

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Amicus Curiae.

ICDR CASE NO: 01-18-0004-2702

***AMICUS*' SUBMISSION ON AFILIAS' ARTICLE 33 APPLICATION**

6 August 2021

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TABLE OF CONTENTS

	Page
I. Introduction and Summary of Argument.....	1
II. Afilias’ Request For An Additional Decision Is Unjustified And Should Be Rejected	9
A. Each Of The So-Called “Claims” Asserted By Afilias In Its Application Is, In Fact, An Argument Rather Than A “Claim” And Therefore Not Suitable For An Additional Decision.....	10
B. Even If The Purported “Claims” Were In Fact “Claims,” The Panel Has Already Sufficiently Addressed Each Of Them And No Additional Decision Is Required.....	14
1. Afilias Disregards The High Standard Required For A Tribunal To Issue An Additional Decision Under ICDR Article 33	14
2. Even If The So-Called “Rules Breach Claim” Were A “Claim,” It Was Sufficiently Addressed In The Final Decision And No Additional Decision Is Justified.....	19
3. Even If The So-Called “International Law Claim” Were A “Claim,” It Was Sufficiently Addressed In The Final Decision And No Additional Decision Is Justified.....	27
4. Even If The So-Called “Disparate Treatment Claim” Were A “Claim,” It Was Addressed In The Final Decision And No Additional Decision Is Justified.....	34
III. Afilias’ Request for Interpretation Is Unjustified And Should Be Summarily Rejected By The Panel	37
A. Afilias Disregards the Limited Purpose and Scope of ICDR Article 33	37
B. Afilias’ “Requests for Interpretation” Are Beyond the Scope of Article 33	41
1. Afilias’ Requests Regarding the Term “Pronounce” are Unnecessary and Improper	41
2. Afilias’ Request Regarding the Law Applied to this Dispute Is Unnecessary and Improper	46
3. Afilias’ Request Regarding ICANN’s “Knowledge, Expertise, and Experience” Is Improper	47

4.	Afilias' Request Regarding the Standard of Proof Is Improper.....	49
IV.	Contrary To Afilias' Assertions, The Panel's Decision Is Fully Consistent With The Purposes Of The IRP	53
V.	Conclusion	58

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Ali Allwai v Pakistan</i> [2019].....	16
<i>Colonial Penn Ins. Co. v. Omaha Indem. Co.</i> , 943 F.2d 327 (3d Cir. 1991).....	3
<i>Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd</i> [2013].....	18, 24, 25
<i>Secretary of State for the Home Department v. Raytheon Systems Ltd.</i> [2014].....	18
<i>World Trade Corp. v. C. Czarnikow Sugar Ltd</i> [2004].....	47
<i>ZCCM Investments Holdings Plc v Kanashi Holdings Plc</i> , [2019].....	18
<u>Statutes</u>	
AA-50, English Arbitration Act 1996, § 48(1).....	54
AA-050, English Arbitration Act (1996), § 68(2)(d).....	17, 18
English Arbitration Act Section 48.....	54
<u>Other Authorities</u>	
A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES (2d ed. 2019) (“Gusy & Hosking”), at 33.01	<i>passim</i>
Articles and Bylaws. <i>It is not asked to declare whether the applicant who sought reconsideration should have prevailed</i>	56
David D. Caron & Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 5 (2d ed. 2013).....	<i>passim</i>
David St. John Sutton, Judith Gill & Matthew Gearing, RUSSELL ON ARBITRATION (23d ed., 2009)	54

FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Gaillard and Savage (eds.), Jan. 1999) (“ FOUCHARD GAILLARD GOLDMAN ”), ¶ 1417	11, 38, 41
Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2014)	54
ICC ARBITRATION	<i>passim</i>
Klaus Reichert, <i>Prayers for Relief – The Focus for Organization</i> , in	11
MACMILLAN DICTIONARY	41
REDFERN AND HUNGER ON INTERNATIONAL ARBITRATION ¶ 9.193 (6th ed. 2015).....	40
<i>Rules, Section IV, Article 39</i>	15
Sigvard Hakan Ludvig Jarvin & Corinne Nguyen, <i>VI.4.1 Application for Correction or Interpretation of the Award – Introductory Comments</i> , in	40
Stuart Isaacs, <i>Chapter 22: Life after Death: The Arbitral Tribunal’s Role Following Its Final Award</i> , in.....	7
UNCITRAL ARBITRATION 355 (Nov. 2017) (“ Paulsson & Petrochilos ”)	<i>passim</i>

I. Introduction and Summary of Argument

1. On May 20, 2021, the Panel¹ in this IRP issued a comprehensive 128-page Final Decision on Afilias' claim in this IRP. The Panel expressly rejected both Afilias' claim that ICANN had violated its Articles of Incorporation and Bylaws by failing to disqualify NDC's bid for .WEB and rejected Afilias' demand that ICANN be ordered to "disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant."² In rejecting Afilias' demand, the Panel specifically found that it was "reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take."³

2. Even though the Panel found that ICANN was justified in withholding a determination of Afilias' objections to NDC's bid, the Panel found that ICANN violated its Articles and Bylaws by failing to act transparently, openly and fairly in communications with Afilias. The Panel further determined that specified actions of ICANN were inconsistent with ICANN's decision to await the outcome of this proceeding before addressing Afilias' objections.⁴

3. Finally, the Panel expressly rejected Afilias' demand that the Panel not remand Afilias' objections to ICANN⁵ for its determination – a remand required by the Bylaws under which this IRP must proceed. Instead, consistent with the Bylaws, the Panel directed that

¹ Unless otherwise indicated, *Amici's* Submission uses the same defined terms set forth in the Panel's Final Decision at pp. iii–vii.

² Final Decision (20 May 2021), ¶ 413(7).

³ *Id.*, ¶ 331.

⁴ *Id.*, ¶ 8.

⁵ *Id.*, ¶ 299.

remaining objections by Afilias or NDC regarding the auction and/or Award be directed to the ICANN Board for decision.⁶

4. The Final Decision comprehensively addressed and resolved all of the claims and material issues raised by Afilias consistent with both the evidence presented at the hearing and the limits on the Panel’s jurisdiction and remedial authority under the Bylaws. Nonetheless, Afilias is back again, seeking the same relief based on the same arguments. Afilias styles its demand as an application pursuant to Article 33 but, in reality, Afilias seeks reconsideration of the Final Decision – a reconsideration that is improper and unauthorized by Article 33 or any other rule.

5. In its Article 33 Application, Afilias contends that the Panel failed to resolve claims Afilias presented to the Panel and demands that the Panel substantively amend its opinion to reject NDC’s application for .WEB, deem NDC ineligible to enter into a registry agreement for .WEB, and award .WEB to Afilias as the next highest bidder.⁷ Afilias further demands that the Panel “interpret” multiple statements in the Final Decision on the purported grounds that they are ambiguous.⁸ There can be no doubt that the Application seeks reversal of the Panel’s decision rejecting what Afilias characterizes as its “core claims” in this IRP.⁹

6. Afilias’ Application is nothing more than a very thinly disguised request for reconsideration that has no basis in the applicable rules and also has no merit. “As a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes

⁶ *Id.*, ¶¶ 299 & 413(5).

⁷ Afilias’ Application (21 June 2021), ¶¶ 16–19.

⁸ *Id.*, ¶¶ 90–114.

⁹ *Id.*, ¶ 251 (characterizing the claims upon which Afilias seeks reversal as the “core claims” in the IRP).

functus officio and lacks any power to reexamine that decision.”¹⁰ ICDR Article 33¹¹ is a limited exception to this general rule, and intended to provide a panel the opportunity to decide claims clearly presented but inadvertently omitted from the final decision and/or to interpret insolubly ambiguous statements in the dispositive portion of a panel’s award.¹² None of the supposed deficiencies in the Final Decision identified by Afilias falls within these limited categories. Instead, Afilias is misusing Article 33 to seek a do-over of the IRP.

7. In its Application, Afilias asks the Panel to issue an additional decision – in fact, a reversal of the Final Decision -- with respect to three purported “claims” that Afilias contends “the Panel did not decide and resolve”:¹³ (i) the “Rules Breach” claim, (ii) the “International Law Claim”; and (iii) the “Disparate Treatment Claim.” As demonstrated below, Afilias’ request is wholly without merit.

8. *First*, each of the so-called “claims” is actually an *argument* in support of the only “claim” asserted by Afilias – namely, the claim that ICANN violated its Articles and Bylaws. In a failed attempt to conform its reconsideration request to the requirements of Article 33, Afilias conflates the term “claim” with the alleged grounds or arguments asserted in support of its actual claim for violation of ICANN’s Articles and Bylaws. Contrary to Afilias’ Application,

¹⁰ **AA-107**, Gary Born, *INTERNATIONAL COMMERCIAL ARBITRATION* (3d ed. 2021) at 3375 (citing *Colonial Penn Ins. Co. v. OmahaIndem. Co.*, 943 F.2d 327, 331 (3d Cir. 1991)) (“**Born**”).

¹¹ ICDR amended its rules on March 1, 2021 and former ICDR Article 33 is now Article 36. *See* INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (Rules Amended and Effective March 1, 2021), available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar. Unless otherwise indicated, *Amici* refer to Article 33 under the 2014 version of the ICDR.

¹² **CA-0148**, Martin F. Gusy & James M. Hosking, *Commentary on the ICDR International Rules, Article 33*, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES (2d ed. 2019) (“**Gusy & Hosking**”), at 33.01.

¹³ Afilias’ Application (21 June 2021), ¶ 4.

Article 33 does not require that an arbitral panel address every ground or argument made by a claimant in order to dispose of a claim.

9. *Second*, even if each argument Afiliás made was considered a “claim” for purposes of Article 33, the Panel in fact addressed and resolved each of the arguments in its Final Decision. Afiliás’ dissatisfaction with the Panel’s determinations is not a basis on which to request an additional – or, more specifically – a different, decision.

The “Rules Breach” Claim

10. Afiliás’ so-called “Rules Breach Claim” *was* resolved by the Panel – but *adversely* to Afiliás. The Panel determined that ICANN was justified in reserving consideration and determination of Afiliás’ demands until this IRP had concluded. Because the Panel found that ICANN was not obligated to act with respect to Afiliás’ claims while this IRP was pending, the Panel also necessarily found that ICANN’s failure to act was not a violation of its Articles and Bylaws.¹⁴ Moreover, each of the purported failures identified by Afiliás as a basis for its “Rules Breach Claim” – *e.g.*, not rejecting NDC’s application – corresponds to the affirmative relief sought by Afiliás in the IRP and expressly rejected by the Panel as, among other things, premature.¹⁵ The Panel’s rejection of Afiliás’ requested relief, and the alleged basis for that

¹⁴ See **AA-48**, *Donuts, Inc v. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel (Boesch, Coe, Hamilton) (5 May 2016), ¶ 168 (“In the Panel’s view, ‘actionable inaction’ is a failure by the Board that is inconsistent with a duty to act, whether that duty is formally established by ICANN’s constitutive documents, established by some other explicit or clearly implied undertaking by the Board, or, powerfully suggested by all the circumstances present.”); ¶ 169 (“It follows that not every circumstance in which the Board might be empowered to act gives rise to a duty to act.”).

¹⁵ Final Decision (20 May 2021), ¶ 413(7) (“**Dismisses** the Claimant’s other requests for relief in connection with its core claims and, in particular, the Claimant’s request that [] the Respondent be ordered by the Panel to disqualify NDC’s bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410 (5) [*sic*]”).

relief, was an outright rejection of the “claims” or arguments that Afilias advanced in support of that relief.

11. The Panel further specifically found that ICANN has the “knowledge, expertise, and experience, to pronounce in the first instance”¹⁶ on Afilias’ complaints, and it recommended that ICANN do so now that the IRP has concluded.¹⁷ This was not a failure of the Panel to resolve a claim properly placed before it. It is a rejection of Afilias’ claim based on a recognition that ICANN should decide these complaints in the first instance and that any other decision by the Panel would exceed its limited jurisdiction by substituting its judgment for that of ICANN.¹⁸

12. The Panel’s obligation under the Bylaws is to compare ICANN’s action or inaction against ICANN’s Commitments and Core Values, and to make a determination whether ICANN has adhered to its Commitments and Core Values in its handling of a particular dispute.¹⁹ ICANN did not “act” in the manner alleged by Afilias (*e.g.*, ruling in NDC’s favor on .WEB), nor was its “failure to act” a violation of the Bylaws. For the Panel to proceed further and consider the substance of Afilias’ complaints with respect to NDC’s bid would exceed the Panel’s jurisdiction and constitute an improper resolution of a dispute between Afilias and *Amici*.²⁰ The Panel properly declined Afilias’ invitations to do so.

¹⁶ *Id.*, ¶ 9.

¹⁷ *Id.*, ¶ 413(5).

¹⁸ See Section IV, *infra*.

¹⁹ **CA-011**, *Booking.com B.V. v. ICANN*, ICDR Case No.: 50-20-1400-0247, Final Declaration (Drymer, Matz, Bernstein) (3 March 2015) (“**Booking.com Final Declaration**”), ¶ 104.

²⁰ Final Decision (20 May 2021), ¶ 253 (“As the Panel observed in its Procedural Order No. 5, this IRP is an ICANN accountability mechanism, the Parties to which are the Claimant and the Respondent. As such, it is not the forum for the resolution of potential disputes between the Claimant and the *Amici*...”).

13. In short, Afilias' Article 33 Application asks the Panel to *reverse its decision* – not resolve *undecided* claims as Afilias argues – including the Panel's decisions that ICANN had the discretion properly to defer a decision on Afilias' objections, that such objections should be considered by ICANN in the first instance, and that the Panel's limited jurisdiction does not include resolution of disputes between Afilias and *Amici*.

The “International Law” and “Disparate Treatment” Claims

14. Afilias' so-called “International Law” and “Disparate Treatment” claims fare no better. Both are clearly arguments as to *why* ICANN allegedly violated its Articles and Bylaws, not claims themselves. With respect to the “International Law” claim, it rests on the same facts, and encompasses and is encompassed by, the “Rules Breach Claim.” The only difference is that, according to Afilias, “international law” is an additional reason it disagrees with the Panel's decision on the “Rules Breach Claim.” As such, Afilias' arguments about international law do not present a claim that the Panel failed to decide.

15. Furthermore, Afilias never articulated any “principles” of international law that differed from the principles embodied in ICANN's Bylaws (which are controlling). On the contrary, as pleaded by Afilias, ICANN's obligations under the Bylaws and international law (*e.g.*, fairness, transparency) were *identical*.²¹ Having decided that ICANN violated its Bylaws' principles of transparency, fairness, and openness, there is no reason the Panel would address an identical argument based upon international law. The Panel left no claim undecided.

²¹ See Afilias' Response to the *Amici*'s Briefs (24 July 2020), ¶¶ 145–47 (regarding procedural fairness and due process), ¶¶ 148–50 (regarding impartiality and non-discriminatory treatment), ¶¶ 151–58 (regarding transparency), ¶¶ 159–61 (regarding legitimate expectations).

16. The same is true for Afiliás' so-called "Disparate Treatment" claim. As the Panel stated: "As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims . . . Accordingly, 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."²² Having already determined that ICANN failed to act objectively and fairly in specified ways, the Panel properly determined that it was not obligated to duplicate that same determination and say that it also included "disparate treatment."

Afiliás' Request for Purported "Interpretation" of Particular Statements

17. Afiliás' request for interpretation of multiple statements in the Final Decision is similarly misguided and motivated by Afiliás' desire to reverse the Final Decision. Interpretation is a very limited remedy, and rarely granted.²³ Turning the general rule on its head, Afiliás seeks to use the interpretation prong of Article 33 expansively and to effectively rewrite the Final Decision to its benefit.

18. A request for interpretation generally must seek to clarify only the operative part of an arbitral tribunal's decision and do so on the ground that the specified language is so vague and confusing that a party has a genuine doubt about how the award should be carried out.²⁴

²² *Id.*, ¶ 350.

²³ **AA-107**, Born at §24.04 ("In practice, it is very rare for interpretations to be either sought or granted."); **AA-108**, International Chamber of Commerce ("ICC"), THE SECRETARIAT'S GUIDE TO ICC ARBITRATION (2012), ¶ 3-1275 ("In practice, applications for interpretation (as opposed to correction) are rarely accepted.") ("SECRETARIAT'S GUIDE TO ICC ARBITRATION").

²⁴ **AA-108**, THE SECRETARIAT'S GUIDE TO ICC ARBITRATION, ¶ 3-1275 ("Most arbitral tribunals find that to be admissible a request for interpretation must seek to clarify the meaning of an operative part of the arbitral tribunal's decision. Therefore, requests for interpretation should generally target the dispositive section of the award or other parts that directly affect the dispositive section or the parties' rights and obligations."); **AA-109**, Stuart Isaacs, *Chapter 22: Life after Death: The Arbitral Tribunal's Role Following Its Final Award*, in JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 367

Afilias does not even attempt to meet this standard for any of its multiple requests for interpretation. Nor could it.

19. There is no clearer example of Afilias' disingenuousness than its request for interpretation of the word "pronounce" used by the Panel.²⁵ Afilias claims in its Application that the meaning is unclear, despite the clear guidance by the Panel that "pronounce" means for ICANN to consider and make a determination with respect to Afilias' claims.²⁶ At the same time that Afilias feigns ignorance in its Application, Afilias and its counsel had no difficulty issuing a press release declaring victory in the IRP and describing specifically the process to be followed by ICANN in pronouncing on Afilias' claims: "The ICDR Panel has directed ICANN's Board to conduct an objective and fair review of Afilias' complaints, consider whether NDC violated ICANN's rules and what the consequences should be if a determination of illegality is made."²⁷

20. This IRP has spanned nearly three years at a cost of millions of dollars for the Parties and *Amici* (circumstances seemingly heralded by Afilias, *see* fn. 27). The Panel has

(Kaplan and Moser (eds.)) (Jan. 2018) ("**Isaacs**") at 367 (Interpretation is "understood to be permissible only where the terms of an award are so vague or confusing that a party has a genuine doubt *about how the award should be carried out*" (emphasis added)).

²⁵ Afilias Application (21 June 2021), ¶ 96.

²⁶ Final Decision (20 May 2021), ¶ 413(5) ("**Recommends** that the Respondent stay any and all actions or decisions that would further the delegation of the .WEB gTLD until such time as the Respondent 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").

²⁷ Dechert LLP, *Dechert Secures Another Victory Against ICANN in .WEB Arbitration* (9 June 2021), <https://www.dechert.com/knowledge/news/2021/6/dechert-secures-another-victory-against-icann-in--web-arbitration.html> ("Following a three-year, multimillion arbitration and a week-long virtual hearing, involving extensive cross-examinations of ICANN's, Verisign's and NDC's witnesses, the ICDR Panel found that ICANN had breached its Articles and Bylaws in numerous ways...The Panel also awarded Afilias a significant portion of its costs and fees as the prevailing party in the proceedings"); *see also* PR Newswire, *Afilias prevails in .WEB arbitration* (27 May 2021), <https://www.prnewswire.com/news-releases/afilias-prevails-in-web-arbitration-panel-rules-that-icann-staff-and-board-breached-icanns-bylaws-by-treating-afilias-unfairly-and-by-failing-to-disclose-secret-verisign-deal-301300549.html>.

issued a comprehensive Final Decision that conclusively resolves all claims properly within its jurisdiction in accordance with the Bylaws. Afilias' dissatisfaction with that result is no justification for prolonging these proceedings with a futile and improper request for reconsideration masquerading as an Article 33 Application. Afilias' Application should be denied in its entirety.

II. Afilias' Request For An Additional Decision Is Unjustified And Should Be Rejected

21. Article 33 of the ICDR Rules provides that a party may request an additional decision "as to claims, counterclaims, or setoffs presented but omitted from the [decision]."²⁸ A tribunal is obliged to comply with such a request only "[i]f the tribunal considers such a request justified after considering the contentions of the parties. . . ."²⁹ An arbitral tribunal has wide discretion to determine whether a request for an additional decision is "justified." For example, a tribunal "may reject a request on grounds that [1] there was no omission of claims [or 2] the [decision] sufficiently addressed the alleged omissions"³⁰

22. In its Application, Afilias asks the Panel to issue an additional decision with respect to three purported "claims," which, according to Afilias, "the Panel did not decide and resolve."³¹ The three allegedly undecided "claims" are that ICANN breached its Articles and Bylaws by:

(1) "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

²⁸ ICDR Rules (2014), Art. 33(1). As Afilias noted in its Application, the ICDR Rules use the term "award," but in the context of an IRP and the Bylaws, the word "award" should be understood to apply to an IRP panel's "decision." The two terms are used interchangeably in this submission.

²⁹ ICDR Rules (2014), Art. 33(2) (emphasis added).

³⁰ CA-0152, David D. Caron & Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 5 (2d ed. 2013) ("Caron & Caplan").

³¹ Afilias' Application (21 June 2021), ¶ 4.

gTLD Program Rules, and not offering .WEB to Afilias as the next highest bidder” (the so-called “**Rules Breach Claim**”);³²

(2) “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 [*sic*] breaches of the Rules” (the so-called “**International Law Claim**”);³³ and

(3) “treating Afilias inequitably and disparately when compared to the manner in which it treated NDC and non-applicant Verisign” (the so-called “**Disparate Treatment Claim**”).³⁴

23. Afilias’ request for an additional decision as to each of the three purported “claims” above is unjustified. As shown below in **Section II.A**, each of the three purported “claims” is, in fact, an *argument* rather than a “claim;” accordingly, there was no omission of any *claims* and no basis to seek an additional decision under Article 33 of the ICDR Rules. Further, as shown below in **Section II.B**, even if any of the purported “claims” were in fact a claim that might be subject to further analysis or statement, the Panel has already sufficiently addressed every such “claim” in the Final Decision and no additional decision is warranted.

A. Each Of The So-Called “Claims” Asserted By Afilias In Its Application Is, In Fact, An Argument Rather Than A “Claim” And Therefore Not Suitable For An Additional Decision

24. As noted above, Article 33 of the ICDR Rules permits arbitral tribunals to “make an additional [decision] as to *claims*, counterclaims, or setoffs presented but omitted from the [decision].”³⁵ Afilias has not alleged that any counterclaims or setoffs were presented but omitted from the Final Decision. Therefore, Afilias’ request for an additional decision must concern a purported *claim*.

³² *Id.*, ¶ 4(1).

³³ *Id.*, ¶ 4(2).

³⁴ *Id.*, ¶ 4(3).

³⁵ ICDR Rules (2014), Art. 33(1) (emphasis added).

25. By contrast, in accordance with the plain text of Article 33, an additional decision is *not* justified or appropriate where an arbitral tribunal has simply omitted a decision concerning an *argument* put forward by a party in support of its claim.³⁶ As commentators have explained,

[N]ot all omissions give rise to a claim for *infra petita*. The omission must be related to a claim (“*chef de demande*”), as opposed to a ground for relief put forward in support of a claim (“*moyen*”). . . The claim(s) submitted by the parties form(s) the subject matter of a dispute. Grounds, on the other hand, are the reasons forming the basis of a claim.”³⁷

26. This principle is critical to each of Afiliás’ arguments and requires a rejection of its Article 33 Application. At most, Afiliás’ Application asks the Panel to make a further statement regarding an argument by Afiliás with respect to a decided claim or a ground for deciding a claim. Indeed, in each case an acceptance of Afiliás’ additional argument or ground would require a reversal of the express decision by the Panel with respect to the considered claim.

27. At bottom, the only “claim” at issue in this IRP—indeed, in *every* IRP—is whether ICANN breached its Articles of Incorporation and Bylaws. This follows from the plain language of the Bylaws. For example,

(1) Article 4.3(d) of the Bylaws defines a “Claim” as the Claimant’s “written statement of a Dispute;” put differently, there is a *singular* “Claim,” which is embodied in the Claimant’s “written statement of a Dispute;”³⁸

³⁶ See, e.g., **AA-110**, *Part 4 : Chapter IV — The Arbitral Award*, in FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Gaillard and Savage (eds.), Jan. 1999) (“**FOUCHARD GAILLARD GOLDMAN**”), ¶ 1417 (“In some cases, the arbitral tribunal fails to decide one of the heads of claim. This situation is not to be confused with that where the tribunal does not respond to all the allegations, or even all the arguments put forward by the parties.”).

³⁷ See, e.g., **AA-111**, Klaus Reichert, *Prayers for Relief – The Focus for Organization*, in EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION 717 (Kalicki and Abdel Raouf (eds.), (Dec. 2019).

³⁸ **Ex. C-1**, Bylaws, Art. 4.3(d).

(3) Article 4.3(b)(ii) defines “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;*”³⁹

(2) Article 4.3(b)(iii)(A) defines “Disputes” as “[c]laims that Covered Actions constituted an action or inaction *that violated the Articles of Incorporation or Bylaws;*”⁴⁰

(3) Article 4.3(i) directs IRP Panels to “make findings of fact to determine whether the Covered Action constituted an action or inaction *that violated the Articles of Incorporation or Bylaws;*”⁴¹ and

(4) Article 4.3(o) narrowly circumscribes the authority of IRP Panels,⁴² which principally includes the authority to “[d]eclare whether a Covered Action constituted an action or inaction *that violated the Articles of Incorporation or Bylaws.*”⁴³

In short, the only “claim” at issue in this IRP was whether ICANN breached its Articles and Bylaws; the *grounds* on which a “claim” is based are ICANN’s “actions or failures to act.” Afiliat’s Application tries to re-cast arguments relevant to the subject matter of a claim into claims themselves in order to fit within the narrow confines of Article 33.

28. In its Application, Afiliat conflates the term “claim” with the alleged grounds or arguments in support of its singular “Claim” (*i.e.*, its written statement of Dispute). In other words, what Afiliat now casts as its “claims”—*i.e.*, the so-called Rules Breach, International Law, and Disparate Treatment Claims—are instead more accurately described as “arguments” or “grounds,” which Afiliat advanced in support of its claim that ICANN breached its Articles and

³⁹ *Id.* at Art. 4.3(b)(ii) (emphasis added).

⁴⁰ *Id.* at Art. 4.3(b)(iii)(A) (emphasis added).

⁴¹ *Id.* at Art. 4.3(i) (emphasis added).

⁴² *See, e.g.*, NDC’s Brief (26 June 2020), § III.A and authorities cited therein.

⁴³ **Ex. C-1**, Bylaws, Art. 4.3(o)(iii) (emphasis added). *See also, e.g.*, Final Decision (20 May 2021), ¶ 24 (“Section 4.3 of the Bylaws provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by and within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction *that violated the Articles and Bylaws.*” (emphasis added)).

Bylaws. The following table, which uses Afilias’ own words, illustrates how Afilias has conflated its claim with its grounds:

Alleged “Claim” in Afilias’ Art. 33 Application	Afilias’ Actual Claim	Afilias’ Grounds/Arguments in Support of its Claim
The so-called “Rules Breach Claim”	“[Afilias’] <i>claim</i> that ICANN breached its Articles and Bylaws . . .	“. . . <i>by</i> 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 Afilias as the next highest bidder” (Afilias’ Application, ¶ 4(1) (emphases added)).
The so-called “International Law Claim”	“[Afilias’] <i>claim</i> that ICANN breached its Articles and Bylaws . . .	“. . . <i>by</i> 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 [<i>sic</i>] breaches of the Rules” (Afilias’ Application, ¶ 4(2) (emphases added)).
The so-called “Disparate Treatment Claim”	“[Afilias’] <i>claim</i> that ICANN breached its Articles and Bylaws . . .	“. . . <i>by</i> treating Afilias inequitably and disparately when compared to the manner in which it treated NDC and non-applicant Verisign” (Afilias’ Application, ¶ 4(3) (emphases added)).

29. Consistent with the Bylaws and customary arbitration practice, the Panel was obligated only to decide the *claim* presented by Afilias—*i.e.*, that ICANN breached its Articles and Bylaws. The Panel decided such claim, declaring that ICANN did, in fact, do so.⁴⁴ By contrast, the Panel was *not* obligated to address each and every argument or ground advanced by

⁴⁴ See Final Decision (20 May 2021), ¶ 413(1).

Afilias, and any alleged failure to do so is not a proper basis to request an additional decision under Article 33 of the ICDR Rules. Accordingly, Afilias' request for an additional decision with respect to each of the so-called "claims" described above is unjustified, and the Panel should deny it.

B. Even If The Purported "Claims" Were In Fact "Claims," The Panel Has Already Sufficiently Addressed Each Of Them And No Additional Decision Is Required

30. As explained below, the Panel did, in fact, sufficiently address each argument or ground identified above—*i.e.*, each of the three so-called "claims" about which Afilias now complains. Therefore, even if each of the arguments or grounds could properly be characterized as a "claim," as Afilias contends, they still would not be suitable for an additional decision.

31. Before showing that the Panel sufficiently addressed each of the allegedly omitted "claims," it is useful to first set out the applicable legal standard for a request for an additional decision, which Afilias largely ignores. To that end, **Section II.B.1** summarizes key elements of the applicable legal standard for a request for an additional decision. **Sections II.B.2, II.B.3,** and **II.B.4** then demonstrate that the Panel did, in fact, decide or otherwise sufficiently address the so-called Rules Breach Claim, International Law Claim, and Disparate Treatment Claim, respectively.

1. Afilias Disregards The High Standard Required For A Tribunal To Issue An Additional Decision Under ICDR Article 33

32. In its Application, Afilias has overlooked, misstated, or attempted to confuse several important elements of the standard for seeking an additional decision under Article 33 of the ICDR Rules.

33. *First*, as Jan Paulsson has explained, an arbitral tribunal may avoid any ambiguity concerning the fact that it has resolved all claims put to it by “record[ing] in the dispositive part of [its] decision that [it] thereby reject[s] all other claims and submissions.”⁴⁵ That is *precisely* what the Panel did in the Final Decision.⁴⁶

34. *Second*, requests for an additional decision are intended to cover only “obvious cases of omission,” such as when the tribunal has failed to (a) fix or apportion the costs of the arbitration, (b) rule on a claim for interest payments, or (c) adjudicate a counterclaim that was asserted.⁴⁷ It stands to reason that a request for an additional decision concerning an “obvious case[] of omission” should *not* require a lengthy and meandering submission like Afilias’ Application.

35. *Third*, a tribunal may decide claims *impliedly*, especially where the tribunal rejects the relief requested in connection with such claims. As Gary Born has explained, “[t]he mere fact that an arbitral tribunal has not expressly addressed a particular claim does not automatically require issuance of an additional [decision]: *a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief . . .*”⁴⁸ Here, Afilias’ arguments would require a reversal of express decisions by the Panel on Afilias’ claim and requested relief, making it even clearer that Afilias’ arguments were rejected by the Panel.

⁴⁵ **CA-0154**, Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional award]*, in *UNCITRAL ARBITRATION* 355 (Nov. 2017) (“**Paulsson & Petrochilos**”). This authority and others referenced herein address Article 39 of the UNICTRAL Arbitration Rules, which is substantively similar to Article 33 of the ICDR Rules (2014).

⁴⁶ Final Decision (20 May 2021), ¶ 413(14) (“For the reasons set out in this Final Decision, the Panel unanimously . . . **Dismisses** all of the Parties’ other claims and requests for relief.”).

⁴⁷ **CA-0152**, Caron & Caplan at 5.

⁴⁸ **CA-0149**, Born at 3407 (emphases added).

36. *Fourth*, additional decisions “obviously ha[ve] no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the [decision].”⁴⁹ In this connection, an arbitral tribunal may “deliberately elect[] not to address a particular claim or issue in the [decision] because it regards it as unnecessary to do so given [its] decisions on other issues which render further consideration moot.”⁵⁰ In such circumstances, an additional decision is not required or warranted.⁵¹ English courts take this position: as the court in *Ali Allwai v Pakistan* explained, “[n]o court or tribunal is ever obliged to determine every issue raised or issues which it decides do not arise in the light of other findings.”⁵² Here, Afiliias is attempting to use Article 33 to undermine these established principals as applied by the Panel.

37. *Fifth*, requests for an additional decision under Article 33 of the ICDR Rules are not intended to be used by an aggrieved party “to ‘reargue’ a particular legal, evidential, or procedural point.”⁵³ In substance, Afiliias’ entire Application is a motion for reconsideration seeking a different result – indeed, a reversal of the Panel’s decision – based on the same arguments it made to the Panel during the IRP.

38. *Sixth*, throughout its Application, Afiliias repeats like a mantra its contention that the Panel failed to fulfill its purported “mandate” in the IRP.⁵⁴ In doing so, Afiliias attempts to confuse the issues by conflating the standard for an additional decision with the purported scope

⁴⁹ CA-0152, Caron & Caplan at 5.

⁵⁰ CA-0154, Paulsson & Petrochilos at 355.

⁵¹ *Id.*

⁵² AA-112, *Ali Allwai v Pakistan* [2019] EWHC 430 (Comm) per Carr J at [88].

⁵³ CA-0148, Gusy & Hosking at 33.01.

⁵⁴ See Afiliias’ Application (21 June 2021), ¶¶ 5–20, 37, 48–49, 53, 65–67.

of the Panel’s so-called “mandate.” The consideration of Afiliias’ Application starts and stops with Article 33 of the ICDR Rules. That Article concerns only “claims, counterclaims, or setoffs presented but omitted from the [decision].”⁵⁵ Except to the extent that a tribunal’s “mandate” may include the requirement to decide upon “claims, counterclaims, or setoffs presented,” the remaining scope of any such “mandate” is irrelevant for purposes of justifying a request for an additional decision.

39. In any event, Afiliias’ attempt to create a purported “mandate” for the Panel is misguided. The word “mandate” does not even appear in the IRP provisions of the Bylaws or the Interim Supplementary Procedures. More fundamentally, in asserting the Panel’s “mandate,” Afiliias does nothing more in its Application than repeat the arguments that it made during the IRP concerning the scope of the Panel’s jurisdiction and remedial authority.⁵⁶ Afiliias ignores that, in its Final Decision, the Panel declined to accept Afiliias’ broad characterization of the Panel’s jurisdiction and remedial authority -- *viz.* what Afiliias now calls the Panel’s “mandate”. Instead, the Panel largely agreed with the jurisdictional and remedial authority arguments and authorities presented by ICANN and *Amici*.⁵⁷ In short, Afiliias’ lengthy discussion of the Panel’s purported “mandate” is a red-hearing that has no bearing on its request for an additional decision.

40. *Finally*, Afiliias suggests in its Application that the Final Decision would be subject to set aside in English Courts under Section 68(2)(d) of the EAA on the grounds that it is *infra petita*.⁵⁸ Afiliias is mistaken. To be set aside under Section 68(2)(d) specifically requires a

⁵⁵ ICDR Rules (2014), Art. 33(1).

⁵⁶ See Afiliias’ Application (21 June 2021), ¶¶ 10–20; Claimant’s (Afiliias’) PHB (12 October 2020), ¶¶ 207–35; Afiliias’ Response to the *Amici*’s Brief (24 July 2020), § IX.

⁵⁷ See Final Decision (20 May 2021), ¶¶ 358–64.

⁵⁸ See Afiliias’ Application (21 June 2021), ¶¶ 6, 8–9 & nn.10, 12.

“serious irregularity” in the form of a “failure by the tribunal to deal with all the issues that were put to it.”⁵⁹ English courts have confirmed that the key principles that apply to a Section 68(2)(d) challenge impose a “high threshold” for setting aside an award as *infra petita*. For example, the decision in *Secretary of State for the Home Department v Raytheon Systems Ltd*⁶⁰—which Afiliias relies upon in its Application—identified the following key principles (among others) that are relevant to assessing whether a decision is *infra petita*:

- (1) “there is a distinction to be drawn between ‘issues’ on the one hand and ‘arguments’, ‘points’, ‘lines of reasoning’ or ‘steps in an argument;’”
- (2) “if the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry . . .;”
- (3) “[a] failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue;”
- (4) “[a] tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise;”
- (5) “[i]t is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged;” and
- (6) “[w]hether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties.”⁶¹

⁵⁹ AA-050, English Arbitration Act (1996), § 68(2)(d).

⁶⁰ CA-0150, *Secretary of State for the Home Department v. Raytheon Systems Ltd*. [2014] EWHC 4375 (TCC).

⁶¹ *Id.* at [33]. See also, e.g., AA-113, *ZCCM Investments Holdings Plc v Kanashi Holdings Plc*, [2019] EWHC 1285 (Comm) at [71] (“[T]he authorities make clear [that the award has to be read] constructively rather than destructively.”); AA-114, *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm) at [30] (per Flaux J: “A number of cases have emphasised that the court should read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults.”).

41. In sum, the standard to set aside an arbitral award as *infra petita* under Section 68(2)(d) of the EAA is consistent with the high standard for an additional decision under Article 33 of the ICDR Rules and international arbitration practice generally. It also is consistent with the commonsense conclusion that the Panel is not bound to decide a case solely in the manner that the parties present or argue that case. Rather, the tribunal may decide how to approach the issues, including whether some issues are threshold issues that obviate the need to specifically consider other points.

42. The sections below apply the above principles and demonstrate that the Panel sufficiently addressed each of Afilias' purported "claims" and no additional award is justified.

2. Even If The So-Called "Rules Breach Claim" Were A "Claim," It Was Sufficiently Addressed In The Final Decision And No Additional Decision Is Justified

43. Despite Afilias' apparent effort to confuse the issue, there are a number of straightforward and simple reasons why the Panel should conclude that the Final Decision sufficiently addressed the so-called Rules Breach Claim. Based on such reasons—individually or collectively—the Panel should deny Afilias' request for an additional decision as unjustified.

44. *First*, in the Decision's *dispositif*, the Panel expressly "[d]ismiss[e]d all of the Parties' other claims and requests for relief."⁶² In view of the fact that the Panel expressly recorded that it resolved all claims put to it, there can be no ambiguity concerning the fact that it did, in fact, resolve all such claims, including the so-called Rules Breach Claim.⁶³ For that reason alone, no additional decision is warranted.

⁶² Final Decision (20 May 2021), ¶ 413(14).

⁶³ *See, e.g., CA-0154*, Paulsson & Petrochilos at 355.

45. *Second*, the alleged omission of a decision on the so-called Rules Breach Claim would not constitute an “obvious case[] of omission,” like when a tribunal has failed to rule on a claim for interest payments or a counterclaim.⁶⁴ Notably, Afilias has devoted a disproportionate amount of its Application—approximately 27 pages and 50 paragraphs—to arguing in support of its request for an additional decision concerning the so-called Rules Breach Claim.⁶⁵ The scope and detail of Afilias’ argument itself unintentionally confirms that Afilias’ request for an additional decision does not relate to an “obvious case[] of omission,” and that an additional decision is unjustified.

46. *Third*, at a minimum, the Panel *impliedly* rejected the so-called Rules Breach Claim. It did so through express decisions on Afilias’ request for affirmative relief and the explicit confirmation that ICANN possessed discretion to defer a decision on Afilias’ objections. To recall, Afilias has articulated the Rules Breach Claim as

[its] claim that ICANN breached its Articles of Incorporation 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 Afilias as the next highest bidder.⁶⁶

In connection with this purported “claim,” Afilias asked the Panel to (1) declare that ICANN must disqualify NDC’s bid for .WEB, (2) order ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias, and (3) specify the bid price to be paid by Afilias.⁶⁷

⁶⁴ See CA-0152, Caron & Caplan at 5.

⁶⁵ See Afilias’ Application (21 June 2021), ¶¶ 21–70.

⁶⁶ *Id.*, ¶ 4(1). See also *id.*, ¶ 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 dis-qualify NDC’s application and bids, determine that NDC is eligible to enter into a registry agreement for .WEB, and offer .WEB to Afilias as the second highest bidder.”).

⁶⁷ See Afilias’ Amended Request for IRP (21 March 2019), ¶¶ 89(2)–(4).

However, the Panel determined that it would be improper for it to order the affirmative relief that Afiliás requested,⁶⁸ including because ICANN “enjoy[s] some discretion in addressing [alleged] violations of the Guidebook and Auction Rules.”⁶⁹ Accordingly, the Panel concluded that ICANN must pronounce in the first instance as to the propriety of NDC’s alleged conduct.⁷⁰ Notably, the Panel’s conclusions in this regard were consistent with the arguments advanced in the IRP by ICANN and *Amici*.⁷¹

47. Afiliás mistakenly asserts in its Application that “[the Panel] did not reach the issue of the remedies requested by Afiliás.”⁷² In fact, the Panel included in the Final Decision’s *dispositif* the following statement expressly dismissing Afiliás’ request for affirmative relief arising out of the so-called Rules Breach Claim:

[The Panel d]ismisses the Claimant’s other requests for relief in connection with its core claims and, *in particular, the Claimant’s request [] that the Respondent*

⁶⁸ See, e.g., Final Decision (20 May 2021), ¶ 348 (“[The Panel] declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.”), ¶ 351 (“As seen, the Respondent has not as yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB, and therefore this claim, as just summarized, appears to the Panel to be premature.”), ¶ 352 (“For reasons expressed elsewhere in this Final Decision, 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. Likewise, the Respondent is invested with the authority to approve an eventual transfer of a possible registry agreement for .WEB from NDC to Verisign, which it may or may not be called upon to exercise depending on whether NDC’s application is rejected and its bids disqualified.”), ¶ 362 (“As foreshadowed earlier in these reasons, the Panel is firmly of the view that it 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.”), ¶ 363 (“The Panel also accepts the Respondent’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.”).

⁶⁹ *Id.*, ¶ 363 (“[T]he 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.”)

⁷⁰ See, e.g., *id.*, ¶ 9.

⁷¹ See, e.g., Respondent’s (ICANN’s) Answer (31 May 2019), ¶ 61; NDC Brief (26 June 2020), ¶¶ 64–84; *Amici*’s PHB (12 October 2020), §§ III, IV. See also Final Decision (20 May 2021), ¶¶ 134, 137, 141, 156, 162, 163, 164, 170, 172, 173, 228, 230, 235, 241, 257 (summarizing arguments advanced by ICANN and *Amici*)

⁷² Afiliás’ Application (21 June 2021), ¶ 67.

*be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant*⁷³

Thus, contrary to Afilias' contention above, the Panel *expressly* reached and rejected the issue of remedies requested by Afilias in connection with its so-called Rules Breach Claim. In doing so, the Panel also impliedly rejected the Rules Breach Claim itself.⁷⁴ As Gary Born has explained, “a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief”⁷⁵

48. *Fourth*, the route by which the Panel approached the issues in the IRP rendered an express decision on the so-called Rules Breach Claim moot. As Afilias itself has stated, “a threshold issue for [its] Rules Breach Claim”⁷⁶ was “the question of whether the DAA and NDC's other conduct violated the New gTLD Program Rules. . . .”⁷⁷ In other words, in

⁷³ Final Decision (20 May 2021), ¶ 413(7) (emphasis added).

⁷⁴ In a footnote in its Application, Afilias erroneously and misleadingly contends that “[t]here has never been any question as to whether Afilias' Rules Breach Claim[] is within the Panel's jurisdiction.” Afilias' Application (21 June 2021), at 12, n.35. Afilias then provides the following partial quote from the Final Decision: “the jurisdiction of the Panel to hear the Claimant's core claims against the Respondent in relation to .WEB is not contested.” *Id.* But Afilias elides the fact that in the sentences preceding the quoted statement, the Panel expressly stated that the statement was “subject to” the “jurisdictional” issues raised by the Parties and *Amici*, including issues concerning “the relief that the Panel is empowered to grant.” Final Decision (20 May 2021), ¶ 26. Afilias also erroneously contends in its Application that “there is no dispute that if a breach is found, the Panel has the authority to make a declaration [providing for affirmative declaratory relief].” Afilias' Application (21 June 2021), ¶ 68. In fact, as noted above, both ICANN and *Amici* argued—and the Panel accepted—that the Panel lacked authority to order affirmative relief, including “affirmative declaratory relief” or “injunctive” relief.

⁷⁵ CA-0149, Born at 3407.

⁷⁶ Afilias' Application (21 June 2021), ¶ 21.

⁷⁷ *Id.* See also, e.g., *id.*, ¶ 23 (“As set forth in the Decision, Afilias 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.’” (emphasis in original)), ¶¶ 42–43 (describing certain allegedly “threshold questions” for the Panel with respect to whether NDC violated the Guidebook), ¶ 70. As shown above, the Panel determined that ICANN retained discretion with respect to evaluating the allegations concerning NDC's conduct, and therefore ICANN was *not* “required” to make the determinations that Afilias sought.

connection with the so-called Rules Breach Claim, Afilias wanted the Panel to rule on NDC’s conduct, rather than ICANN’s. However, the Panel confirmed in the Final Decision that “[the IRP] is not the forum for the resolution of potential disputes between [Afilias] and [NDC and Verisign].”⁷⁸ The Panel also expressly—and correctly—found that it lacked authority to decide the “threshold issue” identified by Afilias, and that ICANN retained discretion with respect to whether the DAA and NDC’s conduct violated the New gTLD Program Rules.⁷⁹ By rejecting that it had authority to decide the “threshold issue” to Afilias’ so-called Rules Breach Claim, and by concluding that ICANN must pronounce on the issue in the first instance, the precise issues raised by Afilias under the so-called Rules Breach Claim were rendered moot, and no further discussion of the purported claim was necessary.⁸⁰

49. In its Application, Afilias also asserts repeatedly that the Panel failed to decide the so-called Rules Breach Claim insofar as such “claim” allegedly required the Panel to determine whether ICANN’s “failure” to disqualify NDC, or other purported “inaction,” violated the Articles and Bylaws.⁸¹ However, the Panel expressly determined that it was reasonable for

Afilias also argues that because it put this question to the Panel, “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.” *Id.*, ¶ 70. This is a non-sequitur. Simply putting a question to a tribunal or a court does not create an entitlement to an answer to the question, let alone the specific answer sought by the party who posed the question.

⁷⁸ Final Decision (20 May 2021), ¶ 253.

⁷⁹ *See id.*, ¶¶ 351, 363.

⁸⁰ *See, e.g., CA-0154*, Paulsson & Petrochilos at 355 (“[A tribunal may] deliberately elect[] not to address a particular claim or issue in the [decision] because it regards it as unnecessary to do so given [its] decisions on other issues which render further consideration moot.”).

⁸¹ *See, e.g., Afilias’ Application* (21 June 2021), ¶ 38 (“The Dispute at issue (as the Panel acknowledged elsewhere in its Decision) is whether the Covered Action identified by Afilias—ICANN’s *failure* to disqualify NDC’s application and bids, determine NDC’s ineligibility to enter in to a registry agreement, and offer .WEB to Afilias—complied with the Articles, Bylaws, and New gTLD Program Rules. That is Afilias’ Rules Breach Claim.” (emphasis in original)), ¶ 48 (“[T]he Panel’s ruling (or more accurately, its failure to rule) on ICANN’s [*sic*] Rules Breach Claim has effectively written the terms ‘inaction’ and ‘failure to act’ out of the Bylaws.”). *See also id.*, ¶¶ 21, 23, 24, 25.

ICANN’s Board to defer consideration of the complaint that had been raised in relation to NDC’s application and auction bids for .WEB.⁸² Because it was reasonable for the Board to defer consideration of the issue, it follows that the Board did not “fail” to address anything. Thus, the Panel rendered moot Afilias’ “claim” that the “failure” to disqualify NDC violated the Articles and Bylaws, because the Board could not have *failed* to take an action that the Panel deemed was appropriate for the Board to defer. Stated differently, the Panel’s decision that ICANN had the discretion to defer a determination of Afilias’ objections is a rejection by the Panel of Afilias’ Rules Breach Claim.

50. *Finally*, Afilias uses much of its request concerning the Rules Breach Claim to dispute the soundness of the Panel’s reasoning and findings with respect to the foregoing issues, and to reargue its case from the underlying IRP. For example,

(1) Afilias argues—repeatedly⁸³—that “[t]he 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,”⁸⁴

(2) Afilias argues that “[t]he notion that ICANN or its Board has the ‘requisite knowledge, expertise, and experience to pronounce in the first instance’ on issues that have been squarely presented to this Panel . . . has no legal or factual basis whatsoever . . . ;”⁸⁵ and

(3) purporting to identify alleged inconsistencies, Afilias argues *inter alia* that the Panel improperly “adopt[ed] ICANN’s belated (and self-contradictory) assertion that it never considered or addressed Afilias’ complaints” and such decision “cannot be reconciled with the record.”⁸⁶

⁸² See Final Decision (20 May 2021), ¶ 331.

⁸³ See Afilias’ Application (21 June 2021), ¶¶ 45, 46, 47, 49, 51, 54, 63.

⁸⁴ *Id.*, ¶ 46.

⁸⁵ See *id.*, ¶ 63.

⁸⁶ *Id.*, ¶ 32. See also *id.* ¶¶ 52–61 & n.94.

51. None of the arguments above advances Afiliás' request for an additional decision. A request for an additional decision is not a vehicle for disputing the reasoning or findings that led a tribunal to its decision on a particular claim, or for relitigating the dispute.⁸⁷ Nor are alleged inconsistencies a basis for an additional decision, let alone a basis for setting aside a decision under English law. As explained by the court in *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd*, "the court should read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults."⁸⁸

52. Further, and in any event, Afiliás' complaints about the Panel's reasoning and findings are unfounded. For example, the Panel's conclusion that ICANN must pronounce in the first instance concerning the propriety of NDC's conduct clearly follows from the facts that (1) ICANN enjoys a certain amount of discretion with respect to the determination of whether the New gTLD Program Rules have been violated;⁸⁹ (2) ICANN and its Board have the expertise to make such a determination;⁹⁰ (3) ICANN's Board has not yet made such a determination;⁹¹ and (4) in view of the Panel's limited remedial authority and lack of expertise and the Board's discretion, it would be improper for the Panel to make such a determination or to issue the affirmative relief that Afiliás requested.⁹² The Panel made each of these points in the Final

⁸⁷ See, e.g., **CA-0148**, Gusy & Hosking at 33.13.

⁸⁸ **AA-114**, *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm) at [30].

⁸⁹ See, e.g., Final Decision (20 May 2021), ¶ 363.

⁹⁰ See, e.g., *id.*, ¶ 9 ("The Panel is also of the view that it 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.").

⁹¹ See, e.g., *id.*, ¶ 333.

⁹² See, e.g., *id.*, ¶ 363.

Decision, and it did so consistent with the arguments presented by ICANN and *Amici*.⁹³ Each such point leads to and supports the conclusion that ICANN must pronounce in the first instance as to whether it believes that there has been a violation of the New gTLD Program Rules.

53. The Panel also explained why ICANN possesses the expertise to pronounce upon the propriety of the DAA in the first instance, including because

[t]he [applicable] instruments originate from [ICANN], and it is [ICANN] that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.⁹⁴

The Panel’s conclusion that ICANN has the requisite expertise also is consistent with submissions by ICANN and *Amici*. Further, the Panel’s decision to defer an issue to ICANN’s expertise is well-supported by ample IRP precedent, which was discussed throughout the proceeding.⁹⁵

⁹³ In fact, in its Application, Afiliias acknowledges that the Panel adopted ICANN’s positions regarding the priority that should be given to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program. Afiliias’ Application (21 June 2021), ¶ 53 (“[T]he Panel . . . 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.”).

⁹⁴ Final Decision (20 May 2021), ¶ 299.

⁹⁵ See, e.g., NDC’s Brief (26 June 2020), ¶¶ 71–74 & n.167 (explaining that “[n]umerous prior IRP decisions confirm that a panel’s remedial authority is significantly circumscribed under the Bylaws, and that such authority does not include the authority to order affirmative relief.” (citing **CA-011, *Booking.com Final Declaration***, ¶ 153 (holding that it “cannot grant [the claimant] the relief that it seeks [because] [a] panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are or are not inconsistent with ICANN’s Articles of Incorporation and Bylaws.”)); **CA-02, *Vistaprint Limited v. ICANN***, ICDR Case No. 01-14-0000-6505, Final Declaration (Gibson, Glas, Elsing) (9 October 2015) (“**Vistaprint Final Declaration**”), ¶¶ 149, 196 (finding that the panel did “not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision” and it therefore did “not have authority to order the relief requested by [the claimant].”); **AA-43, *Asia Green IT System v. ICANN***, ICDR Case No. 01-15-0005-9838, Final Declaration, (Hamilton, Cahill, Reichert) (30 November 2017) (“**AGIT Final Declaration**”), ¶ 149 (“[N]othing as to the substance of [ICANN’s ultimate] decision [on the claimant’s applications] should be inferred by the parties from the Panel’s opinion in this regard. The decision, whether yes or no [to the claimant’s applications], is for [ICANN].”); **AA-49, *Dot Registry, LLC v. ICANN***, ICDR Case No. 01-14-0001-5004, Final Declaration (Brower (dissenting), Kantor, Donahey) (29 July 2016) (“**Dot Registry Final Declaration**”), ¶ 70 (“An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed.”); **AA-55, *Merck KGaA v.***

54. In short, Afilias’ criticisms of the Panel’s findings and reasoning are wholly misplaced, and amount to no more than another red-herring that does not support Afilias’ request for an additional decision. The Panel need not engage with such arguments in order to conclude that Afilias’ request is unjustified and should be denied.

55. For the reasons above—taken individually or collectively—the Panel sufficiently dealt with the so-called Rules Breach Claim in the Final Decision, and should deny Afilias’ request for an additional decision regarding such “claim.”

3. Even If The So-Called “International Law Claim” Were A “Claim,” It Was Sufficiently Addressed In The Final Decision And No Additional Decision Is Justified

56. As explained above, the so-called International Law Claim— *i.e.*, that ICANN breached its Bylaws and Articles by failing to conduct its activities in accordance with relevant principles of international law—is an argument or reason supporting an argument, rather than a

ICANN, ICDR Case No. 01-14-0000-9604, Final Declaration (Reichert, Matz, Dinwoodie) (11 December 2015) (“**Merck Final Declaration**”), ¶ 21 (“[I]t is clear that the [p]anel may not substitute its own view of the merits of the underlying dispute.”); **AA-56**, *Namecheap, Inc. v. ICANN*, ICDR Case No. 0120-0000-6787, Decision on Request for Emergency Relief (Benton (Emergency Panelist)) (20 March 2020), ¶ 114 (“To the extent there are competing Core Values involved, it is for the Board to exercise its judgment as to which competing Core Values are most relevant and to find an appropriate balance.”); **AA-42**, *Amazon EU S.A R.L v. ICANN*, ICDR Case No. 01-16-0000-7056, Final Declaration (Bonner, O’Brien, Matz (concurring and partially dissenting)) (11 July 2017) (“**Amazon Final Declaration**”), ¶¶ 83, 124–25 (declining to grant the claimant’s request for “affirmative relief in the form of a direction to ICANN to grant [claimant’s] applications,” and instead recommending that the Board make an objective and independent judgment regarding whether there were reasons for denying the claimant’s applications); **CA-016**, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938, Final Declaration (Miles, Morril, Ostrove) (17 October 2016), ¶¶ 8.15, 10.1, 11.1 (quoting with approval the holding from Booking.com that “it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook;” the panel also declined to grant the claimant’s request to direct ICANN to take certain steps in connection with the claimant’s gTLD application); **AA-48**, *Donuts, Inc. v. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel (Coe, Boesch, Hamilton) (5 May 2016), ¶ 133 (explaining that, consistent with the Bylaws, “the ICANN board enjoys a large degree of discretion in its decisions and actions,” and “the Board . . . shall itself ‘determine which [of ICANN’s] core values are most relevant and how they apply to the specific circumstances of the case at hand” (quoting *Booking.com*, Final Declaration, ¶ 129))).

claim.⁹⁶ This conclusion is self-evident from Afiliás' Application and its prior pleadings in this IRP: at no point has Afiliás identified any facts or issues unique to the so-called International Law Claim. Instead, the International Law Claim apparently is only a legal theory that Afiliás believes may support a claim of ICANN action or inaction contrary to its Articles or Bylaws. Afiliás never explains, however, how its International Law Claim is a claim for purposes of Article 33, how an express statement by the Panel regarding international law would change the result in the IRP, or how international law differs in any respect from the law applied by the Panel, including ICANN's Bylaws.

57. The same facts and circumstances that underpin its Rules Breach Claims form the basis for the International Law Claim. The only difference is that "international law" is, according to Afiliás, an *additional basis* on which the Panel could find in its favor with respect to the facts and circumstances that underly the Rules Breach Claim. Accordingly, nothing said by Afiliás regarding international law qualifies for a new or additional decision under Article 33. In addition, even if this argument could be characterized as a "claim," it still would not be suitable for an additional decision because the Panel sufficiently addressed the argument/purported "claim" in the Final Decision.

58. *First*, and again, the Panel sufficiently addressed the so-called International Law Claim by recording in the Final Decision's *dispositif* that all other claims or requests for relief were dismissed.⁹⁷ On this basis alone, the Panel should conclude that Afiliás' request for an additional decision is unjustified.⁹⁸

⁹⁶ See *supra* Section II.A.

⁹⁷ Final Decision (20 May 2021), ¶ 413(14).

⁹⁸ See, e.g., CA-0154, Jan Paulsson & Georgios Petrochilos at 355.

59. *Second*, to the extent that the so-called International Law Claim could be characterized as a standalone claim (it cannot), it seems likely that the Panel deliberately omitted any standalone discussion of such claim because it added nothing to Afilias’ claim that ICANN breached the Articles and Bylaws by violating express commitments in those instruments. To recall, the Panel concluded that ICANN did, in fact, breach its Articles and Bylaws by violating its commitment to (1) “make decisions by applying documented policies objectively and fairly,” and (2) “operate in an open and transparent manner and consistent with procedures to ensure fairness.”⁹⁹ Such “commitments” are found in the Articles and Bylaws,¹⁰⁰ and, in simple terms, they obligate ICANN to act fairly, impartially, transparently, and consistent with expected procedures.¹⁰¹

60. These principles—fairness, impartiality, transparency, and conduct consistent with expected procedures—are the same principles that Afilias sought to invoke with respect to its so-called International Law Claim. In this regard, Afilias argues in its Application that the “international law principle of good faith” required (1) “[p]rocedural fairness and due process;” (2) “[i]mpartiality and non-discriminatory treatment;” (3) “[o]penness and transparency;” and (4) [r]espect for legitimate expectations.”¹⁰² In other words, there is virtually no difference between the principles of conduct expressly required by the Articles and Bylaws, and expressly applied by the Panel, and the principles of international law upon which Afilias allegedly bases its purported International Law Claim. Accordingly, any International Law Claim was entirely

⁹⁹ Final Decision (20 May 2021), ¶¶ 413(1)–(3).

¹⁰⁰ See, e.g., **Ex. C-1**, Bylaws, §§ 1.2, 1.2(a)–(c), 3.1; **Ex. C-2**, Articles of Incorporation, Art. 2, III.

¹⁰¹ See generally Final Decision (20 May 2021), ¶¶ 290–96.

¹⁰² Afilias’ Application (21 June 2021), ¶ 75.

redundant of and subsumed by Afiliás’ overall claim for breach of the Articles and Bylaws, a claim the Panel already expressly decided (granting it in part).

61. The overlap between, on the one hand, the express commitments in the Articles and Bylaws, and, on the other hand, the principles of international law that Afiliás has invoked, also is evident from Afiliás’ own submissions in the IRP. For example, in its submission in response to the *Amici* briefs, Afiliás expressly confirmed that principles of international law and the requirements set forth in the Articles and Bylaws provide “*generally overlapping*” safeguards.¹⁰³ Afiliás also explained in its submission that each of the four purported principles of international law above—*i.e.*, procedural fairness and due process, impartiality and non-discrimination, transparency, and legitimate expectations—arise out of the express terms of the Bylaws, rather than out of international law alone.¹⁰⁴

62. The redundancy of the purported International Law Claim was recognized by the Panel in its summary of Afiliás’ arguments. For example, in paragraph 195 of the Final Decision, the Panel explained that:

The Claimant also argues that ICANN is required by its Bylaws to afford impartial and non-discriminatory treatment, *an obligation that is consistent with the principles of impartiality and non-discrimination under international law*.¹⁰⁵

Likewise, in paragraph 196 of the Final Decision, the Panel explained that “[t]he Claimant avers that the Respondent also failed to act transparently as required by the Articles, Bylaws *and*

¹⁰³ Afiliás’ Response to the *Amici*’s Briefs (24 July 2020), ¶ 143 (emphasis added).

¹⁰⁴ See *id.*, ¶¶ 145–47 (regarding procedural fairness and due process), ¶¶ 148–50 (regarding impartiality and non-discriminatory treatment), ¶¶ 151–58 (regarding transparency), ¶¶ 159–61 (regarding legitimate expectations).

¹⁰⁵ Final Decision (20 May 2021), ¶ 195 (emphases added).

international law.”¹⁰⁶ The Panel thus considered Afiliias’ arguments on international law in resolving the claims in the IRP.

63. To the extent that Afiliias may be arguing that it asserted a separate theory under international law for the violation of the principle of “good faith,” the argument necessarily was considered by the Panel. In its Application, Afiliias acknowledges that the principle of “good faith” is not a standalone rule of law, but rather is a general source of the specific principles of international law that Afiliias has invoked and are equally reflected in ICANN’s Bylaws. In this regard, Afiliias stated the following in its Application (as well as in its response to the *Amici* briefs):

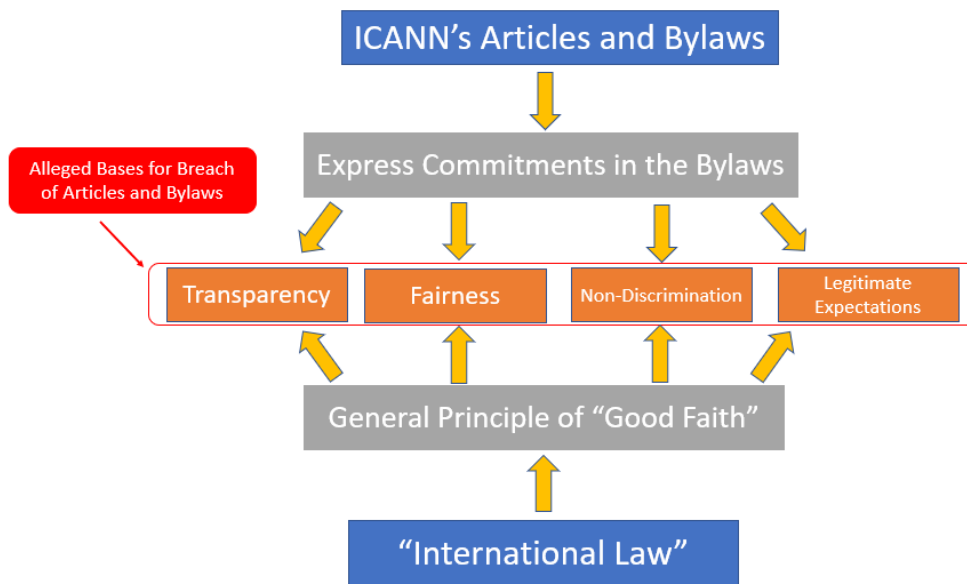
The guiding substantive and procedural rules in ICANN’s Articles and Bylaws—including the rules involving procedural fairness, transparency, and non-discrimination—are so fundamental that they appear in some form in virtually every legal system in the world, and, as discussed below, are given definition by numerous sources of international law. *They arise from the general principle of good faith, which is considered to be the ‘foundation of all law and all conventions’.*¹⁰⁷

64. Thus, as Afiliias must admit, the general principle of good faith is the source of the principles of international law as well as the ICANN Bylaws upon which Afiliias relies. That is, in Afiliias’ own words, the principles of international law “*arise from the general principle of good faith.*”¹⁰⁸ The principles of international law, in turn, also appear expressly in the Articles and Bylaws. The following diagram illustrates this point graphically:

¹⁰⁶*Id.*, ¶ 196 (emphasis added).

¹⁰⁷ Afiliias’ Application (21 June 2021), ¶ 74 (quoting Afiliias’ Response to the *Amici*’s Briefs (24 July 2020), ¶ 144 (underlining added)).

¹⁰⁸ *See id.* (emphasis in original).



65. In short, the purported International Law Claim is no different than Afilias' claim for breach of the express commitments in the Articles and Bylaws, which the Panel dealt with in the Final Decision. Therefore, there would be no purpose served for the Panel to repetitively address the so-called International Law Claim as some form of separate standalone claim.¹⁰⁹

66. *Third*, any purported omission of the International Law Claim from the Final Decision is not an "obvious case[] of omission" as required by Article 33.¹¹⁰ In its Application, Afilias alleges that it made "extensive submissions on ICANN's international law violations," which the Panel allegedly failed to assess.¹¹¹ It also asserts that it "laid out its position on ICANN's international law obligations clearly and distinctly."¹¹² Neither assertion is true. In truth, none of Afilias' core submissions in the IRP—not its Amended Request for Arbitration, its

¹⁰⁹ See, e.g., CA-0154, Paulsson & Petrochilos at 355 (explaining that there is no need for an additional decision where a tribunal "deliberately elect[s] not to address a particular claim or issue in the [decision] because it regards it as unnecessary to do so given [its] decisions on other issues which render further consideration moot.").

¹¹⁰ See CA-0152, Caron & Caplan at 5.

¹¹¹ Afilias' Application (21 June 2021), ¶ 71.

¹¹² *Id.*, ¶ 72.

Reply Memorial, its Response to *Amici*'s Briefs, or its Post-Hearing Brief—includes any meaningful discussion of international law as a distinct basis for a claim in this IRP.¹¹³ To be sure, each submission references “international law,” and Afilias’ Response to *Amici*'s Briefs in particular references “international law” a number of times. However, as explained above, Afilias referenced “international law” in its submissions simply to expound on rules or principles that already are expressly contained in the Articles and Bylaws themselves, rather than to assert a standalone claim based on international law.¹¹⁴ Afilias never distinguishes in any way—and in fact equates—the requirements of the Articles and Bylaws and the principles of international law.

67. *Fourth*, the so-called International Law Claim—as articulated by Afilias in its Application—relates to the same request for affirmative relief that Afilias sought in connection with its purported Rules Breach Claim. Specifically, Afilias describes its International Law Claim as its “key claim that ICANN violated its international obligations of good faith, transparency, and respect for legitimate expectations when it failed to disqualify NDC’s

¹¹³ See generally Afilias’ Amended Request for IRP (21 March 2019); Claimant’s (Afilias’) Reply (4 May 2020); Afilias’ Response to the *Amici*'s Brief (24 July 2020); Claimant’s (Afilias’) PHB (12 October 2020). One can glean the limited extent of Afilias’ discussion of “international law” by using the “Ctrl-F” function in the PDF version of each of Afilias’ submissions and searching for “international.” Clicking through the results reveals that while “international law” was referenced, it was not referenced as a standalone claim.

¹¹⁴ See generally Afilias’ Response to the *Amici*'s Brief (24 July 2020), ¶¶ 145–61.

Further, even Afilias’ request for a declaration that “ICANN has . . . violated international law” was not distinctly set off from its overarching claim for a declaration “that ICANN has acted in-consistently with its Articles and Bylaws.” Afilias’ Amended Request for IRP (21 March 2019), ¶ 89(1) (requesting a declaration “that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law”). In fact, the Bylaws would not even permit an IRP panel to declare that ICANN violated international law; instead, and at most, the Bylaws would permit the panel to declare that ICANN violated its Articles or Bylaws as a result of some action that was in violation of international law. See C-1, Bylaws, § 4.3(o)(iii).

application and bid pursuant to a good faith application of the New gTLD Program Rules.”¹¹⁵

As explained above, Afilias asked the Panel to award certain affirmative relief in connection with this argument, including an order requiring ICANN to disqualify NDC and delegate .WEB to Afilias. As also explained above, however, the Panel expressly rejected such request for relief in the Final Decision.¹¹⁶ Accordingly, at a minimum, the Panel impliedly rejected the so-called International Law Claim associated with such request.¹¹⁷

68. For each of the reasons above, Afilias’ request for an additional decision regarding a purported International Law Claim is unjustified and should be denied.

4. Even If The So-Called “Disparate Treatment Claim” Were A “Claim,” It Was Addressed In The Final Decision And No Additional Decision Is Justified

69. Lastly, even if the so-called Disparate Treatment Claim were a claim, the Panel undoubtedly addressed it sufficiently in the Final Decision.

70. *First*, the Panel’s *dispositif* implicitly addresses the purported Disparate Treatment Claim. Afilias describes its Disparate Treatment Claim as its claim “that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias vis-à-vis Verisign and NDC.”¹¹⁸ Such claim presumably arises out of the Bylaws’ prohibition on “discriminatory treatment” in ICANN’s decision-making.¹¹⁹ The Panel found that ICANN breached its

¹¹⁵ Afilias’ Application (21 June 2021), ¶ 80. *See also id.*, ¶ 71 (describing its International Law Claim as its claim “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.”).

¹¹⁶ *See supra* Section II.B.2.

¹¹⁷ **CA-0149**, Born at 3407.

¹¹⁸ Afilias’ Application (21 June 2021), ¶ 85.

¹¹⁹ *See Ex. C-1*, Bylaws, §§ 1.2(a)(v), 2.3.

commitment “to make decisions by applying documented policies objectively and fairly.”¹²⁰ “Discriminatory treatment” is necessarily unobjective and unfair treatment. The Panel’s conclusion that ICANN breached its commitment to make decisions objectively and fairly sufficiently resolved Afilias’ arguments of disparate treatment.

71. Indeed, the Panel explained that “the allegation of disparate treatment . . . rests for the most part on facts already considered by the Panel in analyzing the Claimant’s core claims.”¹²¹ The Panel then identified such overlapping facts, which include many of the same findings of fact that Afilias’ repeats in its Application in support of the purported Disparate Treatment Claim.¹²² Because the factual findings overlapped with the findings that supported Afilias’ “core claims,” the Panel explained that “[it] does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant’s core claims.”¹²³ The Panel did not decline to *decide* the so-called Disparate Treatment Claim; rather, it declined to add additional findings of fact in relation to such a claim because the claim was already upheld based on findings of fact that the Panel had made in connection with Afilias’ “core claims.” The so-called Disparate Treatment Claim was subsumed in the “core claims” relating to ICANN’s alleged unobjective and unfair conduct and decided by the Panel.

72. *Second*, and in any event, Afilias mistakenly argues that “[t]he Panel . . . cannot simply decide not to resolve a claim that was presented to it,” and that “it is not an option for an IRP panel to determine that it is not ‘necessary’ to decide a claim that has been squarely put to it,

¹²⁰ Final Decision (20 May 2021), ¶ 413(2).

¹²¹ *Id.*, ¶ 350.

¹²² *See id.*, Afilias’ Application (21 June 2021), ¶ 86.

¹²³ Final Decision (20 May 2021), ¶ 350.

and then fail to resolve the claim on that basis.”¹²⁴ In fact, a panel *may* conclude that it is unnecessary to resolve a claim in light of its findings. As David Caron and Lee Caplan explained, additional decisions “obviously ha[ve] no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the [decision].”¹²⁵ Other IRP panels also have adopted this approach. For example, the panel in *Gulf Cooperation Council (“GCC”) v. ICANN* concluded as follows:

Having made findings on the Board’s duties to make decisions fairly and transparently, we do not need to make an additional finding on the GCC’s allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment¹²⁶

73. Accordingly, to the extent that the Panel chose not to expressly deal with the so-called Disparate Treatment Claim because it was sufficiently dealt with through Afilias’ “core claims,” the Panel was clearly empowered to make such a choice.

74. *Finally*, as explained above, the fact that the Panel expressly dismissed all other claims or requests for relief was sufficient to address the so-called Disparate Treatment Claim.¹²⁷

75. For all of the foregoing reasons—individually or collectively—Afilias’ request for an additional decision is unjustified and should be denied.

¹²⁴ Afilias’ Application (21 June 2021), ¶ 88.

¹²⁵ **CA-0152**, Caron & Caplan at 5.

¹²⁶ **CA-0006**, *Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration of the Independent Review Process Panel (Reed, Sabater, van den Berg) (2016) (“**GCC Partial Final Declaration**”), ¶ 144.

¹²⁷ Final Decision (20 May 2021), ¶ 413(14).

III. Afilias' Request for Interpretation Is Unjustified And Should Be Summarily Rejected By The Panel

A. Afilias Disregards the Limited Purpose and Scope of ICDR Article 33

76. Afilias makes its “Requests for Interpretation” pursuant to the following provision set forth in Article 33 of the ICDR Rules: “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”¹²⁸ On the basis of this language alone, Afilias improperly “requests the Panel to provide an interpretation of several ambiguous and vague *points of substance and reasoning* contained in the Decision.”¹²⁹ Afilias goes so far as to suggest that it is “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*” to allow both the Parties and “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.*”¹³⁰

77. Afilias misunderstands the purpose and scope of the Article 33 “interpretation” process, which does not justify such expansive requests or permit post-Decision explanation of either the Panel’s “reasoning” or the Panel’s views of the “implications” of its Decision on this or any other Dispute. As we explain below, interpretation under Article 33 is a narrow remedy that is rarely granted at all, let alone expanded to encompass the substantive explanations and

¹²⁸ Afilias’ Application (21 June 2021), ¶ 92 (quoting ICDR Rules (2014), Art. 33(1)).

¹²⁹ *Id.*, ¶ 90 (emphasis added).

¹³⁰ *Id.*, ¶ 94 (emphasis added).

analysis contemplated by Afiliás' Application.¹³¹ Nonetheless, disregarding relevant authority, Afiliás seeks to transform the narrow interpretation process into an *ex-post* review of the Panel's Decision in order to resuscitate rejected arguments, effectively appeal that Decision, delay resolution of the .WEB gTLD still further, and influence ICANN's future actions. The Panel should reject Afiliás' attempt to misuse Article 33 for these improper purposes.

78. It is well-settled that interpretation of an arbitral decision allows only for "clarification of the award by resolving any ambiguity and vagueness in its terms."¹³² It "does not permit re-argument of a conclusion, nor may new arguments or evidence be raised."¹³³ As Gary Born explains, "an interpretation or clarification of an award does not alter the previous award's statements or calculations, but instead more clearly explains what such statements were intended to mean, without altering them."¹³⁴ Afiliás pays lip-service to this standard,¹³⁵ but fails to explain or adhere to its limited scope.

79. For example, not every decision warrants further interpretation, even if the decision contains "ambiguity and vagueness in its terms."¹³⁶ As the Report on the draft UNCITRAL Arbitration Rules (cited by Afiliás) states, interpretation of an award is "considered useful in that it provides a vehicle for one or both parties to secure clarification of the award *where necessary*."¹³⁷ Clarification is only "necessary," however, and "interpretation of an arbitral

¹³¹ **AA-107**, Born at §24.04 ("In practice, it is very rare for interpretations to be either sought or granted."); **AA-108**, THE SECRETARIAT'S GUIDE TO ICC ARBITRATION, ¶ 3-1275 ("In practice, applications for interpretation (as opposed to correction) are rarely accepted.").

¹³² **CA-0148**, Gusy & Hosking at 33.13.

¹³³ *Id.*

¹³⁴ **AA-107**, Born at § 24.04.

¹³⁵ Afiliás' Application (21 June 2021), ¶ 92.

¹³⁶ **CA-0148**, Gusy & Hosking at 33.13.

¹³⁷ **CA-0162**, Commentary on Article 30, at 180 (emphasis added).

award is only really helpful where the ruling ... is so ambiguous that the parties could legitimately disagree as to its meaning.”¹³⁸ As a result, “any obscurity or ambiguity in the grounds for the decision does not warrant a request for interpretation of the award.”¹³⁹ Rather, interpretation is “understood to be permissible only where the terms of an award are so vague or confusing that a party has a genuine doubt *about how the award should be carried out*”¹⁴⁰ and “only if a party demonstrates that the award is ambiguous and requires clarification *for its effective execution*.”¹⁴¹ It makes sense, therefore, that requests for interpretation generally “seek to clarify the meaning of an operative part of the arbitral tribunal’s decision”¹⁴² and, therefore, should be “directed to specific portions of the dispositive part of the award.”¹⁴³

80. In addition, it is not proper to use the interpretation process, as Afilias attempts to do, to seek (i) “clarification of [the Panel’s] factual findings in order to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question” or (ii) “so-called interpretation of the award on the basis that the tribunal did not in its award address all of the parties’ submissions.”¹⁴⁴ These limitations are consistent with the settled

¹³⁸ **AA-110**, FOUCHARD GAILLARD GOLDMAN ¶ 1415.

¹³⁹ *Id.*

¹⁴⁰ **AA-109**, Isaacs at 367 (emphasis added).

¹⁴¹ **AA-107**, Born at §24.04[B] (emphasis added) (describing the UNCITRAL Rules’ provision on interpretation, which is substantively similar to ICDR Rule 33).

¹⁴² **AA-108**, THE SECRETARIAT’S GUIDE TO ICC ARBITRATION, ¶ 3-1275 (“Most arbitral tribunals find that to be admissible a request for interpretation must seek to clarify the meaning of an operative part of the arbitral tribunal’s decision. Therefore, requests for interpretation should generally target the dispositive section of the award or other parts that directly affect the dispositive section or the parties’ rights and obligations.”).

¹⁴³ **CA-0149**, Born at 3405 (“In practice, requests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award.”).

¹⁴⁴ **AA-109**, Isaacs at 367 (“It would also be a step too far to regard as ‘*interpretation*’ requests to the tribunal for clarification of its factual findings in order to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question and for a party to seek so-called interpretation of the award on the basis that the tribunal did not in its award address all of the parties’ submissions.”)

principle that a request for interpretation “may not be used to challenge the tribunal’s reasoning or dispositions.”¹⁴⁵ Indeed, it is beyond doubt that interpretation “do[es] not entail any appeal procedure or any opportunity to rehear procedural or substantive issues which have been, or could and should have been, dealt with in the proceedings and by way of the award.”¹⁴⁶

Numerous authorities concur that arbitration rules allowing for interpretation requests, like Article 33, do “not provide a means of appeal”¹⁴⁷ or “permit the arbitral tribunal to review the substance of its reasoning or deal with additional claims or arguments.”¹⁴⁸ Instead, as noted, such requests are properly “limited to situations involving clear errors or vague language.”¹⁴⁹

81. As demonstrated by Afiliás’ Application, there is a clear danger of “abuse resulting from [interpretation] requests made for delaying purposes, or requests aimed at obtaining a revision of the entire award.”¹⁵⁰ This Panel, like other similarly situated tribunals, is

¹⁴⁵ **CA-0149**, Born at 3405 (“A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions. As one decision by an ICC tribunal reasoned: ‘As to the scope of “interpretation”, which might be regarded as broader than the ‘correction’ feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.” (citation omitted)).

¹⁴⁶ **AA-109**, Isaacs at 363; *see also id.* at 367 (“Many applications for interpretation amount to attempted appeals aimed at altering the meaning of an award, raising an additional issue or attempting to have the arbitral tribunal reconsider its decision or the evidence.” (quoting the SECRETARIAT’S GUIDE TO ICC ARBITRATION (**AA-108**))).

¹⁴⁷ **AA-108**, THE SECRETARIAT’S GUIDE TO ICC ARBITRATION, ¶ 3-1265.

¹⁴⁸ *Id.* at ¶ 3-1265; *see also CA-0148*, Gusy & Hosking at 33.13 (“[T]he interpretation process does not permit re-argument of a conclusion, nor may new arguments or evidence be raised”); **AA-108**, THE SECRETARIAT’S GUIDE TO ICC ARBITRATION, ¶ 3-1283 (“Applications made under Article 35(2) [of the ICC Rules] are not infrequently disguised attempts to appeal an award. In such cases, the applications are often lengthy and complicated, requiring the arbitral tribunal to undertake significant work before rejecting the application as falling outside the scope of Article 35(2).”). **CA-0152**, Caron & Caplan at 3 (“[Interpretation and additional awards] are not mechanisms by which a party may reargue its case or introduce new arguments or claims for resolution by the arbitral tribunal.”).

¹⁴⁹ **AA-109**, Isaacs at 368.

¹⁵⁰ **AA-107**, Born at § 24.04[B]. *See also, e.g., AA-115*, Sigvard Hakan Ludvig Jarvin & Corinne Nguyen, *VI.4.1 Application for Correction or Interpretation of the Award – Introductory Comments*, in COMPENDIUM OF INTERNATIONAL COMMERCIAL ARBITRATION FORMS: LETTERS, PROCEDURAL INSTRUCTIONS, BRIEFS AND OTHER DOCUMENTS 580 (2017) (“Parties sometimes try to use the correction and interpretation mechanisms offered by arbitration rules and legislation, to obtain a modification of the decision or the reasoning of the arbitrators, on the basis of alleged deficiencies of the award. The aim may also be to delay the enforcement of the recognition of the award.”).

empowered to summarily reject such requests¹⁵¹ and to “merely provide a reasoned confirmation that the award is sufficiently clear.”¹⁵² As discussed in more detail below, that is precisely what the Panel should do here.

B. Afilias’ “Requests for Interpretation” Are Beyond the Scope of Article 33

1. Afilias’ Requests Regarding the Term “Pronounce” are Unnecessary and Improper

82. In Paragraphs 95–103 of its Application, Afilias requests that the Panel opine on several issues concerning its use of the term “pronounce.” Each of those requests should be denied for the reasons set forth below.

a. It is Not Necessary to Interpret the Term “Pronounce”

83. First, of all of Afilias’ requests, the request for “an interpretation that clarifies what the Panel meant when it stated that ICANN had ... failed to ‘pronounce’” on the propriety of the DAA is the *only* request that is conceivably appropriate under Article 33, as it alone concerns the clarification of an allegedly ambiguous term used by the Panel in the *Dispositif*.¹⁵³ But the request is utterly inappropriate here. As discussed above, not every alleged ambiguity “warrant[s] a request for interpretation of the award,”¹⁵⁴ and Afilias’ purported confusion¹⁵⁵ regarding the term “pronounce” does not create or reflect an ambiguity as to the meaning of that

¹⁵¹ **AA-116**, Blackaby Nigel, Constantine Partasides, et al., *Chapter 9. Award*, in REDFERN AND HUNGER ON INTERNATIONAL ARBITRATION ¶ 9.193 (6th ed. 2015) (explaining that, where an arbitral tribunal “take[s] the view that the request [for interpretation] is without substance” the request “may be dealt with in a summary manner”).

¹⁵² **AA-108**, THE SECRETARIAT’S GUIDE TO ICC ARBITRATION, ¶ 3-1297.

¹⁵³ *E.g., id.*, ¶ 3-1275.

¹⁵⁴ **AA-110**, FOUCHARD GAILLARD GOLDMAN ¶ 1415.

¹⁵⁵ As noted earlier, Afilias’ purported confusion appears solely to exist for purposes of this Application, but not for purposes of issuing press releases touting its “victory” in this IRP. *See* fn. 27 *supra*.

term, let alone one so significant “that the parties could legitimately disagree as to its meaning.”¹⁵⁶

84. To the contrary, the meaning of “pronounce” as used by the Panel is easily-understood; “pronounce” in this context is a transitive verb meaning to declare officially or authoritatively.¹⁵⁷ That meaning is clear not only from any English language dictionary and common use, but also from the Panel’s consistent use of the term throughout the Decision.¹⁵⁸

85. After years of litigation in which the core issues included, *inter alia*, (i) whether ICANN should exercise discretion to disqualify NDC for alleged violations of the New gTLD Program Guidebook and Auction Rules and (ii) ICANN’s contention that it has not yet taken a position on whether NDC violated the Guidebook and Auction Rules, Afilias cannot reasonably feign surprise or confusion at the Panel’s use of the verb “pronounce” in connection with the ICANN Board’s previous inaction and the Panel’s recommended action.¹⁵⁹ Indeed, as *Amici* argued in their post-hearing brief, the ICANN “Board must first decide whether or not NDC

¹⁵⁶ AA-110, FOUCHARD GAILLARD GOLDMAN ¶ 1415.

¹⁵⁷ MERRIAM-WEBSTER, “Pronounce,” <https://www.merriam-webster.com/dictionary/pronounce>; *see also* COLLINS DICTIONARY, “Pronounce,” <https://www.collinsdictionary.com/us/dictionary/english/pronounce> (“If you pronounce something to be true, you state that it is the case”); OXFORD LEARNER’S DICTIONARIES, “Pronounce,” <https://www.oxfordlearnersdictionaries.com/us/definition/english/pronounce> (“to give a judgement, opinion or statement formally, officially or publicly”); MACMILLAN DICTIONARY, “Pronounce,” <https://www.macmillandictionary.com/us/dictionary/american/pronounce> (“to formally state an official opinion or decision”).

¹⁵⁸ *See, e.g.*, Final Decision (20 May 2021) ¶ 8 (“failing to pronounce on the question”); ¶ 254 (“the Board’s decision not to pronounce upon these allegations”); ¶ 258 (“not to pronounce upon the DAA’s alleged non-compliance. . . .”); ¶ 333 (“remained a pending question on which the Board had yet to pronounce...”); ¶ 413(5) (“considered and pronounced upon the question”).

¹⁵⁹ Curiously, Afilias suggests that the Panel’s use of the term “pronounce” was inappropriate because that term does not appear in ICANN’s Bylaws or the ICDR Rules, among other documents. Afilias’ Application (21 June 2021), ¶ 96. That suggestion has no merit, as there is no requirement, and Afilias cites to none, that the Panel only use words found in such documents. The verb “to pronounce” is commonly used in the English language, and both the Parties and the Internet community are more than capable of understanding the Panel’s meaning.

actually violated the Guidebook . . .”¹⁶⁰ That is precisely what the Panel determined ICANN should have done to uphold “its commitment to make decisions by applying documented policies objectively and fairly” and should do next, *i.e.*, before any “action or decision that would further the delegation of the .WEB gTLD.”¹⁶¹

b. Afilias’ Requests Regarding (i) the Basis for the Panel’s Use of the Term “Pronounce,” and (ii) the “Process, Form, and Substance an Adequate ‘Pronouncement’ Must Have to Comply with the Panel’s Decision” Far Exceed the Panel’s Authority or Duty Under Article 33

86. Second, even if it were appropriate for the Panel to interpret the term “pronounce” as used in the *Dispositif*, Afilias’ additional inquiries into (i) “what parts of ICANN’s Articles and Bylaws as well as the Parties’ submissions [the Panel] has relied upon in concluding that ICANN failed to ‘pronounce’” and (ii) “what process, form, and substance an adequate ‘pronouncement’ must have to comply with the Panel’s decision” are beyond the scope of Article 33.

87. Simply put, an Article 33 request cannot be used to seek an explanation of the factual basis for the Panel’s determinations, or the reasoning of the Panel. As explained by Isaacs, it is improper to use Article 33 “to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question . . .”¹⁶² Indeed, that exercise is pointless, as interpretation requests “may not be used to challenge the tribunal’s reasoning or dispositions.”¹⁶³ Afilias cites to one letter from a UNCITRAL panel that found that, although the

¹⁶⁰ *Amici’s* PHB (12 October 2020), ¶ 245. In addition, Amici argued, and maintain, that ICANN must also decide “whether Afilias’ own uncontroverted rule violations should be disqualifying.” *Id.*

¹⁶¹ Final Decision (20 May 2021), ¶¶ 413(1), (2), (5).

¹⁶² **AA-109**, Isaacs at 367.

¹⁶³ **CA-0149**, Born at 3405 (“A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions. As one decision by an ICC tribunal reasoned: ‘As to the scope of ‘interpretation,’ which might be

claimant’s request fell outside the scope of the relevant interpretation mechanism, “it can do no harm and possibly some good if [the panel] were to address certain of the points raised by [claimant].”¹⁶⁴ That one note of dicta certainly does not state a rule, and the dicta certainly does not apply here.¹⁶⁵ Rather, Afilias’ Article 33 Application confirms only that Afilias will seize every opportunity to prolong this years-long dispute, even without a legitimate basis to do so, thereby adding time and expense to the proceeding and continuing to injure *Amici*. Without any reason or obligation to do so, the Panel should not open the door to further abuse on the part of Afilias, which is sure to condemn and attack any explanation the Panel might provide.

88. Afilias’ request that the Panel answer ten questions “regarding the nature of a ‘pronouncement’”¹⁶⁶ not only fails to seek any legitimate clarification, it is an open invitation to the Panel to exceed its authority.

89. As the Panel determined, its remedial authority “is set out in Section 4.3(o) of the” ICANN Bylaws.¹⁶⁷ Section 4.3(o) does not authorize the Panel to dictate how ICANN might implement its Decision, only to *declare* whether ICANN violated its Articles of Incorporation or Bylaws and *recommend* that ICANN take some interim action until ICANN considers the panel’s Decision.¹⁶⁸ This the Panel did.¹⁶⁹

regarded as broader than the ‘correction’ feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.”).

¹⁶⁴ **CA-0164**, *Methanex Corp. v. United States of America*, UNCITRAL, Letter to Parties from Tribunal (25 Sept. 2002), at 3.

¹⁶⁵ *Cf.* Afilias’ Application (21 June 2021), ¶ 92.

¹⁶⁶ *Id.*, ¶ 99.

¹⁶⁷ Final Decision (20 May 2021), ¶ 358.

¹⁶⁸ *See C-1*, Bylaws, §4.3(o); NDC’s Brief (26 June 2021), ¶¶ 66–69.

¹⁶⁹ Final Decision (20 May 2021), ¶ 413.

90. Afilias’ current request far exceeds that limited authority. For example, nothing in Section 4.3(o) authorizes the Panel to dictate the “form and substance” of ICANN’s pronouncement, or dictate who “must be given an opportunity to be heard” before the Board acts, whether there must be “an opportunity for Afilias and other Internet community members to receive and comment on all relevant evidence and argument,” what materials ICANN must consider, or what reasoning, form, and means of publication ICANN must employ.¹⁷⁰ Such questions are for ICANN, not the Panel, to determine.

c. Afilias’ Request that the Panel State Whether the ICANN Board Must Always “Pronounce” on Staff Action or Inaction Is Not a Proper Request for Interpretation

91. Third, for similar reasons, the Panel is not obligated or authorized to opine on whether “all future IRP challenges to Staff action or inaction must first be pronounced upon by the” ICANN Board.¹⁷¹ In making this request, Afilias does not hide either its attempt to reargue the merits or its complaints that the Panel’s Decision is wrong.¹⁷²

92. Afilias misses the point. After an extended IRP proceeding, the Panel made reasoned determinations based on ICANN’s *past* conduct, which is what the Panel was authorized to do. As ICANN argued in its Rejoinder Memorial dated June 1, 2020, the “Panel has authority to issue a binding declaration regarding only whether past actions or inactions violated ICANN’s Articles or Bylaws. It does not have authority to ‘declare’ that ICANN must take some specific action in the future.”¹⁷³ Yet that is what Afilias now seeks through the guise

¹⁷⁰ Cf. Afilias’ Application (21 June 2021), ¶ 99(a)–(j).

¹⁷¹ *Id.*, ¶ 103.

¹⁷² See, e.g., *id.* at ¶¶ 101–102 (“The revised IRP directly and explicitly eliminated any such restriction and expressly permits the submission of claims directly against ICANN Staff action.”).

¹⁷³ Respondent’s (ICANN’s) Rejoinder (1 June 2020), ¶ 119.

of interpretation. Not only does Article 33 not permit such substantive re-examination of the Final Decision, but a prospective declaration concerning ICANN’s future obligations would be beyond the scope of the Panel’s jurisdiction.

2. Afilias’ Request Regarding the Law Applied to this Dispute Is Unnecessary and Improper

93. Article 33 does not permit Afilias to request a detailed explanation regarding the law the Panel applied in reviewing the issues and reaching its conclusions.¹⁷⁴ Without any authority suggesting otherwise, Afilias merely complains that the Panel should not have interpreted relevant ICANN documents under California law and critiques the Panel for supposedly “fail[ing] to read [its] voluminous submissions on this point,” thus denying Afilias “its right to be heard and to be treated fairly.”¹⁷⁵ In this, however, Afilias again contends that the Panel’s application of law and reasoning was erroneous, not, as it must under Article 33, that there is an ambiguity that genuinely and significantly affects the Decision’s execution, *i.e.*, how the Decision will be carried out.¹⁷⁶

94. Afilias’ contention regarding the Panel’s reasoning is misplaced and does not warrant an interpretation under Article 33. As Gary Born explains, a “request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions,” and such a request “cannot be used to seek revision, reformulation or additional explanations of a given decision.”¹⁷⁷ Moreover, Afilias’ complaint that the Panel “failed to read Claimant’s voluminous submissions” runs afoul of the settled principle that parties cannot use interpretation requests “to

¹⁷⁴ Cf. Afilias’ Application (21 June 2021), ¶ 107.

¹⁷⁵ *Id.*, ¶¶ 104–05.

¹⁷⁶ AA-109, Isaacs at 367.

¹⁷⁷ CA-0149, Born at 3405 (citation omitted).

ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question” or “for a party to seek so-called interpretation of the award on the basis that the tribunal did not in its award address all of the parties’ submissions.”¹⁷⁸ In short, Afiliás might disagree with the Panel’s decisions on the applicable law and the Panel’s substantive determinations, but that disagreement does not give Afiliás license to misuse Article 33 in an attempt to circumvent or undo any of those decisions or determinations.

3. Afiliás’ Request Regarding ICANN’s “Knowledge, Expertise, and Experience” Is Improper

95. Without any supporting authority, Afiliás requests that the Panel “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 Afiliás’ complaints”¹⁷⁹ This request is facially and substantively improper. Again, a party cannot use interpretation requests “to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question.”¹⁸⁰ That is precisely what Afiliás attempts to do, and the Panel should not permit it. As one English court has explained:

Unless their award is so opaque that it cannot be ascertained from reading it by what evidential route they arrived at their conclusion on the question of fact there is nothing to clarify. To arrive at a conclusion of fact expressly on the basis of evidence that was before them does not call for clarification for it is unambiguously clear that they have given more weight to that evidence than to other evidence.¹⁸¹

¹⁷⁸ **AA-109**, Isaacs at 367.

¹⁷⁹ Afiliás’ Application (21 June 2021), ¶ 111.

¹⁸⁰ **AA-109**, Isaacs at 367.

¹⁸¹ **AA-117**, *World Trade Corp. v. C. Czarnikow Sugar Ltd* [2004] EWHC 2332, [8] (Comm) (English High Ct.).

96. Here, there is no doubt that the Panel heard and considered evidence demonstrating ICANN’s relative -- and superior -- knowledge, expertise and experience to determine alleged violations of ICANN’s own rules and guidelines. Such evidence was presented to the Panel in pre-hearing submissions and at the IRP hearing itself.¹⁸² Among other evidence, the record established that ICANN has spent years developing the rules applicable to the New gTLD Program, including the Guidebook, and implementing that Program.¹⁸³ As a result, it is not for Afilias to question the basis for the Panel’s unambiguous conclusion that it “is firmly of the view” that ICANN “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.”¹⁸⁴

97. Moreover, Afilias’ request is another naked attempt to argue that the Panel’s conclusion *is wrong*. For example, Afilias repeats its substantive argument that “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.”¹⁸⁵ As discussed throughout this Response, Article 33 is not an appropriate mechanism for such arguments, which amount to an attempt to appeal and reverse the Panel’s determinations. Again, a request for interpretation “may not be used to challenge the tribunal’s

¹⁸² *E.g.*, Respondent’s (ICANN’s) Rejoinder, ¶¶ 19–20, 82.

¹⁸³ *E.g.*, *id.* ¶¶ 21–23; Willett Witness Statement (31 May 2019), ¶ 4; Hearing Transcript, Vol. III (Willett Testimony) 546:14–547:2; Hearing Transcript, Vol. II (Burr Testimony) 381:17–22.

¹⁸⁴ Final Decision (20 May 2021), ¶ 362.

¹⁸⁵ Afilias’ Application (21 June 2021), ¶ 110.

reasoning or dispositions,”¹⁸⁶ and the interpretation process “do[es] not entail any appeal procedure or any opportunity to rehear procedural or substantive issues which have been, or could and should have been, dealt with in the proceedings and by way of the award.”¹⁸⁷

98. In sum, the issues raised by Afilias have been considered and addressed. As the Panel acknowledged, “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.”¹⁸⁸ In addition, the Panel acknowledged the limits of its authority, noting that its “conclusions are consistent with the authority of IRP Panels under Section 4.3(o)(iii) of the Bylaws, which grants the Panel authority to ‘declare’ whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.”¹⁸⁹ Afilias might disagree, but may not use Article 33 as a pretense to re-argue its contention that the Panel, not ICANN, should determine any violation of the New gTLD Program Rules.

4. Afilias’ Request Regarding the Standard of Proof Is Improper

99. Afilias’ final request for interpretation is similarly beyond the scope of Article 33 and, therefore, should be summarily rejected. First, there is no ambiguity or vagueness in the standard of proof applied. As Afilias concedes, the Panel identified the standard it applied in Paragraphs 32–33 of the Decision.¹⁹⁰ The Panel stated that “it is generally accepted in practice

¹⁸⁶ **CA-0149**, Born at 3405 (“A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions. As one decision by an ICC tribunal reasoned: ‘As to the scope of ‘interpretation,’ which might be regarded as broader than the ‘correction’ feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.’”).

¹⁸⁷ **AA-109**, Isaacs at 363; *see also id.* at 367 (“Many applications for interpretation amount to attempted appeals aimed at altering the meaning of an award, raising an additional issue or attempting to have the arbitral tribunal reconsider its decision or the evidence.”) (quoting the SECRETARIAT’S GUIDE TO ICC ARBITRATION (**AA-108**)).

¹⁸⁸ Final Decision (20 May 2021), ¶ 363.

¹⁸⁹ *Id.*, ¶ 364.

¹⁹⁰ Afilias’ Application (21 June 2021), ¶ 112.

in international arbitration that [the standard] is normally that of the balance of probabilities, that is, ‘more likely than not.’”¹⁹¹ The Panel further stated that “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.”¹⁹² And the Panel explained, unambiguously, that “[t]hese principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.”¹⁹³

100. Perhaps to have something—anything—to complain about on this subject, Afiliás nonetheless contends that “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.”¹⁹⁴ That is incorrect. As quoted above, the Panel applied these principles “in considering the issues in dispute in Phase II of this IRP,” *i.e.*, the Panel applied these principles to *all of the issues* resolved in the *Dispositif*.¹⁹⁵

101. Second, as discussed above, interpretation is “understood to be permissible only where the terms of an award are so vague or confusing that a party has a genuine doubt *about how the award should be carried out*”¹⁹⁶ and “only if a party demonstrates that the award is ambiguous and requires clarification *for its effective execution*.”¹⁹⁷ Even if there were a legitimate question as to the standard of proof applied by the Panel, which there is not, that question would not affect “how the award should be carried out.” Rather, the Panel’s

¹⁹¹ Final Decision (20 May 2021), ¶ 32.

¹⁹² *Id.*

¹⁹³ *Id.*, ¶ 33.

¹⁹⁴ Afiliás’ Application (21 June 2021), ¶ 113.

¹⁹⁵ Final Decision (20 May 2021), ¶ 33.

¹⁹⁶ **AA-109**, Isaacs at 367 (emphasis added).

¹⁹⁷ **AA-107**, Born at §24.04[B] (emphasis added).

conclusions, irrespective of the standard of proof applied, are themselves not subject to reasonable debate. *See* ¶¶ 82–85, *supra* [discussion of “pronounce”]. Although Afilius again attempts to create a problem where none exists by arguing that the “Panel must provide explicit guidance on the standard of review in order to fulfill the IRP’s purpose” of creating precedent,¹⁹⁸ it fails to cite any authority or otherwise explain how or why such “explicit guidance” would create additional precedent beyond what the Panel has already achieved. Indeed, consistent with Section 4.3(a) of the Bylaws, the panel “heard and resolved” this Dispute, and its conclusions, as set forth in the Decision, provide the relevant precedent to “guide and inform” ICANN, not further “guidance” as to the legal standards the Panel used to reach those conclusions.

102. Third, Afilius’ request for “an interpretation that clarifies whether the application of a heightened standard of proof affected the Panel’s resolution” of the many issues in dispute,¹⁹⁹ impermissibly asks the Panel to “correct the substance of its [decision].”²⁰⁰ There is no question that Article 33 does not allow for that review, and thus Afilius’ request can only be viewed as a transparent attempt to find some purported error in order to initiate a baseless and prohibited appeal of the Panel’s Decision.²⁰¹ The Panel should not permit this end-run around the ICDR Rules.

¹⁹⁸ Afilius’ Application (21 June 2021), ¶ 113.

¹⁹⁹ *Id.*, ¶¶ 113–14,

²⁰⁰ **AA-109**, Isaacs at 361–62; *see also* **CA-0148**, Gusy & Hosking at 33.01

²⁰¹ **CA-0149**, Born at 3405 (“A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions. As one decision by an ICC tribunal reasoned: ‘As to the scope of ‘interpretation,’ which might be regarded as broader than the ‘correction’ feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.’”); *see also* **AA-108**, THE SECRETARIAT’S GUIDE TO ICC ARBITRATION, ¶ 3-1265; **AA-109**, Isaacs at 362; *see also id.* at 366 (“Many applications for interpretation amount to attempted appeals aimed at altering the meaning of an award, raising an additional issue or attempting to have the arbitral tribunal reconsider its decision or the evidence.”) (quoting the SECRETARIAT’S GUIDE TO ICC ARBITRATION (**AA-108**)).

103. Finally, Afilias’ list of specific (but not exclusive) issues on which it requests that the Panel clarify “whether the application of a heightened standard of proof affected the Panel’s resolution” of the issues further reveals the lack of sincerity behind Afilias’ Application.²⁰² Not only does Afilias fail to cite to any authority entitling it to an issue-by-issue explanation, particularly when the Panel clearly stated the standard under which it determined *all* of the relevant issues, but Afilias also asks for “clarification” on issues for which there can be no good faith dispute. For example, Afilias inquires about the standard of proof applied to its Rule 4 claim *even though* the Panel held that, “in light of [its] finding as to the accrual date of the Claimant’s core claims, it is not necessary further to consider” Afilias’ allegation that Rule 4 was enacted “in order to retroactively time bar [Afilias’] claims in this IRP.”²⁰³ To what legitimate end, therefore, does Afilias seek clarification on the standard of proof applied? There is none. Similarly, Afilias inquires about the standard of proof applied to the Panel’s review of Afilias’ pre-auction investigation claims, *even though* the Panel explicitly stated that it had “considered the witness and documentary evidence on this question, *which is preponderant,*” in the course of its review.²⁰⁴

104. At best, these facially unnecessary and baseless requests seek merely further to delay this proceeding. More likely, however, Afilias seeks any opportunity to undo the Panel’s deliberate and thoughtful Decision, disregarding settled legal principles that forbid such post-award reviews or appeals. Either way, the Panel should reject Afilias’ purported “Requests for Interpretation.”

²⁰² See Afilias’ Application, ¶¶114 (a)–(h).

²⁰³ Final Decision, ¶¶ 281–83.

²⁰⁴ *Id.*, ¶ 298 (emphasis added).

IV. Contrary To Afilias' Assertions, The Panel's Decision Is Fully Consistent With The Purposes Of The IRP

105. Afilias contends that the Panel's decision "undermines" the "purposes" of the IRP listed in Section 4.3(a) of the Bylaws. Once again, Afilias is wrong for several reasons. *First*, the "purposes" of the IRP have no relevance to the narrow issues permitted to be addressed by an Article 33 Application. Under Article 33, a party may seek (i) an additional award as to claims presented but omitted from an award, and (ii) interpretation or clarification of an operative part of the Panel's decision.²⁰⁵ Neither ground requires nor permits a Panel to amend its original decision simply because one of the parties contends that it is inconsistent with the "purposes" of an IRP, and Afilias cites no authority to support such a remarkable proposition. Moreover, as addressed *supra*, Afilias has failed to demonstrate any purported defect in the Final Decision that falls within the limited scope of Article 33. Afilias cannot overcome this fatal flaw through vague invocations of an IRP's "purpose."

106. *Second*, an IRP panel's foremost mandate or purpose is to issue a decision that is consistent with the jurisdictional limits on a panel's authority set forth in the Bylaws. None of the "purposes of the IRP" quoted by Afilias²⁰⁶ grants – either explicitly or implicitly – an IRP

²⁰⁵ See *supra* ¶¶ 21, 76.

²⁰⁶ See Afilias' Application (21 June 2021), ¶¶ 117–23. Afilias refers to the following "Purposes of the IRP," which are listed in Section 4.3(a) of the Bylaws: (i) "Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws;" (ii) "Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions . . ."; (iii) "Ensure that ICANN is accountable to the global Internet community and Claimants;" (iv) "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;" (v) "Secure the accessible, transparent, efficient, coherent, and just resolution of Disputes;" (vi) "Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction;" and (vii) "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." *Id.* (quoting C-1, Bylaws, §§ 4.3(a)(i)–(iii), (vi)–(ix)).

panel the authority to exceed its jurisdiction by opining on the merits of a decision that ICANN has not yet made, or substituting its judgment for that of ICANN. Yet that is precisely what Afilias' Application seeks – an amended order from the Panel that exceeds its authority by adjudging alleged actions that ICANN has not yet taken and substituting the Panel's judgment regarding those actions for ICANN's.

107. Afilias' "purposes of the IRP" argument is a near verbatim repeat of the same argument it has made throughout these proceedings in an attempt to induce the Panel to ignore the clear limits on its jurisdiction. For example, Afilias invoked the same "purposes of the IRP" in pre-hearing briefing to argue that the Panel had authority to grant affirmative relief awarding the .WEB TLD to Afilias. (Compare Afilias' Application at ¶¶ 115–23 with Reply Memorial²⁰⁷ at ¶¶ 151–152). The affirmative relief sought by Afilias – an order by the Panel (i) disqualifying NDC's bid for .WEB, (ii) ordering ICANN to enter into a registry agreement for .WEB with Afilias, and (iii) specifying the price to be paid by Afilias for .WEB – is the same as the demand Afilias now characterizes as its "Rules Breach Claim." In both instances, however, Afilias studiously ignores the central governing provision from the Bylaws, Section 4.3(o), which expressly defines – and circumscribes – the Panel's jurisdiction.

108. It is a fundamental principle that "[t]he remedial powers of an international arbitral tribunal are defined in the first instance by the parties' arbitration agreement."²⁰⁸ Here,

²⁰⁷ Reply Memorial In Support Of Amended Request By Afilias Domains No. 3 Limited For Independent Review (4 May 2020).

²⁰⁸ **AA-51**, Gary Born, *INTERNATIONAL COMMERCIAL ARBITRATION* (2d ed. 2014), at § 23.070[A]; *see also*, *e.g.*, **AA-50**, English Arbitration Act 1996, § 48(1) ("The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies."); **AA-47**, David St. John Sutton, Judith Gill & Matthew Gearing, *RUSSELL ON ARBITRATION* (23d ed., 2009), ¶ 6-097 ("[Section 48 of the English Arbitration Act] makes clear that party autonomy prevails and preserves the parties' right to extend or restrict the tribunal's powers as regards remedies by agreement in writing.").

the parties' arbitration agreement is set forth in ICANN's Bylaws, and significantly circumscribes the Panel's remedial powers in this dispute.²⁰⁹

109. The scope of the authority of an IRP Panel as set forth in Section 4.3(o) of the Bylaws comprises a closed list of permitted actions, including *declaring* that ICANN committed a violation of its Articles of Incorporation or Bylaws, and *recommending* that ICANN take some interim action until ICANN considers the panel's opinions.²¹⁰ Section 4.3(o) does not authorize – either explicitly or implicitly – an IRP panel to order affirmative relief or otherwise dictate ICANN's remedial actions if a panel were to find that ICANN violated its Articles of Incorporation or Bylaws.

110. Afilias' Article 33 Application seeks to contravene the limits on the Panel's remedial authority by demanding that the Panel rule on the so-called "Rules Breach Claim," even though the Panel determined that it was appropriate for ICANN *not* to address those issues while accountability mechanisms were pending.²¹¹ Under the circumstances here, Section 4.3(o) does not permit an IRP Panel to determine Afilias' claims regarding NDC's alleged conduct, particularly where ICANN has not yet issued its own judgment and the Panel has made clear –

²⁰⁹ **CA-011**, *Booking.com* Final Declaration, ¶ 104; *see also*, **AA-55**, *Merck* Final Declaration, ¶ 22 (“[T]he Independent Review Process is a bespoke process, precisely circumscribed.”); **AA-43**, *AGIT* Final Declaration, ¶ 4 (“The authority of the IRP is found at Article IV, Section 3 of the ICANN Bylaws. The IRP Panel is charged with ‘declaring whether the Board has acted consistently with the Provision of ICANN’s Articles of Incorporation and Bylaws.’”).

²¹⁰ **C-1**, Bylaws, § 4.3(o)(iii) & (iv).

²¹¹ Final Decision (20 May 2021), ¶ 331 (“The Respondent urges that it was not a violation of the Respondent’s Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC’s application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and *it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any it should take.*”) (emphasis added)).

consistent with its limited authority – that an IRP is not the proper forum to resolve potential disputes between Afilias and *Amici*.²¹²

111. Afilias contends that the Panel has given ICANN a “free pass” by finding that it is for ICANN to pronounce first on Afilias’ objections regarding the .WEB auction, in alleged disregard of its obligation to “[e]nsure that ICANN is accountable to the global Internet community and Claimants.”²¹³ Afilias further contends that the Panel did not follow any IRP precedents in reaching its decision.²¹⁴

112. Contrary to Afilias’ critiques, the Panel’s determination that ICANN should, in the first instance, pronounce on Afilias’ complaints regarding .WEB is fully consistent with the Panel’s obligations under the Bylaws and is amply supported by IRP precedent. Several IRP panels have rejected claimants’ requests that the panel go beyond declaring whether ICANN’s action or inaction violated ICANN’s Articles of Incorporation and Bylaws, and determine the course of action ICANN *should* take. Rather, these decisions have affirmed that it is ICANN that must make a determination regarding the underlying dispute, *not* an IRP panel as Afilias advocates.²¹⁵

²¹² *Id.*, ¶ 253 (“As the Panel observed in its Procedural Order No. 5, this IRP is an ICANN accountability mechanism, the Parties to which are the Claimant and the Respondent. As such, it is not the forum for the resolution of potential disputes between the Claimant and the *Amici* . . .”).

²¹³ Afilias Application (21 June 2021), ¶ 119 (“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 . . .”).

²¹⁴ *Id.*, ¶ 120 (“There is no indication that the Panel followed any earlier IRP precedents . . .”).

²¹⁵ See, e.g., **AA-49**, *Dot Registry* Final Declaration, ¶ 70 (“An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. *It is not asked to declare whether the applicant who sought reconsideration should have prevailed.*”); **AA-55**, *Merck* Final Declaration, ¶ 21 (“[I]t is clear that the [p]anel may not substitute its own view of the merits of the underlying dispute.”); **AA-42** *Amazon* Final Declaration, ¶¶ 83, 124–25 (declining to grant the claimant’s request for “affirmative relief in the form of a direction to ICANN to grant [claimant’s] applications,” and instead recommending that the Board make an objective and independent judgment regarding whether there were reasons for denying the claimant’s applications).

113. For example, in the *Asia Green IT System* IRP, the IRP panel agreed with claimant that ICANN violated its Bylaws by deferring indefinitely a decision on the claimant’s gTLD applications. Nevertheless, that panel emphasized that “nothing as to the substance of [ICANN’s ultimate] decision [on the claimant’s applications] should be inferred by the parties from the Panel’s opinion in this regard. *The decision, whether yes or no [to the claimant’s applications], is for [ICANN].*”²¹⁶

114. Similarly, the *GCC* IRP panel also confirmed that “an IRP Panel cannot abuse [its] independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.”²¹⁷ The *GCC* panel thus reinforced that “an IRP Panel is not entrusted with second-guessing the Board, but rather ‘with declaring whether the Board has acted consistently with the provisions of Articles of Incorporation and Bylaws.’”²¹⁸ Further, as the *GCC* panel explained, the role of an IRP panel is to examine the process undertaken by ICANN, and not whether ICANN is “right or wrong on the merits.”²¹⁹

115. In sum, the Panel’s decision *not* to issue a ruling on the underlying dispute, and instead to defer to ICANN to first pronounce on that dispute, *affirms* rather than undermines the IRP process and policies set forth in ICANN’s Bylaws and confirmed in multiple prior IRP decisions. Nothing that Afiliás has argued in its Application detracts from that conclusion.

²¹⁶ **AA-43**, *AGIT* Final Declaration, ¶ 149.

²¹⁷ **CA-0006**, *GCC* Partial Final Declaration, ¶ 94.

²¹⁸ *Id.*

²¹⁹ *Id.*, ¶ 95 (“It is irrelevant whether the IRP Panel considers [ICANN’s] decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board’s decision-making . . .” (emphasis in original)).

V. Conclusion

For the reasons set forth herein, Afilias' Article 33 Application is meritless and should be rejected.

Dated: August 6, 2021

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