispute. Nor is the IRP an “advisory” process. Rather, the resulting precedent-setting decisions of an IRP serve as the basis for the global Internet community to hold ICANN accountable. Clarity and detailed reasoning is therefore essential.

94. It is therefore critical that the Panel provide interpretations of its Decision that are sufficient to remove all ambiguity and obscurity from the terms and phrasing employed as well as from the broader reasoning relied upon to reach its conclusions. Both must be sufficient to allow, not just the Parties, but also an objective observer in the global Internet community to understand how the Panel rendered its decisions and the implications of those decisions both for this Dispute and future Disputes. Thus, in accordance with Article 33 of the ICDR Rules, Afiliias requests the Panel to provide interpretations of the following issues in the Decision that are vague, ambiguous, confusing, and/or contradictory:

- What is the scope and meaning of the terms “pronounce” and “pronouncement” as used by the Panel in stating that ICANN Staff did not “pronounce” on Afiliias’ complaints and in recommending that the Board should now “pronounce” on Afiliias’ complaints? (**Section III(A)**)
- Did the Panel determine that the Board must always “pronounce” on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel’s observations that some sort of decision on Afiliias’ complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction? (**Section III(B)**)
- What law (if any) did the Panel apply in this IRP—just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law? (**Section III(C)**)
- On what legal or evidentiary basis did the Panel determine that ICANN has “the requisite knowledge, expertise, and experience, to pronounce” on Afiliias’ complaints compared to the Panel? (**Section III(D)**)
- What standard of proof did the Panel apply to each of Afiliias’ submissions in support of its claims? (**Section III(E)**)

A. What is the Scope and Meaning of the Terms “Pronounce” and “Pronouncement” as Used by the Panel in Stating that ICANN Staff did not “Pronounce” on Afilias’ Complaints and in Recommending that the Board Should Now “Pronounce” on Afilias’ Complaints?

95. As discussed above, in the Decision, the Panel repeatedly stated that ICANN failed to “pronounce” upon Afilias’ complaints and thus recommended that it is now for the Board to “pronounce” in the first instance on Afilias’ complaints regarding NDC’s violations of the New gTLD Program Rules.

96. Afilias has carefully reviewed ICANN’s Articles and Bylaws, the Applicant Guidebook, as well as the Interim Supplementary Procedures and the ICDR Rules. It has not been able to identify a single reference to or use of the terms “pronounce” or “pronouncement” in any of those instruments—documents that provide the legal framework for ICANN’s activity and for the conduct of IRPs. It equally undertook a careful review of the submissions and statements, both oral and written, by the Parties and the *Amici* in this IRP. It was again unable to identify any reference to the terms “pronounce” or “pronouncement.” The Panel thus appears to have fashioned from whole cloth the terms “pronounce” and “pronouncement” and in so doing introduced a new pre-requisite for claimants to bring IRPs that is neither included in the Bylaws nor the New gTLD Program Rules.

97. And yet the Decision does not provide any explanation as to the legal basis for this requirement or of the form or substance of the “pronouncements” that should have been made by the Respondent, or that the Respondent should now make for its conduct to be subject to review by an IRP panel. Because the Panel failed to explain this key term in its Decision, it is critical that the Panel provide well-reasoned guidance on what constitutes a “pronouncement” and what is the foundation in ICANN’s documents or applicable law for the “pronouncement” requirement,

particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction.

98. The Panel found that the ICANN Staff had implicitly decided the matter of NDC's application when Staff proceeded with the delegation of .WEB to NDC.¹⁶⁴ By that same logic, the Board too must have implicitly decided upon that matter when it stood passively by even while knowing that Staff was proceeding with the delegation.¹⁶⁵ Given that ICANN had indeed decided the matter of NDC's application by proceeding, the Panel's declaration that ICANN nonetheless had never "pronounced" on that matter is both vague and ambiguous. That is especially so given that elsewhere in its Decision, the Panel used the terms "decide" or "determine," which (as discussed above), are generally defined differently from "pronounced."¹⁶⁶ Afilias therefore requests an interpretation that clarifies what the Panel meant when it stated that ICANN had nevertheless failed to "pronounce" on the matter of NDC. It further requests that the Panel clarify what parts of ICANN's Articles and Bylaws as well as the Parties' submissions it has relied upon in concluding that ICANN failed to "pronounce," and that, consequently, ICANN must now "pronounce in the first instance" before Afilias can have its Rules Breach Claim resolved by an IRP Panel.

99. In addition, the Panel unilaterally fashioned a remedy—*i.e.*, one that was not formally requested as relief by ICANN—that depends entirely on the meaning of this term but has failed to provide any indication of what it involves in substance or form. Afilias therefore requests an interpretation of this key term as well as what process, form, and substance an adequate "pronouncement" must have to comply with the Panel's decision, as well as its basis in ICANN's

¹⁶⁴ Decision, ¶ 273.

¹⁶⁵ Decision, ¶ 333.

¹⁶⁶ See **Section III(B)(2)**.

Articles and Bylaws as well as in the Parties' submissions. In particular, it requests that the Panel address the following questions regarding the nature of a "pronouncement":

- a) What constitutes a "pronouncement" and what is the foundation in ICANN's documents or applicable law for the "pronouncement" requirement, particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
- b) What should have been the form and substance of ICANN's "pronouncement" on Afilias' complaints?
- c) On what sources did the Panel rely to fashion its "pronouncement" remedy?
- d) Before ICANN issues the "pronouncement" recommended by the Panel, must Afilias and other Internet community members be given an opportunity to be heard by the Board?
- e) Must the Respondent's "pronouncement" be issued following an opportunity for Afilias and other Internet community members to receive and comment on all relevant evidence and argument?
- f) What materials, documentary or otherwise, must ICANN consider before it issues the "pronouncement" recommended by the Panel?
- g) Must the "pronouncement" be issued in a written form and made public on ICANN's website?
- h) Must the "pronouncement" be issued with full and adequate supporting reasoning following Board deliberation?
- i) Must the "pronouncement" be issued with findings of fact and conclusions of law?
- j) Must the "pronouncement" be issued without the participation of Board members with conflicts of interest?

B. Did the Panel Determine that the Board Must Always "Pronounce" on Staff Action or Inaction as a Pre-Condition for an IRP Panel to Decide a Dispute Based on Staff Action or Inaction?

100. As set forth above, the effect of the Decision is that Afilias' challenge to the action or inaction of Afilias' Staff must first be submitted to the Board for "pronouncement" before an

IRP may be pursued.¹⁶⁷ The Panel imposed this effective requirement notwithstanding the Panel's determination that the Board *knew* that the Staff had not disqualified or rejected NDC's application but instead had proceeded to delegate .WEB.¹⁶⁸ And it did so notwithstanding its determination that it was entirely within the power of the Staff acting alone to execute a registry agreement with NDC.¹⁶⁹ There is nothing in the record to indicate that, had Afiliis not timely commenced CEP, Afiliis' complaints would ever have been addressed by ICANN. Nonetheless, the Panel concluded that in this case, Afiliis' claim about the Board's inaction was "premature,"¹⁷⁰ and that because of ICANN's supposed failure to "pronounce" on the threshold issues underlying Afiliis' claim, the Board must "pronounce in the first instance" before Afiliis' Rules Breach Claim can be addressed by an IRP Panel.¹⁷¹ Here, too, the Panel failed to provide any reasoning or analysis to explain its conclusion that the threshold issues underlying that claim were "premature," so that the Panel could not resolve it.

101. Nothing in the Bylaws qualifies or restricts the right of the Claimant to immediately seek a neutral and binding determination of claims from an IRP panel about Staff action or inaction. The Bylaws provide a formal process—the Reconsideration Request—through which a person or entity *may* obtain review of a Staff action or inaction. This process is optional; it is *not a mandatory prerequisite* for commencing an IRP.¹⁷² The Bylaws provide that "ICANN shall

¹⁶⁷ This conclusion on the Decision's effect is further supported by the following passage from the Decision: "No such decision was made by ICANN's Staff in relation to the issues raised by the Claimant that could have formed the basis for a formal accountability mechanism, in the context of which positions would have been adopted, battle lines would have been drawn, and an adversarial process such as an IRP would have resulted in a reasoned decision binding on the parties." Decision, ¶ 337.

¹⁶⁸ Decision, ¶¶ 333, 344.

¹⁶⁹ Decision, ¶ 334.

¹⁷⁰ Decision, ¶ 410(7).

¹⁷¹ Decision, ¶ 359.

¹⁷² See Bylaws, [Ex. C-1], Sec. 4.2 (nowhere requiring exhaustion of the Reconsideration Request prior to commencing an IRP).

have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may request (‘Requestor’) the review or reconsideration of that action or inaction by the Board.”¹⁷³ Upon receiving a Reconsideration Request, the “Board Accountability Mechanisms Committee shall make a final recommendation to the Board”¹⁷⁴ and then “[t]he Board shall issue its decision on the recommendation....”¹⁷⁵

102. Indeed, the current “enhanced” IRP process directly eliminated the need for such recourse, a requirement that previously existed in earlier versions of the IRP. Prior to the revisions of the IRP on 1 October 2016, independent review could be sought only for ICANN Board actions inconsistent with the Articles or Bylaws, not for ICANN Staff actions.¹⁷⁶ If an ICANN Staff action was inconsistent with the Articles or Bylaws, the matter would have to be submitted to the ICANN Board through a reconsideration request.¹⁷⁷ Only the Board action on that reconsideration request could then be the subject of an IRP. The revised IRP directly and explicitly eliminated any such restriction and expressly permits the submission of claims directly against ICANN Staff action.

103. In light of the above, Afiliis requests that the Panel provide an interpretation that explains whether its decision to remand to the Board for “pronouncement” assumes or requires that all future IRP challenges to Staff action or inaction must first be pronounced upon by the

¹⁷³ Bylaws, [Ex. C-1], Sec. 4.2(a).

¹⁷⁴ Bylaws, [Ex. C-1], Sec. 4.2(q).

¹⁷⁵ Bylaws, [Ex. C-1], Sec. 4.2(r).

¹⁷⁶ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), [Ex. C-23], Art. IV, Sec. 3(2), (4) (“Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. . . . Requests for such independent review shall be referred to an Independent Review Process Panel (‘IRP Panel’), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”).

¹⁷⁷ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), [Ex. C-23], Art. IV, Sec. 2(2)(a) (“Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (‘Reconsideration Request’) to the extent that he, she, or it have been adversely affected by: one or more staff actions or inactions that contradict established ICANN policy(ies)[.]”).

Board. In addition, Afiliias requests an interpretation as to the factual and legal basis for the Panel’s conclusion that the threshold issues put to the Panel in order to resolve Afiliias’ claim that ICANN breached its Articles and Bylaws by failing to disqualify NDC’s application and bids for .WEB and to offer .WEB to Afiliias were “premature.”

C. On What Law Did the Panel Rely to Address (Or Not) Claimant’s Claims?

104. As discussed above, in the Decision, the Panel apparently determined that California law should be applied to the Dispute.¹⁷⁸ As explained previously,¹⁷⁹ and contrary to what the Panel suggests, it is far from the case that Claimant “did not express disagreement with ICANN’s position” that California law is the primary governing law for ICANN or that California law serves as a gap filler.¹⁸⁰ Even when the Panel first issued these observations—in the Phase I Decision¹⁸¹—Afiliias had already made clear its position that the key law applicable to ICANN includes international law.¹⁸² Afiliias developed this position in great written detail across its Request for IRP,¹⁸³ Amended Request for IRP,¹⁸⁴ Reply Memorial,¹⁸⁵ Response,¹⁸⁶ and Post-Hearing Brief.¹⁸⁷ In addition to putting the *ICM Registry* Declaration on record as its very first

¹⁷⁸ Decision, ¶ 29.

¹⁷⁹ See **Section II(C)(1)**.

¹⁸⁰ Decision, ¶ 29.

¹⁸¹ Decision on Phase I (12 Feb. 2020), ¶ 27.

¹⁸² Request for IRP, ¶ 9; Amended Request for IRP, ¶ 8; Phase I Hearing, Tr. (2 Oct. 2019), 54:12-17.

¹⁸³ Request for IRP, ¶ 9.

¹⁸⁴ Amended Request for IRP, ¶ 8.

¹⁸⁵ Afiliias’ Reply Memorial, ¶¶ 4, 26.

¹⁸⁶ Afiliias’ Response to the *Amici*’s Briefs, ¶¶ 140-61.

¹⁸⁷ Afiliias’ PHB, ¶¶ 1, 96, 238.

legal authority,¹⁸⁸ Afiliat cited at least 32 international decisions and 11 other international authorities that address the relevant principles of international law.

105. If the Panel is truly of the view that Claimant “did not express disagreement with ICANN’s position” concerning the application of California law, then Claimant can only conclude that the Panel failed to read Claimant’s voluminous submissions on this point, and that Claimant was thus denied its right to be heard and to be treated fairly. As such, Claimant considers that the Panel must not have intended to hold that California law is the sole law applicable to ICANN, to the exclusion of the relevant principles of international law that the Articles and Bylaws explicitly state must apply to ICANN’s execution of its activities. Instead, the Panel must have, at most, intended that California law would apply, non-exclusively, to privilege issues and to the substance of the business judgment rule (the application of which the Panel declined to reach). These are the only places in the Decision where the Panel appears to conclude that California law is relevant to a concrete legal issue.¹⁸⁹

106. Nevertheless, the Panel does not identify the substantive law (if any) it deemed applicable to its other rulings. Indeed, even when the Panel set forth the general obligations under which it intended to assess ICANN’s conduct, it did not specify what law would be used to interpret those obligations or to fill in any gaps in their application.¹⁹⁰ It merely quoted the relevant provisions of the Bylaws without explaining the basis on which it interpreted their meaning, and specifically the source of law that it used to do so. As such, the Decision is vague and ambiguous

¹⁸⁸ See *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), [Ex. CA-1].

¹⁸⁹ Decision, ¶¶ 30, 285, n. 254.

¹⁹⁰ Decision, ¶¶ 289-92.

as to the actual law applied to these obligations and indeed as to whether international law was applied, either as an interpretative parameter or as an independent source of obligation.

107. In light of the above, Afilias requests the Panel to provide an interpretation of its decision on the applicable law that clarifies (a) whether it held that California law is the sole law applicable to ICANN, (b) what specific law, if any, it applied to interpret the obligations contained in ICANN's Articles and Bylaws, and (c) whether international law is an independent source of obligation in light of the Articles' and Bylaws' requirement that ICANN "shall conduct its activities in conformity with relevant principles of international law."

D. On What Basis did the Panel Determine that ICANN has "the Requisite Knowledge, Expertise, and Experience, to Pronounce"?

108. In the Decision, the Panel twice expressed the view that ICANN has "knowledge, expertise, and experience" that uniquely qualifies it—we assume, in comparison to the Panel's assessment of its own knowledge, expertise and experience—to decide on Afilias' Rules Breach Claim. However, the Panel provided no explanation of ICANN's supposedly unique "knowledge, expertise, and experience" that makes ICANN distinctively suited, and better suited than the Panel, to make a first instance decision on NDC's (and indeed Verisign's) conduct. At no point in its Decision did the Panel provide any analysis or cite to any evidence that ICANN has "the requisite knowledge, expertise, and experience" to make such first instance decisions. Instead, the Panel appears to have acquiesced to ICANN's unsupported assertion on its "knowledge, expertise, and experience[.]" Indeed, the very words that the Panel used to describe ICANN's supposedly privileged position—"the requisite knowledge, expertise, and experience"—are *lifted verbatim* from ICANN's own pleadings.¹⁹¹ However, the paragraph from which the Panel lifted ICANN's

¹⁹¹ ICANN's Rejoinder Memorial, ¶ 82.

language is purely argumentative, identifying no documentary or testimonial evidence whatsoever to support the assertions made about ICANN’s supposedly unique qualities.

109. The Panel parroted this assertion from ICANN even while recognizing that ICANN has done everything in its power to avoid demonstrating any such knowledge, expertise, or experience:

- a) As the Panel held, “[t]he evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC’s and Verisign’s conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them.”¹⁹²
- b) The Panel sharply criticized ICANN’s persistent refusal “to take ownership” of NDC’s compliance with the New gTLD Program Rules¹⁹³ and specifically took issue with ICANN’s “submission in this IRP that the dispute arising out of NDC’s arrangement with Verisign is in reality a dispute between the Claimant and the *Amici*.”¹⁹⁴
- c) The Panel further criticized the fact that, in the IRP, “the Respondent ... declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP.”¹⁹⁵
- d) The Panel stated that it could not “accept the Respondent’s contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent *represented* that it would consider the matter, and made the representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism.”¹⁹⁶
- e) The Panel appropriately expressed bewilderment as to why ICANN had not considered, decided, or pronounced upon Afiliás’ complaints: “[S]ince the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. That would be required not only to preserve and promote the integrity of the New gTLD Program, but also to

¹⁹² Decision, ¶ 297.

¹⁹³ *See, e.g.*, Decision, ¶ 338.

¹⁹⁴ Decision, ¶ 338.

¹⁹⁵ Decision, ¶ 345.

¹⁹⁶ Decision, ¶ 319.

disseminate the Respondent’s position on those questions within the Internet community and allow market participants to act accordingly.”¹⁹⁷

- f) In commenting on ICANN’s assertion that it “has been caught in the middle of this dispute between powerful and well-funded businesses[,]” the Panel stated that “in the Panel’s view, it is not open to the Respondent to add, as it does in the same sentence of its Response, ‘[and ICANN] has not taken sides’, as if the Respondent had no responsibility in bringing about a resolution of the dispute by itself taking a position as to the propriety of NDC’s arrangements with Verisign.”¹⁹⁸

Simply put, the Panel found that ICANN has not acted in manner even remotely consistent with its supposedly unique knowledge, expertise, or experience.

110. Nor can ICANN be said to have unique knowledge, expertise, or experience simply because ICANN’s constitutive documents distinctively empower it to make certain decisions. As an initial matter, ICANN’s power to make those decisions does not itself entail that it has adequate, let alone unique, “knowledge, expertise, and experience” to make those decisions. But more importantly, ICANN’s constitutive documents equally empower, and indeed require, the Panel to make decisions—including as to whether ICANN violated its Bylaws for failure to disqualify NDC and reject its application.¹⁹⁹ Indeed, the IRP Panel is tasked by ICANN’s Bylaws to provide “*expert review of Covered Actions*”²⁰⁰ and is empowered to seek “independent skilled technical experts at the expense of ICANN” upon request.²⁰¹ If the Panel considered it did not have the necessary “knowledge, expertise and experience” to undertake the review that Afiliis squarely put before it, then the Panel should have exercised its authority to be assisted by “independent skilled

¹⁹⁷ Decision, ¶ 319.

¹⁹⁸ Decision, ¶ 340 (citing and quoting ICANN’s Response to Amended IRP Request, ¶ 4).

¹⁹⁹ See, e.g., Bylaws, [Ex. C-1], Sec. 4.3(i)(i).

²⁰⁰ Bylaws, [Ex. C-1], Sec. 4.3(a)(ii) (emphasis added).

²⁰¹ Bylaws, [Ex. C-1], Sec. 4.3(k)(iv).

technical experts” rather than simply send the central Covered Action in this IRP back to ICANN for pronouncement.

111. In light of the above, Afiliat requests the Panel to provide an interpretation that clarifies the basis on which it determined that ICANN has the “knowledge, expertise, and experience” that uniquely qualifies it, as opposed to the Panel, to “pronounce” on Afiliat’s complaints regarding ICANN’s obligations with respect to NDC’s violations of the New gTLD Program Rules.

E. Did the Panel Apply a Heightened Burden of Proof to Any of Claimant’s Claims?

112. In its Decision, the Panel states that it applied a heightened standard of proof to some of the issues before it, in light of allegations of dishonesty or fraud:

As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, ‘more likely than not’. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, ‘[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established’.

These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.²⁰²

113. However, the Panel did not identify at any point in the Decision the issues to which it applied these principles, and so the standard of proof applicable to the issues ultimately resolved in the *Dispositif* is left indeterminate.²⁰³ Nevertheless, the standard of proof applied to the various

²⁰² Decision, ¶¶ 32 (quoting Nigel Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (6th ed., 2015), ¶ 6.87), 33.

²⁰³ Decision, ¶ 410(1)-(3), (7).

issues may make a crucial difference to how other decision-makers, including ICANN’s Board and future IRP panels understand the Panel’s decisions. The Panel must provide explicit guidance on the standard of review in order to fulfill the IRP’s purpose of “creating precedent to guide and inform the Board, Officers ..., Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.”²⁰⁴

114. In light of the above, Afilias requests that the Panel provide an interpretation that clarifies the issues to which a heightened standard of proof was applied. Afilias further requests an interpretation that clarifies whether the application of a heightened standard of proof affected the Panel’s resolution of those issues. In particular, but not exclusively, Afilias requests that the Panel provide this interpretation regarding the following issues:

- a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afilias’ claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?
- b) Whether the pre-auction investigation, including ICANN’s communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?
- c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?
- d) Whether the failure to disclose the “decision” from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?
- e) Whether the failure to “pronounce” on Afilias’ complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?
- f) Whether proceeding toward delegation of .WEB to NDC without a “pronouncement” violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

²⁰⁴ Bylaws, [Ex. C-1], Sec. 4.3(a)(vi).

- g) Whether the disparate treatment of Afiliias violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?
- h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?

IV. CONCLUSION: THE PANEL DECISION UNDERMINES THE PURPOSES OF THE IRP

115. It is regrettable that the Panel failed to address all of the claims presented to it for decision and resolution, as plainly required by its mandate under the Bylaws, or to provide a sufficiently well-reasoned decision free of ambiguity, as also required by the Bylaws, and indeed good arbitral practice. The Panel’s Decision is the first to be issued under the most current version of the Bylaws applicable to this IRP and the “enhanced” accountability²⁰⁵ mechanism that those Bylaws put in place. What is therefore equally regrettable is that far from advancing the system of ICANN accountability with a well-reasoned decision that finally resolves the Dispute presented to it by Afiliias, the Panel’s Decision has seriously undermined the dispute resolution system upon which the global Internet community critically relies to hold ICANN accountable. Indeed, in some cases such as the present one, at the core of which is ICANN’s enforcement of the New gTLD Program Rules, it is the only system through which ICANN says it can be held accountable.

116. The “Purposes of the IRP” are clearly articulated in the opening article of Section 4.3 of the Bylaws.²⁰⁶ We set out below various provisions of Article 4.3(a) together with our main observations regarding how the Panel’s Decision fails to advance the “Purposes of the IRP” (“[t]he IRP is intended to hear and resolve Disputes for the following purposes....”).

²⁰⁵ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 3 (at p. 5); Afiliias’ PHB, ¶¶ 209, 211-13.

²⁰⁶ The substantive importance of the “Purposes of the IRP” lies in the clear instruction set out in Article 4.3(a) that “[t]his Section 4.3 shall be *construed, implemented, and administered* in a manner consistent with these Purposes of the IRP.” Bylaws, [Ex. C-1], Sec. 4.3 (emphasis added).

117. **Article 4.3(a)(i) (“Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws”)**: As we have laid out in this application, the Panel failed to decide and resolve all of the claims submitted to it, provided insufficient reasoning in connection with those matters that it did decide, and reverted to the Respondent the central Covered Action underlying the Dispute—even while finding that ICANN’s initial failure to “pronounce” on Afiliás’ complaints constituted a violation of the Articles and Bylaws. By so doing, the Panel abdicated its responsibility to “[e]nsure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.”

118. **Article 4.3(a)(ii) (“Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i))”)**: Rather than issuing a Decision that supports the objective of “empower[ing]” the global Internet community and Claimants like Afiliás, by sending the issue of ICANN’s proper enforcement of the New gTLD Program Rules back to ICANN, the Panel has essentially eviscerated the force and intended effects of the IRP. This is reflected most starkly in the Panel’s “firm view” that it is ICANN that has greater expertise, knowledge and experience to address the application of the New gTLD Program Rules compared to an IRP Panel, even though such panels are established precisely to undertake an “expert review of Covered Actions.” The Panel’s opinion that it is not as or better positioned than ICANN to interpret, apply and enforce ICANN’s obligations arising from its policies and rules emasculates rather than empowers the global Internet community and Claimants to enforce ICANN’s compliance with the Articles and Bylaws.

119. **Article 4.3(a)(iii) (“Ensure that ICANN is accountable to the global Internet community and Claimants”)**: For the reasons already provided above, the Panel’s Decision does nothing to “[e]nsure that ICANN is accountable to the global Internet community and Claimants.” Far from advancing this purpose of the IRP, the Panel’s Decision has set the precedent that where ICANN is charged with wrongdoing, it will be given the latitude and deference by an IRP panel to correct its actions and omissions constituting violations of the Bylaws, and it is that opportunity to correct that will be the subject of an IRP Panel’s review. This is not accountability. It is a free pass.

120. **Article 4.3(a)(vi) (“Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation”)**: There is no indication that the Panel followed any earlier IRP precedents and, to the extent that the Panel’s Decision will stand as precedent, it is one that provides scant guidance in terms of reasoning or outcome. Moreover, far from reducing Disputes, the Panel itself has suggested that it should be for a future IRP panel to decide the very claims associated with the very Covered Action that was put it for decision; notwithstanding the three years and millions of dollars that were involved in this IRP.

121. **Article 4.3(a)(vii) (“Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes”)**: An outcome is “just” if it is fair. The outcome of this IRP can hardly be described as just or fair, whether to Afilias or ICANN. Insofar as Claimant is concerned, the outcome of this IRP can hardly be considered fair—the Panel failed to decide all of its claims, and even though the Panel found that ICANN breached its Articles and Bylaws, this finding was made in respect of a Covered Action that Afilias did not actually present to the Panel

for decision as a claim. Further, while making specific findings supporting a declaration that ICANN treated Afilias disparately—but then refusing to make a declaration in this regard—and while being fully aware of the positions that ICANN has taken in this IRP on the merits of Afilias’ claims, the Panel has placed Afilias’ fate in ICANN’s hands; it is requiring Afilias to re-enter the lion’s den, but without the benefit of a clear, definitive and comprehensive ruling from the Panel on the core issues on which Afilias asked for a decision. With respect to ICANN, the Panel has put the Board in an untenable position by failing to provide it with any guidance as to the considerations that should guide its “pronouncement” on Afilias’ claims; indeed, the Board is likely to also be left wondering what the Panel intended by requiring it to “pronounce” on the issue of NDC’s compliance with the New gTLD Program Rules and the consequences of Verisign’s attempt to circumvent them. Whatever the Board ultimately does, will result in yet another IRP over the fate of .WEB, further delays in its delegation, and millions more in legal and other fees. This is hardly fair to ICANN org or to the global Internet community—or to Afilias.

122. **Article 4.3(a)(viii) (“Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction”):** To put it plainly, there is nothing in the Decision’s *Dispositif* that reflects a “final resolution” of the “Dispute concerning Covered Actions” that Afilias presented to the Panel. Nor is there in any outcome by way of relief associated with the liability findings that the Panel did make that Afilias could enforce in a court with proper jurisdiction.

123. **Article 4.3(a)(ix) (“Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions”):** The Purposes of the IRP could not be clearer that the system was set up to ensure the “resolution of Disputes.” That is, to resolve the claims associated with the Covered Actions presented to an IRP

panel by a Claimant. The IRP is a binding “alternative dispute resolution” system to litigation before the courts, and must be implemented as such. This, the Panel in this IRP did not do. No court or arbitral tribunal, properly exercising its jurisdiction, would revert the core claims presented to it for resolution back to the very party whose conduct gave rise to the claims in the first place to re-decide the matter or provide justifications for its conduct. As the Panel is aware, pursuant to the Bylaws, the Panel’s mandate required it to conduct a “de novo” and not a deferential review of ICANN’s conduct, just as would be the case before a court or arbitral tribunal. The Panel has fallen short in conducting such a review.

V. RELIEF REQUESTED

124. In light of the foregoing submissions, Afiliias requests the Panel to issue an Amended Final Decision:

- (1) Finally deciding and resolving in a well-reasoned manner Afiliias’ Rules Breach Claim, International Law Claim and Disparate Treatment Claim; and
- (2) Providing the interpretations as set out in Section III of this application.

Respectfully submitted,



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