

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S PHASE I POST-HEARING BRIEF

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ICANN submits this Phase I Post-Hearing Brief to address the three issues set forth in Chairman Bienvenu’s letter dated October 9, 2019.

I. The Status of the IRP Implementation and Oversight Team (IRP-IOT) and Its Relationship with ICANN and Its Board, Including the Recourse Available to a Party Wishing to Challenge the IOT’s Conduct or Decisions.

A. The Status of the IRP-IOT and its Relationship With ICANN.

1. As explained in detail below, the IRP-IOT is a separate and distinct entity from the ICANN Board, created by the global Internet community to assist in ensuring the Board’s accountability and transparency. The purpose of the IRP-IOT and similar groups is to create a vehicle for the global Internet community to provide independent advice to the ICANN Board on matters related to its mission. Any suggestion that such groups are to be equated with the Board is anathema to their separate existence and purpose. The critical point for purposes of the Phase I issues is that the IRP-IOT is plainly *not* the ICANN Board, an individual Director, an ICANN Officer or a Staff member. This Independent Review Process (“IRP”) Panel therefore does not have jurisdiction to adjudicate alleged shortcomings in the IRP-IOT’s conduct.

2. Afilias’ submissions make clear that its Rule 7 Claim seeks to challenge the actions of the IRP-IOT. But an IRP is limited to three narrowly defined categories of claims. The category relevant here is “Claims that Covered Actions constituted violations of the Articles of Incorporation or Bylaws.”¹ “**Covered Actions**’ are defined 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.”² Before reaching the merits of Afilias’ Rule 7 Claim – which ICANN addressed in earlier briefing – the Panel must deal with the jurisdictional question of whether actions of the IRP-IOT are “Covered Actions,” *i.e.*, whether the IRP-IOT is “the Board, individual Directors, Officers or Staff members.” The IRP-IOT clearly is not the ICANN Board, or an ICANN director, officer or staff member. Indeed, Afilias has taken the position that

ICANN's Bylaws do not permit ICANN even to participate in the IRP-IOT because the IRP-IOT is to be comprised of "members of the global Internet community."³ Afilias is wrong in contending that ICANN can have no voice at all in the IRP-IOT's deliberations and work. Nevertheless, Afilias' position constitutes a stark acknowledgement that the IRP-IOT is separate and distinct from the ICANN Board and that it is wrong to conflate the two.

3. The IRP-IOT was created by the organizations supporting ICANN ("Supporting Organizations") and the committees advising ICANN ("Advisory Committees") through the Cross Community Working Group on Enhancing ICANN Accountability ("CCWG-Accountability"). The CCWG-Accountability was established to provide proposals to enhance ICANN's accountability and transparency commitments to the global Internet community.⁴ The CCWG-Accountability is separate and distinct from the ICANN Board. Membership in the CCWG-Accountability and its working groups was open to any person appointed by the Supporting Organizations and Advisory Committees that chartered the CCWG-Accountability.⁵

4. The IRP-IOT was created by the CCWG-Accountability in late 2015, while ICANN's revised Bylaws were being finalized. In its August 3, 2015 Draft Proposal on Work Stream 1 Recommendations, the CCWG-Accountability stated that "[d]etailed rules for the implementation of the IRP (such as rules of procedures) are to be created by the ICANN community through a [cross-community working group]⁶ . . . and approved by the Board, such approval not to be unreasonably withheld."⁷ This recommendation was included in substantially identical form in the Final Report for Work Stream 1, dated February 23, 2016, and it was ultimately reflected in Section 4.3(n) of ICANN's Bylaws.⁸

5. On November 5, 2015, the three co-chairs of the CCWG-Accountability sent an email to a cross-community distribution list requesting volunteers to serve as members of the

IRP-IOT. The CCWG-Accountability also requested that a representative of ICANN’s Legal Department join the IRP-IOT.⁹ All volunteers were accepted as members of the IRP-IOT.¹⁰ The first meeting of the IRP-IOT was held on January 14, 2016.¹¹ Ten more meetings were held before ICANN’s new, substantially revised Bylaws went into effect on October 1, 2016.

6. Consistent with the CCWG-Accountability’s recommendation (*supra* ¶ 4), Section 4.3(n)(i)(ii) of the Bylaws states that an IRP-IOT “shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global internet community” to “develop clear published rules for the IRP” that will “take effect upon approval by the Board, such approval not to be unreasonably withheld.”¹² This is a reference to the IRP-IOT that already existed, which had been established by the Supporting Organizations and Advisory Committees through the CCWG-Accountability. There was never any intention to reconstitute the IRP-IOT following adoption of the Bylaws, and no such effort was necessary until 2019 (*infra* ¶ 9).

7. The first Chairperson of the IRP-IOT was J. Beckwith (“Becky”) Burr. Ms. Burr resigned as Chairperson in November 2016, when she was appointed to the ICANN Board.¹³ The co-chairs of the CCWG-Accountability asked David McAuley to succeed Ms. Burr as chair of the IRP-IOT, and he agreed to do so.¹⁴

8. The IRP-IOT was responsible for determining its own internal operating procedures. For example, the IRP-IOT decided that all participants affiliated with ICANN’s legal department and outside counsel (Jones Day) were to be counted as a single participant for purposes of assessing whether a quorum had been achieved.¹⁵ At the suggestion of IRP-IOT member Malcolm Huty on November 29, 2018, the IRP-IOT began considering whether to

revise its quorum requirements to exclude ICANN internal or outside counsel altogether.¹⁶

While Mr. Huty supported this revision, other members of the IRP-IOT opposed it.¹⁷

9. Despite having accepted all volunteers as members, the IRP-IOT has struggled with lack of participation and has been unable at times to muster a quorum.¹⁸ To address this problem, on June 26, 2019, the ICANN Board Accountability Mechanisms Committee (“BAMC”) sent a letter to the Supporting Organizations and Advisory Committees asking for new candidates to serve as active members of the IRP-IOT.¹⁹ On November 3, 2019, the Board affirmed the BAMC’s initial proposal to select new members to join the IRP-IOT.²⁰

10. In sum, the IRP-IOT clearly is not the ICANN Board, or an ICANN director, officer or staff member. The ICANN Board does not direct how the community-selected Chair of the IRP-IOT presides over meetings or how the IRP-IOT more generally conducts its work. The purpose of the IRP-IOT is to provide recommendations from the global Internet community to the Board on the IRP Rules of Procedure. The conduct of the IRP-IOT is not a “Covered Action” and therefore cannot be challenged by means of an IRP. Despite this obvious flaw, Afilias bases its Phase 1 claim exclusively on accusations regarding the IRP-IOT’s alleged deficiencies in developing Rule 7 of the Interim Supplementary Procedures and presenting it for the Board’s consideration. This claim, therefore, is not within the jurisdiction of this Panel and should be denied on this basis alone.

B. Recourse to a Person Wishing to Challenge the IRP-IOT’s Decisions.

11. The principle means for a person to challenge the IRP-IOT’s decisions is to actively participate. As noted above, when the IRP-IOT was formed all persons who volunteered were accepted as members. Moreover, the meeting transcripts and correspondence of the IRP-IOT are posted on ICANN’s website and accessible to members and non-members alike.²¹ Non-members can follow the proceedings of the IRP-IOT and provide input as they see fit.

12. A person also may challenge the conduct of the IRP-IOT by filing a complaint with the ICANN Ombudsman. The Ombudsman provides “an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board *or an ICANN constituent body* has treated them unfairly.”²² This contrasts with the jurisdiction of the IRP process, which reaches only the ICANN Board, staff, directors and officers, but not ICANN constituent bodies. The CCWG-Accountability considered whether the IRP process should be expanded to allow review of conduct by Supporting Organizations and Advisory Committees, and emphatically determined that it should not. The CCWG-Accountability’s determination was based in part on the fact that the Ombudsman is already chartered to handle complaints against the Supporting Organizations, Advisory Committees and other community groups, such as the IRP-IOT:

[W]e conclude that while the IRP *could* be made applicable by amending Bylaws significantly, the IRP should not be made applicable to SO/AC activities, because it is complex and expensive, and the ICANN Ombuds Office is already chartered to handle complaints regarding whether an SO/AC/Group acted in accord with ICANN Bylaws and individual charters.²³

13. The conduct of the IRP-IOT also may be challenged indirectly by filing a Reconsideration Request under Section 4.2 of the Bylaws asking that the Board reconsider its approval of an IRP-IOT recommendation. Among other grounds, such a request may be based on a contention that the Board approved a recommendation without consideration of material information that was unavailable at the time,²⁴ or in reliance on false or inaccurate information.²⁵

14. A Reconsideration Request is first reviewed by the BAMC, which evaluates it to determine whether it meets formal requirements.²⁶ If it satisfies formal requirements, the Reconsideration Request is sent to the Ombudsman to conduct an investigation and provide an evaluation.²⁷ The BAMC then conducts any additional investigation that it deems appropriate and makes a recommendation to the Board.²⁸ The recommendation is publicly posted and the

party that sought reconsideration has an opportunity to respond in writing prior to any Board action.²⁹

II. The Timeliness of Afilias' Rule 7 Claim.

15. ICANN argued in Section III of its Response to the Amended Request for Independent Review Process, served May 31, 2019, that all of Afilias' claims are time barred. ICANN set out its position on Afilias' Rule 7 Claim in detail at paragraphs 31 and 32 of its Supplementary Brief filed on September 27, 2019. Afilias has never addressed this issue, despite its opportunity to do so in its Supplemental Brief on Amicus Requests and in its argument at the October 2, 2019 hearing.

16. ICANN requests an opportunity to respond in the event that Afilias uses its Post-Hearing Brief to address ICANN's time-bar argument for the first time. Otherwise, Afilias, by lying in wait, will have had an opportunity to respond to ICANN's arguments while ICANN will have had no opportunity to respond to Afilias' arguments, which would be contrary to the requirement of Article 20 of the ICDR Rules that each party be treated with equality and given a fair opportunity to present its case.

III. The Relevance of the Authority Given to IRP Panels Under Section 4.3(o)(v) of the Bylaws to "Take Such Other Actions As Are Necessary for the Efficient Resolution of Disputes."

17. ICANN's Supplemental Brief Regarding Phase I Issues and prior submissions show that there is no merit to Afilias' contention that Rule 7 was improperly adopted. They also show that, for three distinct reasons, the IRP Panel does not have authority to nullify, invalidate or disregard Rule 7 of the Interim Supplementary Procedures.

- a. First, as noted above, Afilias' Rule 7 claim is based on the conduct of the IRP-IOT and is not a Covered Action within the Panel's jurisdiction.

- b. Second, section 4.3(o) of the Bylaws expressly limits the Panel’s authority. Section 4.3(o)(iii) empowers the Panel to “[d]eclare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws . . .” (Emphasis added.)³⁰ Similarly, section 4.3(o)(iv) empowers the Panel to “[r]ecommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered.” (Emphasis added.)³¹ The Panel’s remedial authority clearly does not extend to reversing the action of the Board that is being challenged. Instead, the Panel’s role is confined to issuing declarations and recommendations. It is then within the ICANN Board’s province to consider what remedial action should be taken.
- c. Third, the Bylaws approved in October 2016 added a provision making clear that the Panel is not authorized to “replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.”³² During the Phase I hearing, Afilias incorrectly argued that the Panel need not defer to the Board’s reasonable business judgment because prior IRP panels had rejected this argument. However, this is the first IRP panel convened under the revised Bylaws, and it is thus the first panel to have its remedial authority expressly limited by the Board’s reasonable business judgment. This is therefore a case of first impression, and the prior IRP decisions addressing the business judgment rule under California law are inapposite. Because the Interim Supplementary Procedures were adopted by the Board in the exercise of its reasonable business judgment, and Afilias has never contended otherwise, this Panel is without authority to invalidate Rule 7 as Afilias requests.

18. As the Panel cannot abrogate Rule 7, NDC and Verisign’s right to participate as *amici*, and the scope and nature of such participation, must be decided in accordance with the provisions of Rule 7. There is no dispute that NDC and Verisign are entitled to participate as *amici* by the unambiguous terms of Rule 7, and that the Panel should lean in favor of their broad participation, as expressly directed by Rule 7.

19. Section 4.3(o)(v) addresses the Panel’s authority to structure its procedures so as to promote efficiency, specifying that a Panel is authorized to “[c]onsolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes.”³³ That provision does not expand the expressly limited scope of the Panel’s authority under sections 4.3(o)(iii) and (iv).

20. The authority conferred on the IRP Panel by section 4.3(o)(v) to “take such other actions as are necessary for the efficient resolution of Disputes” confers a general authority empowering the panel to take other procedural steps, similar to consolidation, to ensure that an IRP is conducted efficiently. That authority is expressly “[s]ubject to the requirements of this Section 4.3” – including its provisions regarding the content and application of the Rules of Procedure to be developed by the IRP-IOT.³⁴ Thus, the general authority conferred on the panel to conduct the IRP efficiently cannot be read to conflict with, and certainly cannot supplant, the specific provisions of Rule 7 that govern participation of *amicus curiae*. Indeed, if section 4.3(o)(v) were interpreted to confer such authority, it would effectively render the Interim Supplementary Procedures meaningless: a panel could disregard any of the Interim Supplementary Procedures by determining that they interfered with the pursuit of efficiency. This is clearly an incorrect approach.

21. To the extent that section 4.3(o)(v) has any relevance to the Phase I issues at all, it is because the principle of efficiency that it embodies is fully consistent with Rule 7's specific provisions regarding *amicus* participation. Indeed, section 4.3(o)(v) is echoed in Rule 5 of the Interim Supplementary Procedures, which directs the IRP panel to consider accessibility, fairness and efficiency in its conduct of the IRP, and in Article 20 of the ICDR Rules, which authorizes the Panel to "take such additional steps as are necessary to protect the efficiency and integrity of the arbitration proceeding."

22. Efficiency, as well as integrity, is promoted by conducting this IRP in a manner that will achieve the most correct, fair and just result with a minimum of waste. Afilias' claims are based primarily on alleged conduct by NDC and Verisign, and the relief that Afilias seeks is to disqualify NDC as the winning bidder in the .WEB auction. Those claims will be resolved more efficiently with the fulsome participation of NDC and Verisign than without it. Not only will NDC and Verisign's participation yield a more correct, fair and just award, it also will result in a decision less likely to be vulnerable to collateral attack.

23. In contrast, Afilias' desperate attempt to bar NDC and Verisign from participating in this proceeding – and to effectively try them *in absentia* – has undermined the efficient resolution of this IRP. Afilias has submitted more than 100 pages of briefing before the Procedures Officer and this Panel seeking to exclude NDC and Verisign from this matter. While Afilias gives much lip-service to considerations of efficiency, its tactics have resulted in monstrously complicating and delaying this proceeding. Indeed, its unauthorized attack on Rule 7 before the Procedures Officer resulted in this proceeding being mired in tangential, unnecessary conflict for several months while the Procedures Officer was appointed, accepted briefing, held a hearing, and then decided not to determine the *amicus curiae* applications

pursuant to the straightforward terms of Rule 7. Following the Procedures Officer's declaration, Afilias amended its IRP Request to add the Rule 7 claim for the purpose of excluding NDC and Verisign. The addition of that claim, in turn, necessitated the bifurcation of this IRP into two phases, with all the inefficiency and delay that bifurcation normally entails.

24. This sideshow has gone on long enough. Afilias' claims in this arbitration challenge conduct of NDC and Verisign and seek relief that directly and substantially impacts their legal rights and business interests. Broad participation by NDC and Verisign is mandated by the Interim Supplementary Procedures; will increase the efficiency, transparency and fairness of this proceeding; will increase the likelihood of a thoroughly considered and just result; and will reduce the likelihood of a collateral attack that could undermine or nullify the Panel's decisions.

Respectfully submitted,

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Dated: November 15, 2019

ENDNOTES

¹ Bylaws, Art. 4 § 4.3(b)(iii)(A), Ex. C-1.

² Bylaws, Art. 4 § 4.3(b)(ii), Ex. C-1.

³ *See, e.g.*, Afiliias’ Amended Request for IRP ¶ 86 (asserting that the IRP-IOT must be “comprised of members of the global Internet community, but the committee wrongly included ICANN’s internal and external counsel in quorum counts.”); Afiliias’ Supplemental Brief on the Amicus Requests ¶ 24 & n. 47 (arguing that the IRP-IOT is to be “comprised of members of the Internet community” which should be construed “to exclude ICANN Staff and Board Members and include literally everyone else in the world.”) (citation and internal quotes omitted); Afiliias’ Response to Amici Requests (dated January 28, 2019) ¶ 80 (“the IRP-IOT was supposed to be comprised of ‘members of the Internet community’ and [] ICANN was not part of that community.”).

⁴ Bylaws, Art. 27 § 27.1, Ex. C-1; CCWG Accountability Charter.

⁵ Cross Community Working Group (CCWG) Charter at “Membership Criteria” (available at <https://community.icann.org/display/acctcrosscomm/Charter>); The Supporting Organizations and Advisory Committees that chartered the CCWG-Accountability are: Generic Names Supporting Organization (“GNSO”); At-Large Advisory Committee (“ALAC”); Country-Code Names Supporting Organization (“ccNSO”); Governmental Advisory Committee (“GAC”); Address Supporting Organization (“ASO”); and Security and Stability Advisory Committee (“SSAC”). *See also* Bylaws, Art. 27 § 27.1(a), Ex. C-1.

⁶ This language is bracketed because it differs in the August 3, 2015 draft Report and the Final Report. The August 3, 2015 draft refers to a “CCWG-Accountability”, while the Final Report refers simply to a “CCWG.” The clear intent was that the IRP-IOT would have the character of a group comprised of the ICANN community.

⁷ Available at <https://community.icann.org/download/attachments/56145016/Formatted-Annex%207-PROOFED.pdf?version=1&modificationDate=1452092614000&api=v2> ¶ 38.

⁸ Available at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>, Annex 7 ¶¶ 4, 63.

⁹ Available at <https://mm.icann.org/pipermail/accountability-cross-community/2015-December/008598.html>.

¹⁰ May 25, 2016 Meeting Transcript at 8 (“This group is a fixed group. We did essentially go through a process in the CCWG, where the members of the IOT were appointed. We did ask for volunteers, and as it happened, all of the volunteers were appointed.”), available at <https://community.icann.org/pages/viewpage.action?pageId=56990042&preview=/56990042/59645224/irp-iot-25may16-en.doc>.

¹¹ Available at <https://community.icann.org/pages/viewpage.action?pageId=56990040>.

¹² Bylaws, Art. 4 § 4.3(n)(i)(ii), Ex. C-1.

¹³ May 25, 2016 Meeting Transcript at 10 (available at <https://community.icann.org/pages/viewpage.action?pageId=56990042&preview=/56990042/59645224/irp-iot-25may16-en.doc>); November 22, 2016 Meeting Transcript at 1 (available at https://community.icann.org/pages/viewpage.action?pageId=61607509&preview=/61607509/63149989/IRP-IOT_22November.doc).

¹⁴ November 22 Meeting Transcript at 1 (available at https://community.icann.org/pages/viewpage.action?pageId=61607509&preview=/61607509/63149989/IRP-IOT_22November.doc).

¹⁵ *See, e.g.*, June 12, 2017 Meeting Transcript at 1 (available at https://community.icann.org/pages/viewpage.action?pageId=66061567&preview=/66061567/66080085/IRP-IOT_6-12-17%20ICANN%20IRP-IOT.pdf); April 27, 2017 Meeting Transcript at 1 (available at https://community.icann.org/pages/viewpage.action?pageId=64077897&preview=/64077897/64948112/IOT-IRP_0427ICANN1900UTCfinal%5B1%5D.pdf).

¹⁶ November 29, 2018 Meeting Transcript at 1 (available at https://community.icann.org/display/IRPIOTI/IOT+Meeting+%2344+%7C+29+November+2018+@+19%3A00+UTC?preview=/97845417/100532741/Transcript_IRP-IOT_29Nov2018-en.pdf).

¹⁷ November 29, 2018 Meeting Transcript at 3 (available at https://community.icann.org/display/IRPIOTI/IOT+Meeting+%2344+%7C+29+November+2018+@+19%3A00+UTC?preview=/97845417/100532741/Transcript_IRP-IOT_29Nov2018-en.pdf).

¹⁸ July 11, 2017 Transcript at 1 (available at https://community.icann.org/pages/viewpage.action?pageId=66061571&preview=/66061571/66092269/IRP-IOT%20Subgroup%20Meeting_07112017-FINAL-en.pdf); July 27, 2017 at 1 (available at https://community.icann.org/pages/viewpage.action?pageId=66087375&preview=/66087375/69274782/IRP-IOT%20SUBGROUP_07272017-FINAL-en.pdf); February 22, 2018 Meeting Transcript at 1 (available at https://community.icann.org/pages/viewpage.action?pageId=79430445&preview=/79430445/79436771/IRP-IOT%20MEETING_02222018_FINAL-en.pdf); May 10, 2018 Meeting Transcript at 1 (available at https://community.icann.org/display/IRPIOTI/IOT+Meeting+%2338+10+May+2018+@+19%3A00+UTC?preview=/84217624/84221181/IRP-IOT_10May2018%20-%20FINAL%5B1%5D.pdf).

¹⁹ Available at <https://www.icann.org/en/system/files/correspondence/sanchez-to-siddiqui-et-al-26jun19-en.pdf>.

²⁰ Rationale for Resolutions 2019.11.03.03 – 2019.11.03.05 (available at <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.c>).

²¹ See <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home>.

²² Bylaws, Art. 5 § 5.2, Ex. C-1 (emphasis added).

²³ CCWG-Accountability: WS2 – Final Report (24 June 2018), Appendix 6, Executive Summary (available at <https://community.icann.org/download/attachments/59640761/FULL%20WS2%20REPORT%20WITH%20ANNE%20XES.pdf?version=1&modificationDate=1531484254000&api=v2>) (emphases in original).

²⁴ Bylaws, Art. 4 § 4.2(c)(ii), Ex. C-1.

²⁵ Bylaws, Art. 4 § 4.2(c)(iii), Ex. C-1.

²⁶ Bylaws, Art. 4 § 4.2(k), Ex. C-1.

²⁷ Bylaws, Art. 4 § 4.2(l), Ex. C-1.

²⁸ Bylaws, Art. 4 § 4.2(q), Ex. C-1.

²⁹ *Id.*

³⁰ Bylaws, Art. 4 § 4.3(o)(iii), Ex. C-1.

³¹ Bylaws, Art. 4 § 4.3(o)(iv), Ex. C-1.

³² Bylaws, Art. 4 § 4.3(i)(iii), Ex. C-1.

³³ Bylaws, Art. 4 § 4.3(o)(v), Ex. C-1.

³⁴ Bylaws, Art. 4 § 4.3(o), Ex. C-1.