

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED'S COSTS SUBMISSION

(Corrected)
12 October 2020

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I. INTRODUCTION

1. There was no need for this IRP to be as procedurally complicated—and hence expensive—as it has been, even though this is the first IRP under ICANN's new Bylaws, the enhanced IRP implemented pursuant thereto, and the Interim Supplemental Rules. From the very outset, Afilias' claims have been straightforward and clearly stated, at their core, asking the Panel to evaluate two questions: did ICANN act inconsistently with its Articles and Bylaws by not rejecting NDC's application for .WEB or determining that NDC is ineligible to enter into a registry agreement due to its non-compliance with the New gTLD Program Rules? If so, what price should Afilias, the second-placed bidder, be required to pay for the .WEB gTLD?

2. There was no need for this IRP to have become as substantively complicated as it has, had ICANN participated in the Constructive Engagement Process ("CEP") in good faith, which could have led to a narrowing of the issues in dispute. ICANN instead used the CEP as cover to push through "interim" procedural rules that would eventually allow it to facilitate the Amici's participation in these proceedings and also put forward limitations arguments that were not available but for the fact that ICANN backdated the rules. ICANN has yet to explain why it accepted Afilias' invitation to review a draft of Afilias' Request for IRP in the context of CEP, only to terminate CEP without ever addressing the draft. This is not good faith.

3. There was no need to force Afilias to file for emergency interim relief through ICANN's extraordinary announcement following the termination of CEP that it was taking the .WEB contention set off hold, when the contention set had been on hold for the duration of CEP. ICANN claims it has a well-known "practice" that, although it will put a contention set on hold during pre-IRP accountability processes, when the main mechanism for ICANN accountability (namely an IRP) is initiated, the underlying contention set will not be put on hold absent an order from an emergency arbitrator. If this practice does in fact exist, it is not only ridiculous, but patently abusive.

4. There was similarly no need for Afilias to have had to incur the cost of filing an Amended Request for IRP, which was only necessitated following ICANN's belated disclosure of the Domain Acquisition

Agreement (“DAA”) pursuant to an order by the Emergency Arbitrator. ICANN had been in possession of the DAA since August 2016, but only disclosed it to Afiliis on 18 December 2018 when forced to do so by the Emergency Arbitrator. The disclosure of this agreement fundamentally changed the nature of this dispute, thus requiring Afiliis to amend its IRP request.

5. Nor was there a need for ICANN to press for the *Amici's* participation, particularly Verisign, which was not a member of the .WEB contention set. If a non-party's participation was necessary, as ICANN argued, NDC's participation as *amicus* would have been sufficient; but by no means necessary. ICANN's insistence on *Amici's* involvement in these proceedings was driven by its litigation strategy: to turn this IRP in to a dispute between Afiliis and the *Amici* and thereby cast ICANN as a neutral and impartial bystander with no responsibility for the controversy. There is nothing that *Amici* have contributed substantively to this IRP that could not have been presented by ICANN. ICANN's litigation strategy occasioned a lengthy proceeding before the Procedures Officer, the bifurcation of this IRP into two phases, briefing on the scope of their participation, briefing on ICANN's intentional disregard of the Panel's ruling as to the presentation of *Amici's* witness and documentary evidence, and a variety of other debates that could have been avoided. Afiliis does not contest that the information brought before the Panel relating to the *Amici* has been helpful, but all of that information could easily have been presented by ICANN itself, given that there can be little doubt that throughout this IRP (and indeed since August 2016), ICANN has been working hand-in-glove with the *Amici* to ensure the delegation of .WEB to NDC and ultimately Verisign; a reality that is perhaps best illustrated by ICANN's collaboration with the *Amici* to insert a tailor-made version of Rule 7 into the Interim Supplementary Rules with the specific objective of enabling the *Amici's* participation in this IRP.

6. And there was no reason for ICANN to hide-behind-the-rock until its Rejoinder, which turned out to be its central defense in these proceedings: the ICANN Board's alleged decision to defer consideration of Afiliis' complaints until after all accountability proceedings have been completed. But for ICANN's earlier lack of candor and refusal to observe the rules of the game (*i.e.*, setting out its full defenses in its Response

to Amended Request for Independent Review Process), there would have been no need for the document production submissions and argument that took place following ICANN's Rejoinder.

7. In short, it is ICANN that bears the full responsibility for the length and cost of this IRP. Any IRP against heavily-resourced ICANN is a substantial undertaking. However, Afiliias' fees and costs could have been greatly reduced if ICANN had elected to pursue a good faith defense strategy commensurate with its obligations under its Articles and Bylaws. As ICANN instead chose to pursue every defensive tactic, however frivolous or abusive, to get an edge in this IRP, it must now bear the consequences.

8. Afiliias respectfully submits that it should be declared the prevailing party on all of its claims in this IRP. Reflecting such an outcome, Section 4.3(r) of ICANN's Bylaws empowers the Panel to shift Afiliias' fees and costs to ICANN in the event that ICANN's defenses are deemed to have been "frivolous or abusive."¹ Black's Law Dictionary defines "frivolous" as "[l]acking a legal basis or legal merit"² and "abusive" as "[c]haracterized by wrongful or improper use."³ Pursuant to ICANN's Bylaws,⁴ the Panel's application of the standard should be guided by principles of international arbitration. As such, abusive conduct includes forcing the opponent to litigate unnecessarily,⁵ taking inconsistent positions,⁶ engaging in tactics that increase costs or obstruct the Panel's task,⁷ other bad faith conduct,⁸ and formal abuses of right—exercises of rights for purposes other than that for which they were intended.⁹

9. In light of these principles, Afiliias requests that the Panel order ICANN to cover the totality of Afiliias' fees and costs in the IRP of USD 10,248,227.02. As explained in **Section II**, ICANN's central defensive strategies were frivolous and abusive and therefore merit shifting the entirety of Afiliias' fees and costs to ICANN.

10. Separately, we have calculated the fees and costs associated with two particular elements of the proceedings in the event that they would assist the Panel in allocating costs. As explained in **Section III**, ICANN should bear the following two elements of Afiliias' fees and costs (regardless of whether it should bear the totality of those fees and costs). ICANN should bear the USD 858,262.70 in fees and costs that

Afilias incurred for prosecuting the Emergency Interim Measures phase. ICANN should also bear the USD 2,504,873.06 in fees and costs that Afilias incurred in connection with the participation of the *Amici* in these proceedings.

11. We attach Afilias' Schedule of Costs as **Annex A** and its methodology in **Annex B**.

II. AFILIAS IS ENTITLED TO HAVE ICANN BEAR ITS FULL COSTS AND FEES BASED ON ITS FRIVOLOUS AND ABUSIVE DEFENSE OF THIS IRP

12. The main pillars of ICANN's defense strategy against Afilias' claims in this IRP have been frivolous and abusive in their conception and execution. ICANN's central defense—its Board's supposed decision at a Board workshop to defer deciding Afilias' complaints—was untimely, baseless, contradictory, and sought unjustifiably to oust the authority of this Panel. ICANN's remaining defense tactics during the IRP were in bad faith and supported its effort to moot the Panel's authority. This frivolous and abusive defense merits shifting Afilias' total fees and costs of USD 10,248,227.02 to ICANN.

A. ICANN's Central Defense—the Supposed Board Decision—Frivolously And Abusively Sought to Render the IRP Entirely Worthless

13. It was not until 1 June 2020 that ICANN introduced its central defense in this IRP through its Rejoinder—the Board's supposed "decision not to decide" allegedly taken at the 3 November 2016 Board workshop. ICANN's initial defense had been that it had discretionary authority to evaluate alleged violations of the New gTLD Program Rules, and therefore the Panel could not decide the dispute. However, when ICANN filed its Rejoinder, it abandoned that defense, instead adopting the new argument that the Panel is precluded from finally and comprehensively resolving Afilias' claims because ICANN's Board had allegedly decided to defer consideration of those claims until after the present IRP. ICANN altered its central defense at this late stage because Afilias' Reply had thoroughly discredited ICANN's previous discretion defense—Afilias showed that ICANN has no discretion where an applicant submits an invalid bid and that ICANN's discretion is, in any event, constrained by its competition mandate and principles of international law.

14. It was abusive for ICANN to center its defense around a supposed decision of the Board that

had never been made public or disclosed to Afilias prior to ICANN's Rejoinder. As a result, Afilias was forced to address ICANN's defense—also advanced by *Amici*—in its Response to Amici of 24 July 2020. Afilias had a mere month to prepare that Response after the *Amici* filed a combined 100 pages of briefing and was required to address—apart from ICANN's key defense—the myriad of factual distractions the *Amici* had introduced. But, despite this, ICANN had the gall to complain at the hearing that Afilias rebutted ICANN's defense only in the “response to the Amici briefs, so in their last submission. It wasn't in their reply.”¹⁰ ***It was not in Afilias' Reply because ICANN did not raise the defense until its Rejoinder.***

15. ICANN's new central defense—that the Board had decided to defer consideration of Afilias' complaints until after the IRP and so the Panel may not fully resolve the dispute—was not only abusively introduced but was frivolous in substance.¹¹ To cite but one example: at the hearing, ***none of ICANN's witnesses*** were willing to defend ICANN's assertion that a decision was made at the Board Workshop.

16. ICANN's defense was also abusive in its conception and purpose. It is a recipe for ICANN to immunize itself from any accountability and to render the IRP process an empty shell. ICANN takes the position that, because the Board has decided to defer its decision until after the IRP, the Panel is not authorized to fully resolve the dispute and instead must refer it back to ICANN.¹² It also takes the position that ICANN's Board is not required to comply with any affirmative relief that the Panel might grant to Afilias.¹³ Individually and in combination, these positions seek to defeat the very purpose of the IRP—holding ICANN externally and independently accountable. This abuse merits shifting all of Afilias' fees and costs to ICANN.

17. ICANN cannot be allowed to escape the cost consequences of its frivolous effort to restrict the scope of this IRP by distorting the plain wording of the Bylaws, ignoring the policy directions provided by the ICANN Community as to the conduct and purpose of an IRP under the enhanced IRP system implemented by the new Bylaws, and minimizing the consequences of its representations to the United States federal courts regarding the rights to review and redress provided by the IRP to parties aggrieved by ICANN's conduct.

B. ICANN's Defense Tactics in the IRP Frivolously and Abusively Sought to Deprive Afilias of an Effective Forum

18. ICANN has also engaged in a series of litigation tactics designed to undermine the viability of the IRP as a forum to provide a remedy for Afilias' claims. It has done so even though ICANN itself forced Afilias to litigate its claims in this very forum by virtue of the Litigation Waiver. These frivolous and abusive litigation tactics, including those detailed below, merit shifting the totality of Afilias' fees and costs to ICANN.

1. ICANN's Enactment of the Interim Supplementary Procedures was Frivolous and Abusive

19. Just weeks before Afilias filed this IRP, and knowing that Afilias' IRP was forthcoming, ICANN rushed through the enactment of the Interim Supplementary Procedures, thereby allowing ICANN to assert a defense that had not been available to it previously and to enable the participation of the *Amici*. ICANN was not permitted to enact these rules¹⁴ in order to advance its defense in IRPs, and still less to target Afilias.¹⁵ This was a textbook abuse of right—as was the use to which ICANN put these rules.

20. The circumstances in which ICANN enacted the Interim Supplementary Procedures made it clear that they were specifically targeted to undermine Afilias' position in this IRP. On 10 October 2018, Afilias made ICANN Legal aware that the present IRP was imminent when it submitted its draft IRP Request during CEP. ICANN had dangled the promise that its submission would allow ICANN to engage on the merits of Afilias claims. Instead, the next day, 11 October 2018, Ms. Samantha Eisner, a senior ICANN lawyer, informed the IRP-IOT, the drafting body for the Procedures, that ICANN was “on the precipice of” an IRP¹⁶—a clear reference to Afilias' IRP, as no other IRP would be filed until more than a year later.¹⁷ Under cross-examination, Ms. Eisner admitted that she had been under great pressure from ICANN Legal to ensure that the Interim Supplementary Procedures were ready for a Board vote no later than 25 October 2018.¹⁸ She succeeded in that goal—albeit in violation of ICANN's Bylaws—and the Board adopted the Interim Supplementary Procedures in its 25 October 2018 meeting.

21. The new Interim Supplementary Procedures that ICANN rushed into place for Afilias' IRP

contained two central planks of ICANN's defense—Rule 4 on time bars and Rule 7 on Amici participation.

22. **First**, Rule 4 of the Interim Supplementary Procedures—the Statute of Limitations and Statute of Repose (“**SOL/SOR**”)—was abusively designed to support ICANN's time bar argument. Prior to Rule 4, Afilias' claims had *never* been subject to an SOL/SOR.¹⁹ ICANN Legal—in possession of Afilias' draft Request for IRP—included Rule 4 in the draft Interim Supplementary Procedures and ensured that the Procedures were backdated. Although ICANN itself recognized that Rule 4 required further public consultation,²⁰ the IRP-IOT never carried out that consultation nor published a promised “report on the results of the public consultation,”²¹ and *it never made public its intention to adopt Rule 4*. Instead, ICANN illegitimately approved Rule 4 and backdated the Interim Supplementary Procedures to 1 May 2018—prior to the CEP—in an attempt to thwart any possible effect of Afilias' CEP on the new SOL/SOR.

23. Even if ICANN had not *deliberately* exploited its rule-making authority to prejudice Afilias, ICANN's invocation of the SOL/SOR would nevertheless be abusive. No SOL/SOR applied to Afilias' claims prior to Rule 4's enactment on 25 October 2018. Therefore, Afilias could not have known about or complied with the SOL/SOR prior to that date, especially because, *per ICANN, the SOL/SOR had already expired for Afilias' claims at the very moment it was enacted*. It was unfair for ICANN to exploit the newly enacted SOL/SOR, with which Afilias could not have complied, as a defense in the present IRP. The unfairness was compounded by the fact that ICANN—for almost a year and a half prior to the CEP—had concealed its actions regarding .WEB from Afilias, making it functionally impossible for Afilias to take action. Consistent with the views of international arbitral tribunals,²² ICANN's invocation of the SOL/SOR was an abuse of right.

24. **Second**, ICANN's enactment of Rule 7—affording *Amici* a mandatory right to intervene on ICANN's behalf—during Afilias' CEP was equally abusive. As demonstrated on cross-examination, Ms. Eisner rewrote the draft Rule 7 at the behest of Verisign's David McAuley—circumventing the IRP-IOT—custom tailoring it to guarantee Verisign's and NDC's participation in this IRP.²³ Because the rewritten Rule 7 bore no resemblance to the version previously submitted for public comment, ICANN's Bylaws required a

further round of public comment.²⁴ This never happened. ***Not even the text of the rewritten Rule 7 was made public.*** Instead, the Rule was sent to the IRP-IOT members for their required approval late on Friday, 19 October 2018 and deemed approved on Sunday, 22 October 2018²⁵—illicitly evading that process as well. ICANN enacted Rule 7 on 25 October 2018.²⁶

25. ICANN then abusively made the *Amici* participation a key element of its defense in the IRP. ICANN advocated forcefully for the *Amici* to participate in the IRP through two rounds of briefing before the Procedures Officer, strenuous objections against the Procedures Officer's decision not to decide (due to the suspect origins of Rule 7²⁷), and then two further rounds of briefing in Phase I.²⁸ Once the Panel's Phase I Decision authorized the *Amici* to participate, ICANN sought to maximize their impact, including by forcing a revision of the Panel's instructions. Because the *Amici* were not permitted to adduce witness testimony, ICANN did so on their behalf, but without fully endorsing that testimony—to get the benefit without taking any responsibility.²⁹ As a result, the Panel ruled that counsel for ICANN would have to defend the *Amici* witnesses—Rasco and Livesay—at hearing.³⁰ Nevertheless, because of ICANN's tactic of submitting the unendorsed testimony, Afilias was forced to concede that *Amici's* counsel could defend these witnesses³¹—thereby greatly expanding *Amici* participation from what the Panel's Phase I Decision had authorized.

2. ICANN's Refusal to Put .WEB On Hold was Frivolous and Abusive

26. ICANN further refused to suspend delegation of .WEB voluntarily during the pendency of the IRP, in a frivolous and abusive attempt to defeat the Panel's authority by mooting Afilias' claims. Following Afilias' Request for IRP on 14 November 2018,³² ICANN informed Afilias that it would take .WEB off hold two weeks later on 27 November 2018.³³ It rejected Afilias' request for an explanation only on 26 November 2018 at 9 pm³⁴—*i.e.*, the day before ICANN stated it would proceed with .WEB. Afilias was forced to pursue, under duress, a costly, distracting, and unwarranted Emergency Interim Measures phase. ICANN did so even though IRP panels have unanimously held—with precedential effect—that putting a contention set on hold is necessary to preserve the *status quo* and protect the effectiveness of the IRP.³⁵

27. ICANN's action was also frivolous and abusive because ICANN later abandoned its refusal to put .WEB on hold—but only after Afilias had incurred extensive fees and costs. Due to ICANN's belated reversal of position, Afilias had to prepare its Request for an Emergency Panelist, to participate in the appointment of the emergency panelist, to pursue document production, and to draft additional pleadings.

III. AFILIAS IS, IN ANY EVENT, ENTITLED TO HAVE ICANN BEAR ITS COSTS AND FEES FOR SPECIFIC ELEMENTS OF THE IRP

28. Regardless of whether ICANN should bear all of Afilias' costs and fees from the IRP (which it should), it should at least bear all of Afilias' costs and fees related to the participation of the *Amici* and to the Emergency Interim Relief proceeding. ICANN's defense strategies in relation to each were frivolous and abusive, and dramatically increased Afilias' fees and costs.

A. ICANN Must Bear All of Afilias' Fees and Costs Associated with Amici's Participation

29. Afilias is entitled to have ICANN bear the fees and costs of USD 2,504,873.06 incurred due to the *Amici* participation in the IRP and, in particular, the fees and costs associated with the Procedures Officer, Phase I, and the Response Brief phases.³⁶ ICANN is obligated to cover Afilias' legal fees and costs in connection with the *Amici* participation for the reasons set out above³⁷—ICANN abusively included Rule 7 in the Interim Supplementary Procedures in view of the present IRP and then used the *Amici* as surrogates for its defense.

B. ICANN Must Bear All of Afilias' Fees and Costs Associated with Afilias' Request for Emergency Interim Measures

30. Afilias is also entitled to have ICANN bear its fees and costs of USD 858,262.70 associated with the Emergency Interim Measures phase of this IRP. This phase was necessary *only* because ICANN sought to frustrate the Panel's authority by delegating .WEB to NDC while the IRP was ongoing. ICANN's refusal to put .WEB on hold absent interim measures was *per se* frivolous and abusive, as explained above,³⁸ and also directly contradicted the central tenet of ICANN's defense in this IRP—that ICANN's Board had decided to defer consideration of .WEB until after the IRP.

IV. REQUEST FOR RELIEF

31. For the above reasons, Afilias respectfully requests that the Panel order ICANN to pay USD 10,248,227.02 in compensation for the total fees and costs that Afilias incurred in this IRP. In the alternative, Afilias respectfully requests that the Panel order ICANN to pay USD 2,504,873.06 in compensation for the fees and costs incurred in relation to the *Amici* participation and to pay USD 858,262.70 in compensation for the fees and costs incurred in relation to the Emergency Interim Measures phase.

32. We hereby certify that the fees and costs presented in Afilias' Schedule of Costs, **Annex A**, are true and accurate, in accordance with Afilias' cost calculation methodology, **Annex B**. The fees and costs will be updated for Afilias' reply to ICANN's submission on costs.

Respectfully submitted,



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- ¹ Bylaws, [Ex. C-1], Sec. 4.3(r) (“the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.”); Interim Supplementary Procedures for IRP (25 Oct. 2018), [Ex. C-59], Sec. 15.
- ² *Black’s Law Dictionary* (11th ed. 2019): frivolous, [Ex. CA-128]; *Black’s Law Dictionary* (11th ed. 2019): abusive, [Ex. CA-129]. See also *EURAM v. Slovak Republic*, PCA Case No. 2010-17, Award on Costs (20 Aug. 2014), [Ex. CA-130], ¶ 43 (“Thus, if a party advanced a claim (or a jurisdictional objection) that was manifestly untenable or frivolous, that would be a highly pertinent consideration.”).
- ³ *Black’s Law Dictionary* (11th ed. 2019): frivolous, [Ex. CA-128]; *Black’s Law Dictionary* (11th ed. 2019): abusive, [Ex. CA-129].
- ⁴ Bylaws, [Ex. C-1], Sec. 4.3(viii). See also *id.*, Sec. 4.3(n)(ii); *id.*, Sec. 4.3(x). See also Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], p. 3101 (“the better view is that the standards governing awards of legal costs should be international standards, developed in light of the particular nature and needs of international arbitration.”) (citation omitted).
- ⁵ *Transglobal Green Energy v. Panama*, ICSID Case No. ARB/13/28, Award (2 June 2016), [Ex. CA-131], ¶ 126 (sanctioning repeated and unnecessary requests to suspend proceedings); *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008), [Ex. CA-132], ¶¶ 36-37, 729 (sanctioning repeated and unnecessary objections).
- ⁶ Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (2012), [Ex. CA-133], ¶ 15.9.8 (“Another example may be where a party knowingly makes inconsistent allegations of fact in different fora.”).
- ⁷ Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (2012), [Ex. CA-133], ¶ 15.9.8; ICC Case No. 7453, Award (1994), 22 *Y.B. Com. Arb.* 107 (1997), [Ex. CA-134], ¶ 44 (“First defendant’s conduct herein was dilatory from the beginning until the end of the proceedings and that conduct was obstructive, and it was calculated to be obstructive, of the Tribunal in carrying out its task.”); ICC Case No. 8486, Award (1996), 24 *Y.B. Com. Arb.* 162 (1999), [Ex. CA-135], ¶ 25 (“According to good faith, the parties to an international arbitration must in particular facilitate the proceedings and abstain from all delaying tactics....”) (citation omitted).
- ⁸ Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (2012), [Ex. CA-133], ¶ 15.9.8.
- ⁹ *Phillip Morris v. Australia*, PCA Case No. 2012-12, Final Award on Costs (8 July 2017), [Ex. CA-136], ¶ 60 (“[A] respondent State that faces an abuse of right should, in principle, not be burdened with the costs of defending itself against such a claim.”).
- ¹⁰ Merits Hearing, Tr. Day 1 (3 Aug. 2020), 154:23 – 155:1 (ICANN’s Opening Presentation).
- ¹¹ The defense is further frivolous and abusive because ICANN has claimed attorney-client privilege in regards to most of the significant facts about the Workshop Session.
- ¹² ICANN’s Rejoinder Memorial, ¶¶ 10, 93, 117.
- ¹³ ICANN’s Rejoinder Memorial, ¶ 118.
- ¹⁴ Bylaws, [Ex. C-1], Sec. 4.3(n)(iii) (“no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN.”).
- ¹⁵ Indeed, it did so even though ICANN’s Bylaws require the Procedures to “**apply fairly to all parties**,” “**ensure fundamental fairness and due process**,” and be “**consistent with the Purposes of the IRP**.” Bylaws, [Ex. C-1], Sec. 4.3(n)(i) (emphasis added); *id.*, Sec. 4.3(n)(iv); *id.*, Sec. 4.3(n)(ii).
- ¹⁶ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 15.
- ¹⁷ Merits Hearing, Tr. Day 3 (5 Aug. 2020), 457:1-6 (Eisner Cross-Examination) (“Q: And, in fact, the very next IRP to be filed after this one wouldn’t be filed for more than another year, in December of 2019; isn’t that right? A: As far as I recall, yes, but people can file an IRP on any day.”).
- ¹⁸ Merits Hearing, Tr. Day 3 (5 Aug. 2020), 453:18-21 (Eisner Cross-Examination).
- ¹⁹ Merits Hearing, Tr. Day 3 (5 Aug. 2020), 493:19-494:16, 496:21-497:13 (Eisner Cross-Examination).
- ²⁰ ICANN, IRP-IOT Draft Recommendations (22 June 2018), [Ex. 13], [PDF] p. 2 (“a significant number of comments did not support the proposed limitations....”).

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- 21 ICANN, IRP-IOT Draft Recommendations (22 June 2018), [Ex. 13], [PDF] p. 2.
- 22 *Renco Group v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016), [Ex. CA-137], ¶ 187 (“the Tribunal does not wish to rule out the possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco’s claims were now time-barred under Article 10.18(1).”).
- 23 See Afilias’ Post-Hearing Brief (12 Oct. 2020), Sec. II(I).
- 24 See Afilias’ Post-Hearing Brief (12 Oct. 2020), Sec. II(I).
- 25 Email from Bernard Turcotte (on behalf of David McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), [Ex. 262].
- 26 Interim Supplementary Procedures for IRP (25 Oct. 2018), [Ex. C-59].
- 27 Procedures Officer Declaration (28 Feb. 2019), ¶ 105; Letter from Jeffrey LeVee (Counsel for ICANN) to Tom Simotas (ICDR) (8 Mar. 2019), p. 2; Letter from Jeffrey LeVee (Counsel for ICANN) to Tom Simotas (ICDR) (20 Mar. 2019), pp. 4-5; ICANN’s Request for Corrections to the Declaration of the Procedures Officer (26 Mar. 2019); Procedures Officer’s Order on ICANN’s Request for Corrections (31 Mar. 2019) (denying ICANN’s request for corrections).
- 28 ICANN’s Submission regarding the Requests by VeriSign and NDC to Participate as *Amicus Curiae* (16 Jan. 2019); ICANN’s Reply to Afilias’ Response to the Requests of VeriSign and NDC to Participate as *Amicus Curiae* (5 Feb. 2019); ICANN’s Supplemental Brief Regarding Phase I Issues (27 Sep. 2019); ICANN’s PHB (Phase I) (15 Nov. 2019).
- 29 Procedural Order No. 5 (14 July 2020), ¶ 24.
- 30 Procedural Order No. 5 (14 July 2020), ¶ 54.
- 31 Email from Afilias to Panel (27 July 2020), p. 1.
- 32 Afilias’ Request for Independent Review Process (14 Nov. 2018).
- 33 Email from ICANN Independent Review to Arif Ali and Rosey Wong (Counsel for Afilias) (14 Nov. 2018), [Ex. C-64], p. 1.
- 34 Letter from Arif Ali (Counsel for Afilias) to ICANN Independent Review (20 Nov. 2018), [Ex. C-65].
- 35 See *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Order on Request for Emergency Measures of Protection (23 Dec. 2014), [Ex. CA-4]; see also *DCA v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014), [Ex. CA-5]; *GCC v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6].
- 36 Afilias is not seeking the fees and costs relating to Amici participation in Phase II, although awarding these substantial fees and costs would also be justified.
- 37 See *supra* ¶¶ 19-21, 24-25.
- 38 See *supra* ¶¶ 26-27.