

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

ICDR Case No. 01-18-0004-2702

**AFILIAS DOMAINS NO. 3 LIMITED,
(n/k/a ALTANOVO DOMAINS LTD.)
*Claimant***

v.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
*Respondent***

DECISION ON AFILIAS' ARTICLE 33 APPLICATION

21 December 2021

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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I. OVERVIEW

1. In this decision the Panel rules on an application by the Claimant presented under Article 33 of the International Arbitration Rules of the ICDR (amended and effective 1 June 2014) (**ICDR Rules**) entitled “Afilias Domains No. 3 Limited’s Rule 33 Application for an Additional Decision and for Interpretation”, dated 21 June 2021 (**Application**). The Application states that it requests an additional decision and interpretation of the Panel’s Final Decision in this IRP (**Final Decision**).¹
2. For the reasons set out below, the Panel unanimously denies the Application in its entirety.

II. HISTORY OF PROCEEDINGS

3. The history of the proceedings in this IRP up to 12 February 2020, the date of the Decision on Phase I, is set out at paragraphs 33 to 67 of that decision. The history of the proceedings between 12 February 2020 and 20 May 2021, the date of the Final Decision, is set out at paragraphs 35 to 81 of the Final Decision. Both narratives are incorporated by reference in this decision.
4. In its Final Decision, the Panel found, among others, that the Respondent had acted contrary to its Articles and Bylaws in the manner in which it had dealt with the Claimant’s complaints that NDC had breached the Guidebook and Auction Rules through its arrangements with Verisign in connection with NDC’s application for .WEB.² However, the Panel denied the Claimant’s request that the Respondent be ordered to disqualify NDC’s bid for .WEB and proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.³
5. On 21 June 2021, the Parties filed a Joint Request for Corrections to the Panel’s Final Decision pursuant to Article 33 of the ICDR Rules, seeking the correction of certain clerical or typographical errors and of the numbering of certain paragraphs in the Final Decision. On 15 July 2021, the Panel issued a Decision on the Parties’ Joint Request for Corrections confirming that the requested corrections all related to errors that were clerical or typographical in nature and, as such, fell within the scope of Article 33. The Panel granted the Parties’ Joint Request for Corrections, held that the Final Decision should be corrected as jointly requested by the Parties, and attached for the Parties’ convenience a corrected version dated 15 July 2021 of the Final Decision.

¹ Unless otherwise indicated, all capitalized terms in the present decision have the meaning ascribed to these defined terms in the Final Decision dated 20 May 2021. All references to, and citations from, the Final Decision in the present decision are to the corrected version of the Final Decision dated 15 July 2021.

² Final Decision, para. 8.

³ *Ibid*, para. 9.

6. As already indicated, Afilias' own Application under Article 33 was also filed on 21 June 2021. Following receipt of the Application, the Panel, by email dated 23 June 2021, invited the Parties to consult and submit either a joint proposal for a briefing schedule on Afilias' Application or the Parties' respective positions as to the procedure to be followed in respect of this Application. The Panel also asked that the Parties reach out to the *Amici* to ascertain their positions in respect of the Application.
7. On 28 June 2021, the Parties proposed the following briefing schedule for the Application:

6 August 2021	ICANN Response to Claimant's Rule 33 Application (If permitted to participate in these additional proceedings, the <i>Amici</i> would file a joint submission on this date.)
20 September 2021	Afilias Rejoinder to ICANN Response (if <i>Amici</i> are not permitted to participate)
30 September 2021	Afilias Rejoinder to ICANN Response and Response to <i>Amici</i> Observations (if <i>Amici</i> are permitted to participate)
8. In the same communication Afilias noted that it objected to the *Amici*'s announced intention to participate in this new phase of the IRP, while ICANN indicated that it had no objection to their participation. The Parties added that they proposed to leave it to the Panel to decide whether there should be a hearing on Afilias' Application.
9. On 28 June 2021, the *Amici* requested an opportunity to make submissions in response to Afilias' Application and suggested the adoption of a more expedited briefing schedule than that proposed by the Parties. On 1 July 2021, Afilias objected to the *Amici*'s request to make submissions on its Article 33 Application as well as to their suggestion regarding the briefing schedule.
10. On 3 July 2021, the Panel granted the *Amici*'s request to make submissions on Afilias' Article 33 Application. The Panel reasoned that the *Amici* having participated in Phase II of the IRP to the full extent permitted by the Panel's Decision on Phase I, it was both appropriate and just that they be given an opportunity to make representations on Afilias' Article 33 Application, which directly relates to the Final Decision.
11. In its communication of 3 July 2021, the Panel indicated that it was prepared to accept the briefing schedule proposed by the Parties even though it was longer than what might be expected for an application of that nature. The Panel's acceptance of that schedule came, however, with the caveat that by reason of pre-existing commitments on the part of its members, the Panel might not be in a position to issue its decision on Afilias' Article 33 Application within thirty (30) days after 30 September 2021, the date proposed for the filing of the last submission on the Application, as required under Article 33(2) of the ICDR Rules. The Panel added that while in its experience

it would be exceptional for a hearing to be held in connection with an application for interpretation, correction, and/or for an additional award, the matter would be left open pending consideration of the written submissions to be made by the Parties and *Amici* in connection with the Application.

12. On 3 July 2021, the Respondent confirmed its waiver of the 30-day requirement provided by Article 33(2) with respect to the Panel's determination of Afilias' Article 33 Application. The Claimant and the *Amici* did the same on 5 July 2021.
13. In the event, the Parties and the *Amici* filed their respective submissions in accordance with the agreed Briefing Schedule. These submissions are summarized in the next section of this decision.
14. On 5 October 2021, having considered the comprehensive submissions contained in the Application, the Respondent's Response thereto, the *Amici*'s Submission, and the Claimant's Reply to the Application, the Panel advised the Parties and the *Amici* that it did not see a need to hold a hearing in relation to the Application.
15. As noted in the Final Decision,⁴ in late 2020 the Claimant's former parent company, Afilias, Inc., merged with Donuts, Inc. The Claimant explains in the Application that it and its .WEB application were carved out of the merger transaction and that the Claimant is now known as Altanovo Domains Ltd. While the Claimant is now part of a group of companies that is separate from Afilias, Inc. and Donuts, Inc., the Claimant has chosen "for the sake of consistency and ease of reference"⁵ to continue to refer to itself as "Afilias" throughout the Application. Having noted the Claimant's change of corporate name and affiliation, the Panel adopts the same approach and refers to the Claimant as "Afilias" throughout this decision.

III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED

16. The Application and the submissions filed in relation thereto are voluminous, running in total to more than 250 pages. While summaries of these submissions are included below to provide context, the Panel notes that in coming to its decision on the Application it has carefully considered all of the Parties' and *Amici*'s arguments and submissions, as well as the authorities submitted in support thereof.

⁴ Final Decision, paras. 11 and 247-252.

⁵ Application, para. 1, fn. 1.

A. Afilias' Article 33 Application

1. Overview

17. In its Application, Afilias requests both an additional decision⁶ and an interpretation of the Final Decision.⁷ In Afilias' submission, by failing to resolve all the "claims and issues" presented by Afilias, the Panel "failed to satisfy its mandate" and "undermined the very purposes of the IRP", especially by its decision to refer Afilias' claim arising from NDC's alleged violation of the New gTLD Program Rules back to ICANN's Board and Staff to "pronounce" upon "in the first instance".⁸

2. Request for an Additional Decision

18. Afilias argues that the purpose of an additional award is to ensure that an arbitral tribunal fulfills its mandate and avoids rendering an award that is *infra petita*, that is, that fails to resolve all claims presented to the tribunal as required by the arbitration agreement. In Afilias' view, such an award is subject to set aside, including under the English Arbitration Act (**EAA**), is unjust to the party that has presented the claim and constitutes a waste of the parties' time and resources.⁹
19. Afilias contends that any omission to decide a properly submitted claim is grounds for an additional award, and that the Panel must resolve all of the claims and issues before it in a manner consistent with its mandate as set out in Section 4.3(g) of the Bylaws.¹⁰ That section provides that the "IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response". Afilias argues that the term "Claim" (with a capital "C") refers to a claimant's "written statement of a Dispute" which describes the Covered Actions that the claimant considers has given rise to a Dispute. In turn, the Bylaws define "Covered Actions" as "any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members, that give rise to a Dispute."¹¹ Afilias adds that each "IRP Panel shall conduct an objective, *de novo* examination of the Dispute",¹² that the "IRP is intended as a final, binding arbitration

⁶ The Panel agrees with the Claimant that the term "decision" can, in the context of this IRP, be used interchangeably with the term "award", which is used in the ICDR Rules. See Application, para. 1, fn. 2.

⁷ Application, para. 1.

⁸ *Ibid*, para. 2.

⁹ *Ibid*, paras. 5-7.

¹⁰ *Ibid*, paras. 8-11.

¹¹ *Ibid*, para. 11, quoting from Sections 4.3(d), 4(3)(b)(iii)(A) and 4.3(b)(ii) of the Bylaws, Ex. C-1 [emphasis omitted].

¹² Application, para. 12, quoting from Section 4.3(i) of the Bylaws, Ex. C-1.

process”,¹³ and that IRP decisions “are intended to be enforceable in any court with jurisdiction over ICANN”.¹⁴

20. According to Afilias, the Panel failed to fulfill its mandate with respect to three (3) claims that were put to it for resolution.¹⁵
21. First, Afilias argues that the Panel did not resolve its claim regarding the following Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC’s application, and/or (b) not declaring NDC’s bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder. Afilias defines this claim as its **Rules Breach Claim**.¹⁶ Afilias stresses that its claim was not that ICANN failed to decide or pronounce on the propriety of the DAA, and NDC’s and Verisign’s other conduct. Rather, the question raised by Afilias was whether ICANN’s failure to disqualify NDC and to offer .WEB to Afilias was consistent with the Articles, Bylaws and New gTLD Program Rules, and that question was fully argued in this IRP.¹⁷
22. Afilias avers that ICANN supported the *Amic*’s request to participate in these proceedings for the specific purpose of responding substantively to Afilias’ Rules Breach Claim.¹⁸ According to Afilias, the Panel’s findings of fact cannot be reconciled with its referral of the claim back to the Board for “pronouncement” “in the first instance”.¹⁹ In Afilias’ view, the Panel failed to resolve the Rules Breach Claim as required by its mandate²⁰ and invented a prerequisite that the Board must “pronounce”, “decide” or “determine” the matter in the first instance before a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failing to act as required based on that violation.²¹ This, argues the Claimant, eliminates ICANN’s accountability.²² Afilias adds that

¹³ Application, para. 14, quoting from Section 4.3(x) of the Bylaws, Ex. C-1.

¹⁴ Application, para. 14, quoting from Section 4.3(x)(ii) of the Bylaws, Ex. C-1.

¹⁵ Application, para. 15.

¹⁶ *Ibid*, para. 16.

¹⁷ *Ibid*, paras. 21-27 and 35-36.

¹⁸ *Ibid*, paras. 28-31.

¹⁹ *Ibid*, paras. 17 and 52-58.

²⁰ *Ibid*, paras. 37-43, 49-50 and 62.

²¹ *Ibid*, paras. 44-48, 51, 54 and 63.

²² *Ibid*, paras. 64-66.

the issue of remedy for the Rules Breach Claim had also been properly submitted and fully arbitrated before the Panel.²³

23. Second, Afilias contends that the Panel failed to resolve its claim that ICANN violated its obligation to conduct its activities in accordance with relevant principles of international law. Afilias defines this as its **International Law Claim**, a claim it argues was properly presented to the Panel. Afilias avers that it elaborated as to what the four (4) following specific facets of the international law principle of good faith required of ICANN: (1) procedural fairness and due process, (2) impartiality and non-discriminatory treatment, (3) openness and transparency, and (4) respect for legitimate expectations. In Afilias' view, the Panel never denied that obligations under international law apply to ICANN, but did not address Afilias' International Law Claim or provide reasoning for its failure to do so.²⁴ According to Afilias, the Panel must now resolve in an additional decision the International Law Claim regarding ICANN's failure to disqualify NDC contrary to ICANN's international law obligations.²⁵
24. Third, Afilias submits that the Panel did not resolve its claim that ICANN violated its Articles and Bylaws through its inequitable and disparate treatment of Afilias as compared to its treatment of NDC and Verisign. That is what Afilias defines in the Application as its **Disparate Treatment Claim**. It is argued that the Panel failed to determine that claim even though the Panel made findings of fact establishing its validity. Afilias therefore argues that the Panel must issue an additional decision resolving its Disparate Treatment Claim. Afilias characterizes as manifestly unfair the Panel's view, expressed in the Final Decision, that it was not "necessary, based on the allegations of disparate treatment, to add to its findings in relation to the Claimant's core claims". According to Afilias, it is not open to an IRP panel to determine that it is not "necessary" to decide a claim that was put to it, and then fail to resolve the claim on that basis.²⁶

3. Requests for Interpretation

25. In addition to its request for an additional decision, Afilias asks the Panel to provide an interpretation of several allegedly "ambiguous and vague points of substance and reasoning contained in the Final Decision".²⁷ According to Afilias, the precise meaning and scope of certain aspects of the Final Decision are required for any future resolution of the Dispute, and indeed also for

²³ Application, paras. 67-70.

²⁴ *Ibid*, paras. 18 and 71-84.

²⁵ *Ibid*, paras. 80-84.

²⁶ *Ibid*, paras. 19 and 85-89, quoting from para. 350 of the Final Decision.

²⁷ Application, paras. 90-114.

the pronouncement to be made by the Respondent's Board.²⁸ Afilias underscores that an IRP results in a precedent-setting decision which serves as the basis for the global Internet community to hold ICANN accountable. In that context, Afilias asks the Panel to provide interpretations of the Final 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.²⁹

26. The issues which, according to Afilias, require interpretation are the following:³⁰

- a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?³¹
- b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?³²
- c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?³³
- d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?³⁴
- e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?³⁵

²⁸ Application, para. 91.

²⁹ *Ibid*, paras. 90-94.

³⁰ *Ibid*, para. 94.

³¹ *Ibid*, paras. 95-99.

³² *Ibid*, paras. 100-103.

³³ *Ibid*, paras. 104-107.

³⁴ *Ibid*, paras. 108-111.

³⁵ *Ibid*, paras. 112-114.

27. It bears mentioning that some of the above-cited issues as to which Afiliias requests interpretation are further distilled in series of additional questions that Afiliias requests the Panel to address. For example, Afiliias' request for interpretation of the terms pronounce and pronouncement (issue a) above) includes the request that the Panel address the following questions "regarding the nature of a 'pronouncement'":

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

28. By way of further example, the last of the issues as to which Afiliias seeks interpretation of the Final Decision, relating to the standard of proof applied by the Panel (issue e) in paragraph 26 above), includes the request that:

... the Panel provide this interpretation regarding the following issues:

- a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afiliias' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?
- b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?
- c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?
- d) Whether the failure to disclose the "decision" from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?
- e) Whether the failure to "pronounce" on Afiliias' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

f) Whether proceeding toward delegation of .WEB to NDC without a “pronouncement” violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

g) Whether the disparate treatment of Afiliás violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?

h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?³⁶

29. Afiliás concludes the Application by deploring that the Panel, in its view, failed to address all of the claims presented to it for decision and resolution and to provide a sufficiently well-reasoned decision free of ambiguity as required by the Bylaws and good arbitral practice. The Final Decision, Afiliás complains, has seriously undermined the dispute resolution system upon which the global Internet community relies to hold ICANN accountable, and put the Board in an untenable position by failing to provide it with any guidance as to the considerations that should inform its “pronouncement”.³⁷

4. Request for Relief

30. By way of relief, Afiliás requests the Panel to issue:

... an Amended Final Decision:

- (1) Finally deciding and resolving in a well-reasoned manner Afiliás’ Rules Breach Claim, International Law Claim and Disparate Treatment Claim; and
- (2) Providing the interpretations as set out in [the section requesting interpretation of the Application].³⁸

B. Respondent’s Response to Afiliás’ Article 33 Application

1. Overview

31. In its Response to the Application (**Response**), ICANN submits that the Application is an abuse of Article 33 of the ICDR Rules. In spite of its title, which the Respondent characterizes as misleading, the Respondent contends that the Application does not seek an additional decision on any claim purportedly omitted from the Final Decision or an interpretation of any purported ambiguity in the Final Decision. According to the Respondent, the Application in reality seeks that the Panel reconsider and reverse its determination that ICANN, rather than the Panel, is charged with interpreting and applying the New gTLD Program Rules and resolving disputes among

³⁶ Application, para. 114.

³⁷ *Ibid*, paras. 115-123.

³⁸ *Ibid*, para. 124.

applicants. Requests for reconsideration, the Respondent contends, are not permitted by Article 33 of the ICDR Rules, nor by the EAA.³⁹

32. The Respondent argues that Article 33 provides for a limited exception to the *functus officio* doctrine and does not allow a party to seek reconsideration of the substance of a final award, nor offers a tribunal for a Panel to issue an amended award that conflicts with and supersedes a final award.⁴⁰ The *infra petita* doctrine, it is argued, does not apply to an application to the tribunal for an additional award, but rather to a challenge to the final award in court on the basis that the tribunal has failed to consider and decide all claims properly submitted to it.⁴¹ As for Afilias' requests for interpretation, the Respondent avers that they are based on a series of willful misreadings and distortions of the Final Decision.

2. Request for an Additional Decision

33. ICANN submits that the Panel resolved Afilias' Rules Breach Claim. According to ICANN, Afilias wrongly suggests that ICANN never argued that the Panel should not act as the decision-maker of first instance for the Rules Breach Claim. On the contrary, the Respondent submits, its principal defense to Afilias' Rules Breach Claim was that ICANN, not an IRP Panel, was the appropriate decision-maker.⁴²
34. ICANN underscores that the Guidebook and Auction Rules give it discretion with regard to the interpretation and application of the New gTLD Program Rules.⁴³ ICANN submits that the Panel unequivocally denied Afilias' request for a declaration that the Bylaws and Articles require that ICANN find NDC in breach of the New gTLD Program Rules, disqualify NDC and proceed to enter a Registry Agreement for .WEB with Afilias.⁴⁴ In ICANN's view, Afilias now seeks a different decision and is re-arguing its case.⁴⁵
35. ICANN contends that the Panel did not act *extra petita* in determining that it is for ICANN to pronounce in the first instance on the Rules Breach Claim, and that that determination cannot be revisited through an Article 33 application. In this regard, the Respondent avers that Afilias mischaracterizes the Panel's decision in order to attack it. By rejecting Afilias' request for a

³⁹ Response, paras. 1-2.

⁴⁰ *Ibid*, paras. 1 and 8-11.

⁴¹ *Ibid*, paras. 12-14.

⁴² *Ibid*, para. 19.

⁴³ *Ibid*, paras. 18-22.

⁴⁴ *Ibid*, para. 23.

⁴⁵ *Ibid*, paras. 24-26.

declaration that ICANN violated its Bylaws and Articles by not finding NDC in breach of the New gTLD Program Rules, and by not disqualifying NDC's application for .WEB, the Panel was acting within its authority under Article 4.3(o)(iii) of the Bylaws, as the authority to grant declaratory relief necessarily entails the authority to deny it.⁴⁶

36. With respect to the International Law Claim, ICANN avers that Afilias did not assert any discrete "international law claim", but rather sought an undifferentiated declaration "that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the [Guidebook], and violated international law."⁴⁷ ICANN argues that the Panel resolved this issue in two ways: (1) it found that ICANN violated its Bylaws by never determining whether NDC violated the New gTLD Program Rules, and (2) it rejected Afilias' claim that ICANN was subject to a competition mandate that compelled it to reject NDC's application.⁴⁸ According to ICANN, the Panel would not have had jurisdiction to adjudicate a freestanding international law claim had one in fact been presented by the Claimant.⁴⁹
37. ICANN further argues that while Afilias made various arguments based on international law, those added little to the plain terms of the Bylaws.⁵⁰ In ICANN's words, the International Law Claim "is just a repackaging of Afilias' Rules Breach Claim" and Afilias' "gripe" is that the Panel did not refer to international law in determining whether ICANN violated the Articles and Bylaws. ICANN opines that that complaint is misguided because the Panel did refer to international law and, even if the Panel had omitted any reference to international law, that would not be ground for an additional decision.⁵¹ ICANN states that the Panel granted Afilias' claim regarding the violation by ICANN of its Articles and Bylaws by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC, so that claim did not demand a more in-depth examination of international law.⁵² ICANN also contends that an additional decision addressing Afilias' international law argument is unnecessary and beyond the scope of the Panel's authority, since there is no "claim" that has not been dealt with.⁵³

⁴⁶ Response, paras. 27-36.

⁴⁷ *Ibid*, paras. 37-38, quoting from Afilias' Amended Request for IRP, para. 89(1).

⁴⁸ Response, para. 39.

⁴⁹ *Ibid*, paras. 40-41.

⁵⁰ *Ibid*, paras. 42-44.

⁵¹ *Ibid*, paras. 45-48.

⁵² *Ibid*, para. 49.

⁵³ *Ibid*, paras. 50-51.

38. ICANN likewise argues that the Claimant's Amended Request for IRP, Reply Memorial, and List of Phase II Issues do not state a "Disparate Treatment Claim", and only refer to disparate treatment in support of the Rules Breach Claim or competition claim.⁵⁴ ICANN argues that Afilias substantially expanded its "disparate treatment" arguments in its Post-Hearing Brief and its accompanying Revised Issues List, but (assuming those could be considered claims) that Afilias could not introduce new claims in its post-hearing submissions, after the evidentiary record had closed and when ICANN had no opportunity to respond.⁵⁵
39. In ICANN's submission, the Panel correctly found that the substance of Afilias' allegations of disparate treatment were considered in the analysis of Afilias' core claims. ICANN argues that Afilias cannot use its Article 33 Application to ask the Panel to reconsider its deliberate decision not to make additional findings with respect to the Claimant's allegations of disparate treatment.⁵⁶

3. Requests for Interpretation

40. ICANN notes at the outset that requests for interpretation should be granted only where an award is ambiguous in such a way that the parties may legitimately disagree as to their obligations under it.⁵⁷ ICANN argues that Afilias' requests for interpretation are based on improperly isolating particular words and phrases to create the appearance of ambiguity where none exists.⁵⁸ Moreover, it is contended that nearly all of the matters on which Afilias seeks further interpretation do not go to the dispositive part of the Final Decision and are therefore not appropriate subjects for interpretation under Article 33.⁵⁹
41. ICANN argues that there is no ambiguity in the Panel's use of the term "pronounce", which is used interchangeably in the Final Decision with "decide", "determine" or "resolve".⁶⁰ In its view, Afilias is misusing Article 33 to seek a further decision on a series of issues that have never been briefed by the Parties or put to the Panel, notably on the procedure the Board should follow in its consideration and resolution of Afilias' complaints against NDC. ICANN avers that the Panel has no jurisdiction to provide advice on such issues.⁶¹

⁵⁴ Response, paras. 52-53.

⁵⁵ *Ibid*, para. 54.

⁵⁶ *Ibid*, paras. 55-56.

⁵⁷ *Ibid*, paras. 57-60.

⁵⁸ *Ibid*, para. 61.

⁵⁹ *Ibid*, paras. 62-63.

⁶⁰ *Ibid*, paras. 64-66.

⁶¹ *Ibid*, paras. 67-68.

42. According to ICANN, Afiliás wrongly asserts that the Final Decision holds that, for all future IRP challenges, the action or inaction at issue must first be submitted to the Board for pronouncement before an IRP may be pursued.⁶² On the contrary, ICANN gives several examples of findings by the Panel, in Afiliás' favor, in respect of actions and inactions on which the Board never pronounced.⁶³ In ICANN's submission, what Afiliás is arguing is that the Panel reached the wrong conclusion or that its reasoning or analysis is insufficient, and that type of challenge is meritless in the context of an Article 33 application.⁶⁴
43. Turning to the request for interpretation concerning the law applied by the Panel, ICANN argues that the Panel addressed the governing law at Section I.H of the Final Decision, when stating that the "rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures," including the section of the Bylaws requiring ICANN "to carr[y] out its activities in accordance with relevant principles of international law and international conventions and applicable local law". According to ICANN, Afiliás wrongly asserts that the Panel determined that California law is the primary governing law for ICANN, whereas the Panel stated only that the Interim Supplementary Procedures, Articles and Bylaws are to be interpreted in accordance with California law in case of ambiguity.⁶⁵ With respect to Afiliás' contention that the Panel failed to consider its submissions inviting application of international law, ICANN notes that the Panel repeatedly stated in the Final Decision that ICANN must carry "out its activities in conformity with relevant principles of international law and international conventions."⁶⁶
44. ICANN argues that the Panel should reject the request that it set out in detail the basis on which it determined that ICANN has the knowledge, expertise, and experience to act as first-instance decision-maker for disputes among applicants under the New gTLD Program Rules, as this is not a proper subject for an additional award under Article 33 of the ICDR Rules.⁶⁷ In Respondent's submission, a request for interpretation cannot be used to seek revision, reformulation, or additional explanation for a given decision. In addition, ICANN contends that this determination by the Panel is correct and self-evident considering that ICANN created the New gTLD Program Rules and has ultimate responsibility for the program and for resolving disputes thereunder.⁶⁸

⁶² Response, para. 69.

⁶³ *Ibid*, para. 70.

⁶⁴ *Ibid*, paras. 71-73.

⁶⁵ *Ibid*, paras. 74-77.

⁶⁶ *Ibid*, paras. 78-79, referring to the Final Decision at paras. 28, 290 and 292.

⁶⁷ Response, paras. 80-81.

⁶⁸ *Ibid*, para. 82.

45. ICANN argues finally that the Panel set out the standard of proof in the Final Decision, namely the balance of probabilities, and applied that standard in the normal manner under which more startling propositions such as allegations of fraud require more cogent evidence.⁶⁹

4. Costs

46. ICANN claims that it is entitled to recover its costs and legal fees in responding to Afilias' Article 33 Application. ICANN contends that Afilias' application is abusive because it is unquestionably an improper use of Article 33, seeking as it does reconsideration of core elements of the Final Decision, and requesting that the Panel issue additional declarations and advisory opinions on a series of questions that were never put to the Panel during the course of the IRP.⁷⁰
47. ICANN also submits that the Application is frivolous since it has no sound basis and is based on a series of indefensible and willful misreadings of the Final Decision.⁷¹

5. Request for Relief

48. ICANN submits that Afilias' Article 33 Application should be denied in its entirety and that it as Respondent should be awarded its costs and legal fees incurred as a result of Afilias' Application, in the amount of US \$ 236,884.39, plus the Panel's fees to resolve the Application.⁷²

C. *Amici's* Submission on Afilias' Article 33 Application

1. Overview

49. The *Amici* aver that 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, the *Amici* argue, "Afilias is back again, seeking the same relief based on the same arguments."⁷³ The *Amici* state that while Afilias styled its demand as an application pursuant to Article 33, in reality Afilias seeks reconsideration of the Final Decision – a reconsideration that is improper and unauthorized by Article 33 or any other rule. In the *Amici's* submission, there can be no doubt that

⁶⁹ Response, paras. 83-87.

⁷⁰ *Ibid*, paras. 88-91.

⁷¹ *Ibid*, para. 92.

⁷² *Ibid*, paras. 93-94 and its Appendix B.

⁷³ *Amici's* Submission on Afilias' Article 33 Application (***Amici's* Submission**), para. 4.

the Application seeks reversal of the Panel's decision rejecting what Afiliias characterizes as its "core claims" in this IRP.

2. Request for an Additional Decision

50. The *Amici* submit that Afiliias' request for an additional decision with respect to the three (3) purported claims identified in the Application are unjustified and should be rejected. The *Amici* stress that an arbitral tribunal has wide discretion to determine whether a request for an additional decision is "justified".⁷⁴
51. According to the *Amici*, each of the "claims" asserted in the Application is in reality an argument rather than a claim, and is therefore not suitable for an additional decision pursuant to Article 33 of the ICDR Rules.⁷⁵ The *Amici* contend that, in each case, acceptance of Afiliias' additional argument or ground would require a reversal of the Final Decision with respect to the considered claim. In the *Amici's* submission, the only "claim" at issue in this IRP that the Panel was obligated to decide was whether ICANN breached its Articles and Bylaws. As for ICANN's impugned "actions or failures to act", these were not distinct claims but grounds or arguments on which that claim was based.⁷⁶
52. The *Amici* argue alternatively that, even if Afiliias' additional arguments or grounds were characterized as claims, the Panel sufficiently addressed each of them such that there still would be no basis for an additional decision.⁷⁷
53. The *Amici* set out the applicable standard required to be met for a tribunal to issue an additional decision under Article 33. For starters, it is impressed that, exactly as the Panel did in this case, a tribunal can avoid any ambiguity concerning the fact that it has resolved all claims put to it by recording in the *Dispositif* that it rejects all other claims and submissions.⁷⁸ The *Amici* then contend that requests for an additional decision are intended to cover only obvious cases of omission; that a tribunal may decide claims impliedly; and that additional decisions are unavailable where an arbitral tribunal intentionally has chosen not to address a claim.⁷⁹ The *Amici* also aver that requests for an additional decision are not intended to be used by an aggrieved party to reargue a

⁷⁴ *Amici's* Submission, paras. 21-23.

⁷⁵ *Ibid*, paras. 24-25.

⁷⁶ *Ibid*, paras. 26-29.

⁷⁷ *Ibid*, paras. 30-32.

⁷⁸ *Ibid*, para. 33.

⁷⁹ *Ibid*, paras. 34-36.

particular point.⁸⁰ The *Amici* argue as well that Afilias attempts to confuse the issues by conflating the standard for an additional decision with the scope of the Panel’s so-called “mandate”.⁸¹ Finally, the *Amici* say that Afilias is mistaken where it suggests that the Final Decision would be subject to set aside in the English courts on the ground that it is *infra petita*. On the contrary, it is argued that the standard to set aside an award as *infra petita* under the EAA is consistent with the high standard for an additional decision under Article 33 of the ICDR Rules and international arbitration practice.⁸²

54. Applying those principles to the case at hand, the *Amici* argue that, even if the Rules Breach Claim were a “claim”, it was sufficiently addressed in the Final Decision.⁸³ The *Amici* first note that the Panel having dismissed all of the Parties’ other claims in the *Dispositif*, that necessarily encompassed the Rules Breach Claim. They go on to argue that the scope and detail of Afilias’ argument itself demonstrate that the alleged omission of a decision on the Rules Breach Claim does not constitute an “obvious case of omission”. The *Amici* also submit that the Panel impliedly rejected the Rules Breach Claim by denying the affirmative relief that Afilias had been seeking and by concluding instead that ICANN must pronounce in the first instance as to the propriety of NDC’s alleged conduct.⁸⁴ In this regard, the *Amici* reject the Claimant’s assertion that the Panel never reached the issue of the remedies requested by the Claimant.
55. In the submission of the *Amici*, the route by which the Panel approached the issues in the IRP rendered an express decision on the so-called Rules Breach Claim moot. That is so because the Panel found that it did not have the authority to decide what Afilias characterizes as the threshold issue of the Rules Breach Claim, namely, whether the DAA and NDC’s other conduct violated the New gTLD Program Rules. Likewise, the Claimant’s contention that the Respondent’s “failure” to disqualify NDC or other purported inaction violated the Articles and Bylaws is a false premise in so far as the Panel determined that it was reasonable for the Board to defer consideration of the complaints that had been raised in relation to NDC’s application and its auction bids.
56. The *Amici* also say that Afilias used its request concerning the Rules Breach Claim to dispute the soundness of the Panel’s reasoning and findings, and to reargue its case in the underlying IRP.⁸⁵ The *Amici* argue that Afilias’ complaints about the Panel’s reasoning are unfounded and that there

⁸⁰ *Amici’s* Submission, para. 37.

⁸¹ *Ibid*, paras. 38-39.

⁸² *Ibid*, paras. 40-41.

⁸³ *Ibid*, para. 43.

⁸⁴ *Ibid*, paras. 44-47.

⁸⁵ *Ibid*, paras. 47-51.

was ample IRP precedent for the Panel’s decision that ICANN must indeed pronounce in the first instance as to whether there has been a violation of the New gTLD Program Rules.⁸⁶

57. Turning to the International Law Claim, the *Amici* reiterate the submission that this is an argument – or a reason in support of an argument – rather than a “claim”, and that, in any event, it was sufficiently addressed in the Final Decision in so far as the same facts and circumstances that underpin the Rules Breach Claim form the basis for the International Law Claim.⁸⁷ The *Amici* add that the International Law Claim added nothing to Afiliás’ claim that ICANN breached the Articles and Bylaws by violating commitments in those instruments because the principles of international law invoked by Afiliás are equally reflected in the Bylaws.⁸⁸ In addition, the *Amici* aver that since the International Law Claim relates to the same request for affirmative relief that Afiliás sought in connection with its Rules Breach Claim, the rejection of such request for relief in the Final Decision impliedly rejected the International Law Claim associated with this request.⁸⁹
58. As for the Disparate Treatment Claim, the *Amici* submit that, even if it were a “claim”, it was sufficiently addressed in the Final Decision. The *Amici* note that the Panel found that ICANN breached its commitment to apply documented policies objectively and fairly.⁹⁰ According to the *Amici*, the Panel did not decline to decide the Disparate Treatment Claim, but rather declined to add additional findings of fact because the claim was already upheld based on findings of fact that the Panel had made in connection with Afiliás’ “core claims”.⁹¹
59. In any event, the *Amici* describe as mistaken the assertion that it is not open to an IRP panel to determine that it is not necessary to decide a claim or issue, and cites another IRP panel that has adopted this approach.

3. Requests for Interpretation

60. The *Amici* submit that the Claimant’s requests for interpretation are unjustified, misuse Article 33 for improper purposes, and should be summarily dismissed.
61. The *Amici* say that Afiliás seeks to transform the purpose and narrow interpretation process contemplated by Article 33 into an *ex-post* review of the Final Decision to effectively appeal that

⁸⁶ *Amici’s* Submission, paras. 52-53.

⁸⁷ *Ibid*, paras. 56-58.

⁸⁸ *Ibid*, paras. 59-66.

⁸⁹ *Ibid*, para. 67.

⁹⁰ *Ibid*, paras. 69-70.

⁹¹ *Ibid*, paras. 71-74.

decision, delay resolution of the .WEB gTLD and influence ICANN's future actions. According to the *Amici*, interpretation of an arbitral award is only really helpful where the ruling is so ambiguous that the parties could legitimately disagree as to its meaning.⁹²

62. Turning to Afiliás' specific requests for interpretation, the *Amici* argue that it is not necessary to interpret the term "pronounce". In their submission, there is no ambiguity as to the meaning of the term "pronounce", which, in context, is a transitive verb meaning to declare officially or authoritatively.⁹³ The *Amici* further contend that Afiliás' requests regarding (1) the basis for the Panel's use of the term "pronounce" and (2) the process, form and substance of an adequate pronouncement would exceed the Panel's authority under Article 33. The *Amici* insist that Article 33 cannot be used to seek an explanation of the factual basis for the Panel's determinations or reasoning.⁹⁴ According to the *Amici*, Afiliás' request that the Panel state whether the Board must always "pronounce" on Staff's action or inaction is also not a proper request for interpretation since it concerns ICANN's future obligations and is therefore beyond the Panel's jurisdiction.⁹⁵
63. The *Amici* argue that Article 33 does not permit Afiliás to request a detailed explanation regarding the law the Panel applied in reviewing and reaching its conclusions.⁹⁶ Moreover, the real complaints advanced under this rubric are that the Panel's application of the law and reasoning was erroneous, not, as it must under Article 33, that there is ambiguity.
64. According to the *Amici*, Afiliás' request regarding ICANN's knowledge, expertise, and experience is also improper because a party cannot use interpretation requests to ascertain which precise documents and other evidence the tribunal relied on in support of its findings. The *Amici* state that such evidence was presented in pre-hearing submissions and at the IRP hearing itself. In the *Amici*'s submission, this is another attempt to argue that the Panel's conclusion is wrong.⁹⁷
65. The *Amici* submit that Afiliás' request regarding the standard of proof is similarly beyond the scope of Article 33 and should also be denied. According to the *Amici*, the Panel unambiguously applied the principle that, in international arbitration, the standard is the balance of probabilities and that allegations of dishonesty will attract close scrutiny in order to ensure that that standard is met.

⁹² *Amici*'s Submission, paras. 76-81.

⁹³ *Ibid*, paras. 83-85.

⁹⁴ *Ibid*, paras. 86-90.

⁹⁵ *Ibid*, paras. 91-92.

⁹⁶ *Ibid*, paras. 93-94.

⁹⁷ *Ibid*, paras. 95-98.

The *Amici* add that, in any event, that question would not affect how the award should be carried out and that Afiliias impermissibly asks the Panel to correct the substance of its decision.⁹⁸

66. Finally, the *Amici* aver that the Final Decision is fully consistent with the purposes of the IRP and that, in any event, those purposes have no relevance to the narrow issues permitted to be addressed by an Article 33 Application. According to the *Amici*, Afiliias' "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 limits on its jurisdiction set forth in the Bylaws.⁹⁹
67. The *Amici* reject as ill-founded the contention that the Panel did not follow IRP precedents by finding that it is for ICANN to pronounce first on Afiliias' objections regarding the .WEB auction, and point to a number of IRP decisions declining to go beyond declaring whether ICANN's action violated the Articles or Bylaws.
68. In sum, the *Amici* say that the Panel's decision not to issue a ruling on the underlying dispute and instead to defer to ICANN to first pronounce on the dispute affirms, rather than undermines, the IRP process and policies set forth in the Bylaws and confirmed in prior IRP decisions.¹⁰⁰

D. Afiliias' Reply in Support of the Application

69. In its 70-page Reply in support of the Application (**Afiliias' Reply**), Afiliias revisits each of the grounds set out in the Application and takes issue with the submissions of the Respondent and *Amici* concerning the scope of Article 33 of the ICDR Rules.

1. Framework for Interpreting Article 33

70. According to Afiliias, ICANN and the *Amici* urge the Panel to adopt an extremely narrow interpretation of Article 33. Afiliias argues that based on the text and purpose of Article 33, the applicable provisions of the EAA, and the Parties' dispute resolution agreement, any omission to decide a properly submitted claim is grounds for an additional award.¹⁰¹
71. Regarding the Parties' dispute resolution agreement included in the Guidebook, Afiliias argues that ICANN's decision to delegate .WEB to NDC was a "final decision", which decision would have

⁹⁸ *Amici's* Submission, paras. 99-104.

⁹⁹ *Ibid*, paras. 105-115.

¹⁰⁰ *Ibid*, p. 58 (unnumbered paragraph).

¹⁰¹ Afiliias' Reply, paras. 2 and 10-18.

taken effect and been irreversible had Afilias not commenced a CEP.¹⁰² Afilias adds that Article 33 must be interpreted and given effect based on the IRP's dispute resolution system or framework – and not in the abstract with reference to general arbitral practice and scholarly commentary.¹⁰³ Afilias also denies that it is asking the Panel to “reverse” or “reconsider” any dispute that was resolved by the Panel consistent with its mandate.¹⁰⁴

2. Request for an Additional Decision

72. In relation to the so-called Rules Breach Claim, Afilias argues that ICANN's failure to conclude that NDC breached the Auction Rules, and to disqualify NDC's application were “covered actions”, and that ICANN was required to take those actions to satisfy its obligation to make decisions by applying its documented policies neutrally, objectively and fairly.¹⁰⁵ Afilias argues further that while the Panel denied the “affirmative” or “binding declaratory” relief that it was seeking in relation to the Rules Breach Claim, it omitted to resolve Afilias' requests for declaratory relief on this Rules Breach Claim, *i.e.*, that ICANN was required to enforce the New gTLD Program Rules as specified by Afilias, and that ICANN's failure to do so violated the Articles, Bylaws, and New gTLD Program Rules.¹⁰⁶
73. Afilias rejects the notion that the Panel resolved the claim for declaratory relief on the Rules Breach Claim on jurisdictional grounds, as submitted by the Respondent and the *Amici*. However, it adds that if that is indeed what the Panel intended, then the Panel must say so in a well-reasoned decision consistent with the Bylaws.¹⁰⁷
74. Afilias argues that ICANN's jurisdictional objection based on the Panel's alleged lack of jurisdiction to resolve disputes under the New gTLD Program Rules is untimely and incorrect.¹⁰⁸ Afilias further avers that if the Panel resolved the Rules Breach Claim on jurisdictional grounds, then Afilias has been deprived of due process and its right to be heard because ICANN never made any jurisdictional objection to Afilias' claim for declaratory relief in connection with the New gTLD Program Rules.¹⁰⁹ Besides, still in Afilias' submission, there are no legal or factual bases on which

¹⁰² Afilias' Reply, paras. 19-20.

¹⁰³ *Ibid*, paras. 20-28.

¹⁰⁴ *Ibid*, para. 31.

¹⁰⁵ *Ibid*, para. 32.

¹⁰⁶ *Ibid*, para. 34.

¹⁰⁷ *Ibid*, para. 35.

¹⁰⁸ *Ibid*, para. 36.

¹⁰⁹ *Ibid*, paras. 38-43.

the Panel could have resolved the claim for lack of jurisdiction.¹¹⁰ Afilias takes issue with ICANN and the *Amici's* position that the Board functions as a first instance decision-maker on all matters arising from the New gTLD Program Rules.¹¹¹ Afilias insists that the Panel did not state in the Final Decision that it did not have jurisdiction to determine the Rules Breach Claim, and that in any event such conclusion could not be reconciled with other findings of fact and rulings made in the Final Decision.¹¹²

75. Afilias argues that the Panel's conclusion that ICANN violated its Articles and Bylaws by failing to "pronounce" on Afilias' complaint constituted a declaration that Afilias had never requested.¹¹³ Afilias considers that the Panel's recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as [ICANN's] Board has considered the opinion of the Panel in this Final Decision" is illogical and inconsistent with the Panel's conclusion regarding ICANN's persistent refusal to take any position on Afilias' complaints.¹¹⁴
76. Afilias concludes this section of its Reply by clarifying that it is not seeking an order that ICANN conclude that NDC violated the New gTLD Program Rules, and that it should disqualify NDC's application on that basis, but rather an additional decision that "declares on Afilias' requested declaratory relief in connection to the Rules Breach Claim", and recommendations with respect to that declaration.¹¹⁵
77. With respect to the International Law Claim, Afilias argues that the Panel acknowledged the claim but did not address it, whether as a matter of jurisdiction or on the merits.¹¹⁶ According to Afilias, a finding in its favor on the International Law Claim would not require the Panel to overturn the decisions that it has already rendered; it would rather necessitate that the Panel declare that ICANN failed to interpret and apply the New gTLD Program Rules in accordance with the international principle of good faith.¹¹⁷ That declaration is especially important if the Panel declines to make an additional decision on Afilias' Rules Breach Claim, and simply remands the core claims to the Respondent's Board with no further guidance.

¹¹⁰ Afilias' Reply, para. 44.

¹¹¹ *Ibid*, paras. 45-48.

¹¹² *Ibid*, paras. 49-51.

¹¹³ *Ibid*, paras. 52-54.

¹¹⁴ *Ibid*, paras. 55-57.

¹¹⁵ *Ibid*, para. 58.

¹¹⁶ *Ibid*, para. 59.

¹¹⁷ *Ibid*, para. 61.

78. Afilias urges that it presented a distinct International Law Claim for the Panel's determination and that there is no mention of the claim in the body of the Panel's reasoning nor any reference to it in the Final Decision's *Dispositif*.¹¹⁸ In Annex A of the Reply, Afilias sets out the various instances where it allegedly made clear that it was presenting an independent claim based on an alleged breach of international law. Afilias argues that it explicitly took the position that international law is an independent source of obligation and basis for decision.¹¹⁹
79. According to Afilias, its International Law Claim is within the Panel's jurisdiction. In this regard, Afilias avers that the Bylaws require ICANN to carry out its activities in conformity with relevant principles of international law in addition to its obligations under the Articles and Bylaws.¹²⁰ In Afilias' submission, ICANN is wrong to argue that the Panel sufficiently referred to the International Law Claim in the part of the Final Decision preceding the *Dispositif*.¹²¹ Afilias argues that the Panel did not implicitly resolve Afilias' International Law Claim in its decision either, as the Panel announced that the law applicable to the "quasi-contractual documents of ICANN" was California law and did not mention international law except in the section entitled "Applicable Law".¹²²
80. Turning to the Disparate Treatment Claim, Afilias argues that there is no debate that this claim was not decided since the Panel explicitly stated that it did "not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims".¹²³ Afilias rejects the notion that its Disparate Treatment Claim was sufficiently dealt with through Afilias' core claims. According to Afilias, the Panel's factual findings in dealing with its core claims are more than sufficient for the Panel to conclude that Afilias was treated disparately, and what is lacking is a decision to that effect and a declaration in the Final Decision's *Dispositif*.¹²⁴
81. Afilias also rejects ICANN and the *Amici's* assertion that any resolution now of its allegedly unresolved claims would in some way be inconsistent with the *Dispositif* in the Decision. In this respect, Afilias denies that it is seeking "reconsideration", "revocation" or "reversal" of the Final Decision on the claims that were decided and contends that the Panel would not need to alter a

¹¹⁸ Afilias' Reply, paras. 63-64.

¹¹⁹ *Ibid*, paras. 65-68.

¹²⁰ *Ibid*, paras. 69-71.

¹²¹ *Ibid*, paras. 72-76.

¹²² *Ibid*, paras. 77-83.

¹²³ *Ibid*, paras. 84-87.

¹²⁴ *Ibid*, paras. 88-89.

single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each of these claims.¹²⁵

3. Requests for Interpretation

82. Afilias states that it requests interpretation of the Final Decision “simply because there are core elements of the Decision that struck [its counsel] as simply inconsistent, incongruous and hard to follow”.¹²⁶ Afilias contends that Article 33 of the ICDR Rules expressly provides the Parties with a proper method to request formally that the Panel clarify its decision.¹²⁷ According to Afilias, both ICANN and the *Amici* reinforce the Final Decision's ambiguity and thus the need for the requested interpretations.¹²⁸ In the Claimant's submission, those clarifications would go a long way towards minimizing any future unfair or discriminatory treatment of Afilias by ICANN in the context of ICANN's implementation of the Panel's Final Decision.¹²⁹
83. Afilias argues that interpretation is rarely granted simply because it is rarely sought. Afilias stresses that this IRP being the first to be conducted under ICANN's new enhanced accountability rules, it is certainly one that falls within the purview of the rare instances where interpretation is warranted.¹³⁰
84. Afilias argues that its requested interpretation of the term “pronounce” is necessary so that Afilias and future IRP applicants can understand whether there is a jurisdictional pre-requisite requiring some form of formal Board pronouncement before an IRP may be commenced; what form such a pronouncement must take; and what the interrelationship is between the requirement of a pronouncement and the fact that the Bylaws provide a clear jurisdictional basis for an IRP based on Board or Staff inaction and action.¹³¹ What Afilias characterizes as a disagreement between ICANN and the *Amici* on the meaning of the term “pronounce” shows that the *Dispositif* is vague and ambiguous.¹³² Afilias contends that it is critical that the Panel interpret this holding for the effective execution of the Final Decision in this case and beyond.¹³³

¹²⁵ Afilias' Reply, paras. 91-94 and Annex B thereto.

¹²⁶ *Ibid*, para. 96.

¹²⁷ *Ibid*, para. 97.

¹²⁸ *Ibid*, paras. 98 and 102-104.

¹²⁹ *Ibid*, para. 99.

¹³⁰ *Ibid*, paras. 100-104.

¹³¹ *Ibid*, para. 106.

¹³² *Ibid*, paras. 107-110.

¹³³ *Ibid*, paras. 111-114.

85. According to Afilias, without the requested clarification on ICANN's knowledge, expertise and experience, Afilias, ICANN and the *Amici* will be unable to determine when a future panel addressing .WEB (or other future claims in an IRP) might decline to decide claims otherwise properly before it.¹³⁴ In Afilias' view, it is puzzling that the Panel afforded deference to ICANN based on the latter's knowledge, expertise and experience, considering that the Panel is required to resolve Disputes consistent with the Articles and Bylaws, in the context of prior IRP decisions, and that prior IRP decisions have consistently rejected the application of a deferential standard when reviewing ICANN's decisions.¹³⁵
86. With respect to the requested clarification of the applicable law, Afilias contends that it is necessary for the effective execution of the Final Decision since the applicable law determines the content of ICANN's legal obligations.¹³⁶
87. Afilias argues that an interpretation of the standard of proof, including precisely where the Panel applied a heightened standard, is critical to the effective execution of the Decision since the standard applied by the Panel will necessarily guide any analysis performed by the Board and any future IRP panels.¹³⁷
88. According to Afilias, fairness and due process also require the Panel to interpret and clarify its decision. The Panel's decision to give the Board a "second chance" to consider and pronounce upon NDC's conduct and the DAA's compliance with the New gTLD Program Rules, without providing any guidance on important issues such as those as to which an interpretation is requested, gives ICANN a "free hand". Afilias avers that ICANN's hands are by no means clean and that it "should not be allowed to use the Panel's opaque reasoning to wash them clean".¹³⁸

4. Costs

89. Afilias accepts that the Panel has, in principle, the power to allocate the costs of the Application as between the Parties.¹³⁹ However, Afilias submits that ICANN's costs claim is without merit because even if Afilias does not prevail (in whole or in part), the Respondent is not entitled to its costs since

¹³⁴ Afilias' Reply, paras. 115-117.

¹³⁵ *Ibid*, paras. 118-119.

¹³⁶ *Ibid*, paras. 120-123.

¹³⁷ *Ibid*, paras. 124-126.

¹³⁸ *Ibid*, paras. 127-129.

¹³⁹ *Ibid*, para. 131.

the Application cannot be said to be frivolous or abusive as these terms have been defined and applied in the Final Decision.¹⁴⁰

IV. ANALYSIS

90. As the Claimant correctly points out at the outset of its Reply, the Panel must first decide the scope of Article 33 of the ICDR Rules.¹⁴¹ This is so as a matter of logic and in view of the diametrically opposed positions taken by the Claimant and the Respondent on this question, whether it be in regard to the Claimant's request for an additional decision or its requests for interpretation.

91. Having identified the applicable standards to a request for an additional decision and a request for interpretation, the Panel will turn to considering, first, the request for an additional decision in respect of each of the three (3) claims the Panel is said to have failed to decide or resolve; and second, the various requests for interpretation of the Final Decision.

A. Article 33 of the ICDR Rules

1. Overview

92. Article 33 of the ICDR Rules reads as follows:

Article 33: Interpretation and Correction of Award

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

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

3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

93. It is generally accepted that the opportunity given to an arbitral tribunal to correct or interpret an award, and to make an additional award on claims presented but omitted from the award, is a

¹⁴⁰ Afiliias' Reply, paras. 130-138.

¹⁴¹ *Ibid*, para. 2.

narrow exception to the basic rule of finality of awards, and the principle that once an arbitral tribunal has issued a final award it is “*functus officio*”.¹⁴² To quote from a leading treatise:

There are strong policies counseling against alteration of an award after it has been made. One of the most fundamental purposes of the arbitral process is to obtain a speedy, final resolution of the parties’ disputes, without the costs and delays of litigation. Further, as discussed below, most national legal systems provide that an arbitral tribunal is “*functus officio*” once it has made its award. This again reflects the powerful interest in the finality of awards, free from continuing dispute about their correctness, completeness, or meaning. A liberal approach to “corrections” or “interpretations” is in obvious tension with these policies.¹⁴³

94. It is noted in this same treatise that while the EAA does not expressly provide that the issuance of a final award terminates the arbitral tribunal’s mandate, the *functus officio* doctrine is “well-settled in England as a common law rule.”¹⁴⁴
95. It follows from the foregoing that unless a request for correction, interpretation or for an additional award meets the conditions laid out in Article 33 of the ICDR Rules, an arbitral tribunal has no authority to reconsider, supplement or vary a final award. The same is true of the Panel’s Final Decision which, under English law and pursuant to the Respondent’s Bylaws, is final and binding.¹⁴⁵ As noted by the Claimant in its Reply, the Parties agree that the “final decision” of an IRP panel under the Respondent’s Articles, Bylaws and Interim Procedures is the same as an “award” under the New York Convention and the EAA.¹⁴⁶

2. Applicable Standard to a Request for an Additional Award

96. Article 33 of the ICDR Rules sets out explicitly the basic conditions that must be met for a party to obtain an additional award from an arbitral tribunal. The request must first identify “claims, counterclaims or setoffs presented but omitted from the award”; second, the moving party must persuade the tribunal that the request for an additional award is “justified”.
97. Section 57(3) of the EAA provides that an arbitral tribunal may “make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award”. In the context of Section 57(3) of the EAA, the English courts have held that “the terms of s 57(3)(b) are apt to refer to a head of claim for damages or some other

¹⁴² David D. Caron and Lee M. Caplan, “Part VI The Award, Ch. Post-Award Proceedings” in *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2013, p. 802 [Caron].

¹⁴³ Gary B. Born, “Chapter 24: Correction, Interpretation and Supplementation of International Arbitral Awards” *International Commercial Arbitration*, 3rd ed., Kluwer Law International, 2021, p. 3370 [Born].

¹⁴⁴ *Ibid*, p. 3378.

¹⁴⁵ See Bylaws, Section 4.3(x).

¹⁴⁶ Afiliias’ Reply, fn. 4.

remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims".¹⁴⁷

98. A similar distinction was drawn in respect of the word "issues" as used in Section 68(2)(d) of the EAA, which provides that an award may be challenged for "serious irregularity" in the event of a "failure by the tribunal to deal with all the issues that were put to it", where such failure "has caused or will cause substantial injustice to the applicant". In interpreting the word "issues" as used in that provision, the English courts have observed:

(ii) There is a distinction to be drawn between "issues" on the one hand and "arguments", "points", "lines of reasoning" or "steps" in an argument, although it can be difficult to decide quite where the line demarcating issues from arguments falls. [...]

(iii) While there is no expressed statutory requirement that the Section 68(2)(d) issue must be "essential", "key" or "crucial", a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with [...].

(vi) 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 [...]; it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.

(vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length [...].

(viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue [...]. A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it [...].

(ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences [...]. The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) [...].

(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise [...]. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues [...].¹⁴⁸

99. It follows from the foregoing that a request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim but rather with arguments or grounds in support of a claim.¹⁴⁹

¹⁴⁷ *Torch Offshore LLC v. Cable Shipping Inc.*, [2004] EWHC (Comm) 787, para. 27 (Eng.) [emphasis added].

¹⁴⁸ *Symbion Power*, [2017] EWHC (TCC) 348 (Eng.), para. 18, quoting *Sec'y of State for the Home Dep't v. Raytheon Sys. Ltd.*, [2014] EWHC (TCC) 4375 (Eng.), para. 33.

¹⁴⁹ The *Amici* cite an article highlighting the distinction between a "claim" and a "ground for relief put forward in support of a claim", in which the author notes that "[g]rounds [...]" are the reasons forming the basis of a claim". Klaus Reichert, "Prayers for Relief – The Focus for Organization" in *Evolution and Adaptation: The Future of International Arbitration*, Jean Engelmayr Kalicki and Mohamed Abdel Raouf (eds.), Kluwer Law International, 2019, p. 717.

100. Turning to the requirement that the claim subject to the application for an additional award has been “omitted from the award”, Gary B. Born observes in the above-quoted treatise:

The mere fact that an arbitral tribunal has not expressly addressed a particular claim does not automatically require issuance of an additional award: a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief (although the better practice is clearly to address issues explicitly and although the failure to do so may give rise to claims that the award is, in some respects, unreasoned).¹⁵⁰

101. It is also generally accepted that requests for an additional award are not available to revisit a tribunal’s decision deliberately not to address a particular claim or issue, for example because it considers it unnecessary to do so in light of its decisions on other issues. In the words of the late Professor David D. Caron, when commenting on deliberate omissions to address a claim in the context of Article 39 of the UNCITRAL Rules:¹⁵¹

Article 39 obviously has 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 award. Nevertheless, to avoid any misunderstandings, it is good practice for an arbitral tribunal to document in the award the disposition of each of the parties’ respective claims, no matter how small or inconsequential their bearing is on the outcome of the case.¹⁵²

102. Turning to the second requirement of Article 33 of the ICDR Rules for a party to obtain an additional award, it seems to be common ground between the Parties that it is for the arbitral tribunal, in its discretion, to decide whether a request for an additional award is “justified” within the meaning of Article 33.

103. In its discussion of the legal standard applicable to a request for an additional award under English law and pursuant to Article 33 of the ICDR Rules, the Claimant submits that “any omission to decide a properly submitted claim – whether deliberate, inadvertent, or otherwise – is grounds for an additional award.”¹⁵³ In light of the text of Article 33 and the authorities canvassed above, the Panel finds this to be an overly broad expression of the standard to be met by an applicant for an additional award, and must therefore reject it.

¹⁵⁰ Born, *supra* note 143, p. 3407.

¹⁵¹ Article 39 of the 2010 UNCITRAL Rules reads as follows:

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

¹⁵² Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

¹⁵³ Application, para. 8. See also Afiliias’ Reply, para. 11.

3. Applicable Standard to a Request for Interpretation of an Award

104. For a request to interpret an award to be “justified”, the moving party must demonstrate “that the award is ambiguous and requires clarification for its effective execution”.¹⁵⁴ It is also well accepted that a request for interpretation cannot be used to invite reconsideration of an award, or to challenge a tribunal’s reasoning:

- The power to issue an interpretation does not “enable the arbitrator to change his mind on any matter which has been decided by the award, and attempts to use the section for this purpose should be firmly resisted.”¹⁵⁵
- It is well settled that such a request is limited to an interpretation of the award in the form of clarification; and that it cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award.¹⁵⁶
- A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions.¹⁵⁷
- Tribunals should reject any request which goes beyond the interpretation of the award; provisions in arbitration rules for the interpretation of awards are not meant to empower the tribunal to change the substance of their ruling.¹⁵⁸

105. As was succinctly put in the decision of an ICC tribunal:

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.¹⁵⁹

106. In support of its requests for interpretation, the Claimant contends that Article 33 of the ICDR Rules is “a vehicle for one or both parties to secure clarification of the award where necessary”, including regarding “its exact meaning and scope”; and that this mechanism “is to provide clarification of the award by *resolving any ambiguity and vagueness in its terms*”.¹⁶⁰ Such a formulation of the standard to request interpretation omits mention of the need to safeguard against indirect requests for reconsideration or challenges of the tribunal’s reasoning presented under the guise of a request for

¹⁵⁴ Born, *supra* note 143, p. 3401.

¹⁵⁵ *Al Hadha Trading Co. v. Tradigrain S.A.*, [2002] Lloyd’s Law Reports 512, para. 66, quoting *Mustill & Boyd on Commercial Arbitration*, 2nd ed., Companion Volume 2001, p. 341. See also Born, *supra* note 143, p. 3405 (“In practice, requests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award.”); and Julian David Mathew Lew, Loukas Mistelis, *et al.*, “Chapter 24 Arbitration Award” in *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 658 [Lew] (“Interpretation of an award is justified only when the ruling, rather than the discussion of facts and arguments, is expressed in vague terms or where there is ambiguity as to how the award should be executed.”)

¹⁵⁶ *Methanex Corp. v. United States*, UNCITRAL, Letter to Parties from Tribunal ¶ 2, 25 September 2002.

¹⁵⁷ Born, *supra* note 143, p. 3405.

¹⁵⁸ Lew, *supra* note 155, p. 659, § 24-97.

¹⁵⁹ *Procedural Order of 6 January 2003 in ICC Case 11451 (Extract)*, in ICC, *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003-2004)*, pp. 19 (2010).

¹⁶⁰ Application, para. 92 [emphasis in the original].

interpretation. As noted below, it is altogether clear that the Claimant is not merely seeking “clarification” of the Final Decision, but rather a reversal of its key findings and conclusions.

107. Having identified the standards applicable, respectively, to a request for an additional award and a request for interpretation, the Panel turns to considering the various requests set out in the Application.

B. Afilias’ Request for an Additional Decision

108. Three (3) claims are said to have been presented by the Claimant but omitted by the Panel in the Final Decision. The Panel addresses each of them in turn.

1. The “Rules Breach Claim”

109. As noted already, the Claimant defines the “Rules Breach Claim” as:

...the [...] specifically pled Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC’s application, and/or (b) not declaring NDC’s bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder [...].¹⁶¹

110. The Claimant avers that in omitting to decide Afilias’ claim that ICANN breached its Articles and Bylaws through its *inaction* – and instead referring the claim back to the ICANN Board to “pronounce” on it “in the first instance” – the Panel failed to resolve that specific claim, as required by Article 4.3(g) of the Bylaws, and thus acted *infra petita*.

111. The Claimant argues that it had sought two (2) separate types of relief with respect to the “Rules Breach Claim”: first, “declaratory relief”; and second, “affirmative” or “binding declaratory relief” (also referred to by the Claimant and the Respondent as “injunctive relief”, a terminology which the Panel adopts in this decision to avoid confusion with the first “type” of relief).¹⁶² According to the Claimant, while the Panel denied the request for injunctive relief, the Panel omitted to resolve Afilias’ request for declaratory relief on the so-called Rules Breach Claim. The Claimant submits:

The Panel’s denial of Afilias’ requested injunctive relief did not and could not encompass Afilias’ requested declaratory relief. The Panel thus left Afilias’ principal claim undecided – even though it had been extensively arbitrated by Afilias, ICANN, and the Amici, and submitted to the Panel for resolution.¹⁶³

112. With respect, the Panel finds this reasoning to be mistaken and based on false premises.

¹⁶¹ Application, para. 16; see also para. 4(1). Covered Actions is defined at Sec. 4.3(b)(ii) of the Bylaws 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.”

¹⁶² Application, para. 68 (“Afilias sought both declaratory relief and affirmative declaratory relief (what ICANN more accurately called ‘injunctive’ relief) for its Rules Breach Claim in the IRP.”); Afilias’ Reply, para. 34.

¹⁶³ Afilias’ Reply, para. 34.

113. The Panel recalls that the Claimant requested the following relief in its Amended Request for IRP:

89. Reserving its rights to amend the relief requested below, inter alia, to reflect document production and further witness evidence, Afilias respectfully requests the IRP Panel to issue a binding Declaration:

- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
- (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
- (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
- (4) specifying the bid price to be paid by Afilias;
- (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC;
- (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
- (7) granting such other relief as the Panel may consider appropriate in the circumstances.¹⁶⁴

114. In its Post-hearing Brief, the Claimant articulated its request for declaratory relief as follows:

238. As an initial matter, ICANN agrees that "declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority." Thus the Panel can indisputably declare that ICANN has breached:

- Sections 1.2(a)(v), 1.2(c) of the Bylaws by failing to reject NDC's application, and/or disqualify its bids, and/or deem it ineligible to execute a registry agreement because NDC violated the following sections of the New gTLD Program Rules: Sections 1 and 10 of Module 6, Section 1.2.7 of Module 1, and Sections 4.3.1(5) and 4.3.1(7) of Module 4 of the AGB, as well as Rules 12, 13, 32 of the Auction Rules;
- Sections 1.2(a)(v) and 2.3 of the Bylaws by the arbitrary, capricious, disparate, and discriminatory manner in which it treated Afilias;
- Article III of ICANN's Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws by failing to act transparently to the maximum extent feasible;
- Article III of ICANN's Articles of Incorporation and Sections 1.2(a) and 1.2(b)(iv) of the Bylaws by failing to act in accordance with its competition mandate;
- Sections 1.2(a), 1.1(a)(i), 1.2(a)(iv), 3.1, 3.6(a)(i)-(ii), 4.3(n)(i), and 4.3(n)(ii) of the Bylaws by adopting Rule 7 of the Interim Supplemental Procedures for IRP;
- Article III of ICANN's Articles of Incorporation and Sections 1.2, 1.2(a), 1.2(c) of the Bylaws by failing to conduct itself in accordance with relevant principles of international law, specifically the obligation of good faith.¹⁶⁵

115. As for the Claimant's request for injunctive relief, it was set out in the immediately following paragraphs of the Claimant's Post-Hearing Brief:

¹⁶⁴ Amended Request for IRP, para. 89.

¹⁶⁵ Claimant's PHB, para. 238.

239. In light of the foregoing declarations, the Panel should also grant Afiliás' requested injunctive remedies as well as its request for costs (as set forth in Afiliás' separate submission on costs filed herewith). Such remedies are entirely within the Panel's jurisdiction and are necessary to "[e]nsure that ICANN ... complies with its Articles of Incorporation and Bylaws" and to achieve a "binding, final resolution[]" of this dispute that is "consistent with international arbitration norms" and that is "enforceable in any court with proper jurisdiction."

240. Specifically, as injunctive relief, in addition to granting such other relief as the Panel considers appropriate in the circumstances of this case, the Panel should order and recommend that ICANN:

- Reject NDC's application for the .WEB gTLD;
- Disqualify NDC's bids at the ICANN auction for the .WEB gTLD;
- Deem NDC ineligible to execute a registry agreement for the .WEB gTLD;
- Offer the registry rights to the .WEB gTLD to Afiliás, as the next highest bidder in the ICANN auction;
- Set the bid price to be paid by Afiliás for the .WEB gTLD at USD 71.9 million;
- Pay Afiliás' fees and costs as set out in Afiliás' accompanying costs submission¹⁶⁶.

116. In paragraph 254 of the Final Decision, the Panel described the Claimant's principal claims in the IRP, which the Panel characterized as the Claimant's "core claims".¹⁶⁷ In the immediately following paragraph, paragraph 255, the Panel described the request for relief associated with the Claimant's core claims. For ease of reference, the Panel reproduces these two (2) paragraphs in full:

254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules. The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.

255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.¹⁶⁸

117. It is immediately apparent that the Claimant is seeking to recast as a distinct claim – the so-called Rules Breach Claim – what the Panel described in the Final Decision as the Claimant's core claims and the request for relief that the Claimant had sought in respect thereof. Properly understood, the Claimant's request for an additional award in relation to the Rules Breach Claim is thus but an

¹⁶⁶ Claimant's PHB, para. 240.

¹⁶⁷ In support of the statement at paragraph 32 of its Reply that the Rules Breach Claim was its "principal claim", the Claimant refers to the paragraph of the Final Decision that describes the "core claims".

¹⁶⁸ Final Decision, paras. 254-255 [emphasis added].

expression of the Claimant's disagreement with the Panel's determination of its core claims and the denial of the request for relief associated therewith.

118. It can also be seen that the Panel's description of the Claimant's core claims includes the constituent elements of what the Claimant now calls the "Rules Breach Claim". Moreover, as attested to by the words emphasized in the above quote of paragraph 254 of the Final Decision, it was well understood that the Claimant's claims encompassed the alleged *inaction* of the Respondent when Afilias first asserted that the Respondent was required to reject NDC's application for .WEB,¹⁶⁹ declare NDC's bids at the ICANN auction invalid,¹⁷⁰ and/or deem NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules,¹⁷¹ and offer .WEB to Afilias as the next highest bidder.¹⁷²
119. In the Panel's opinion, it simply cannot be argued that the Final Decision omitted to deal with the "claim" that the Respondent had wrongfully failed to address these assertions, when they were first raised and thereafter later on in the process in June 2018. Insofar as the Respondent's Staff is concerned, the Panel found, at paragraph 413(1):

Declares that the Respondent has violated its [Articles and Bylaws] by (a) its staff (Staff) failing to pronounce on 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, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold";¹⁷³

120. Insofar as the alleged inaction of the Respondent's Board is concerned, the Panel decided:

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. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.**

332. The Panel does find, however, that it was a violation of the commitment to operate "in an open and transparent manner and consistent with procedures to ensure fairness" for the Respondent to have failed to communicate the Board's decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC's application and auction bids for .WEB. Since the Board's decision to defer consideration of these issues contradicted the Respondent's representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.¹⁷⁴

¹⁶⁹ Which corresponds to subparagraph a) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

¹⁷⁰ Which corresponds to subparagraph b) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

¹⁷¹ Which corresponds to subparagraph c) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

¹⁷² Which corresponds to subparagraph d) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

¹⁷³ Final Decision, para. 413(1) [emphasis added].

¹⁷⁴ *Ibid*, paras. 331-332 [emphasis added].

121. The Panel having found that the Respondent was not obligated to act upon the Claimant's complaints during the pendency of these proceedings, the Panel thus necessarily also found that the Respondent's failure to act in this respect (*i.e.*, its alleged *inaction*) was *not* a violation of its Articles and Bylaws. That is precisely the declaratory relief that the Claimant contends the Panel omitted to deal with under the rubric of the Rules Breach Claim.

122. As regards the Respondent's impugned inaction in June 2018, the Panel made the following additional findings – in favor of the Claimant – in respect of both the Staff's and Board's conduct:

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.¹⁷⁵

123. As regards the Claimant's request for relief in relation to its core claims, or Rules Breach Claim, there can be no question that it was denied, and that the associated claims were therefore fully dealt with. In the section of the Final Decision entitled "Determining the Proper Relief", the Panel quoted Section 4.3(o) of the Bylaws, which defines the authority of IRP panels, and decided that "the Claimant [was] entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision [...]."¹⁷⁶ The Panel then turned to the relief sought by the Claimant in respect of what is being referred to in the Application as the Rules Breach Claim, and explained in the following terms its decision to deny it:

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.¹⁷⁷

124. This decision is carried forward in the *Dispositif* as follows:

Dismisses the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that 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 subparagraph 410(5).¹⁷⁸

¹⁷⁵ Final Decision, para. 347 [emphasis added].

¹⁷⁶ *Ibid*, para. 361.

¹⁷⁷ *Ibid*, paras. 362-363.

¹⁷⁸ *Ibid*, para. 413(7) [emphasis added]

125. It is equally apparent that the so-called declaratory relief that the Claimant is seeking in the Application would directly contradict the Panel's decision that it is for the Respondent to pronounce in the first instance on the substance of the constituent elements of the Rules Breach Claim. In this regard, the Panel must reject the Claimant's argument that "the Panel would not need to alter a single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each."¹⁷⁹ In support of this argument, the Claimant has reproduced in Annex B to the Reply the amendments to the *Dispositif* of the Final Decision that it contends would be required in order for the Panel to grant the relief it is requesting in relation to the Rules Breach Claim. The language that the Claimant requests be added to the *Dispositif* reads as follows:

Declares that ICANN violated its Articles and Bylaws by (a) not rejecting NDC's application, (b) not declaring NDC's bids at the ICANN auction invalid, (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder;¹⁸⁰

126. In the Panel's opinion, it would appear undisputable that the Claimant's proposed additional declaration directly contradicts the Panel's "firm view", as it was put in paragraphs 362 and 363 of the Final Decision, that it is for the Respondent 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; as well as the finding 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. Having expressed that opinion, made that decision and fully exercised its authority in relation to the Rules Breach Claim in the Final Decision by dismissing the relief sought in relation to the Claimant's core claims, the Panel is *functus officio* and without any authority to issue an additional award regarding that "claim" or any other claim dealt with in the Final Decision.

2. The "International Law Claim"

127. The Claimant defines the "International Law Claim" in the Application in the following terms:

Claimant's claim that ICANN breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC despite NDC breaches of the Rules;¹⁸¹

and

¹⁷⁹ Reply, para. 94.

¹⁸⁰ Annex B to the Reply, at proposed additional para. 5.

¹⁸¹ Application, para. 4.

Afilias claimed from the very outset 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.¹⁸²

128. Two (2) preliminary observations are in order. As the first of these formulations makes clear, the contention that the Respondent “*breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law*” illustrates that the Claimant’s arguments based on international law served to support the Claimant’s claim that the Respondent had violated its Articles and Bylaws through the actions and inactions that were being impugned by the Claimant in this IRP. This is so because under its Articles and Bylaws the Respondent is obligated to carry out its activities in conformity with relevant principles of international law and international conventions, as well as applicable local law. This was expressly noted by the Panel in the Applicable Law section of the Final Decision:

28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.¹⁸³

129. The other preliminary observation arises from the second formulation of the Claimant’s “International Law Claim”, and the fact that it is based on the same facts and circumstances as the Rules Breach Claim. Indeed, the contention that the Respondent violated international law “*by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC*” is inseparable from the Claimant’s core claims in the IRP, as described in the Final Decision. As noted already, the Panel is of the view that the core claims, including the so-called Rules Breach Claim, were fully dealt with in the Final Decision.
130. While the Claimant presented various arguments based on principles of international law in support of its core claims, it did not advance a distinct claim based on international law. Indeed, the Claimant had observed that the principles of international law it was relying on provided “independent” but “generally overlapping” safeguards to those arising from the terms of the Articles and Bylaws,¹⁸⁴ and submitted that these international law principles were a “lens” through which the Panel should view the provisions of the Bylaws.¹⁸⁵ The excerpts reproduced in Annex A of the Claimant’s Reply exemplify these observations and submissions rather than establish that the Claimant had articulated and advanced an international law claim separate and distinct from its core claims. In sum, the principles of international law relied upon by the Claimant were presented as providing

¹⁸² Application, para. 38.

¹⁸³ Final Decision, para. 28.

¹⁸⁴ Afilias’ Response to the *Amici*’s Briefs, para. 143.

¹⁸⁵ Claimant’s PHB, fn. 203.

an additional basis for the Panel to find in the Claimant's favor in regard to its core claims, or what is now presented as the Rules Breach Claim.

131. As noted in the Panel's discussion of the applicable standard to a request for an additional award, there is a fundamental distinction between, on the one hand, a "claim" and, on the other, grounds or arguments put forward in support of a claim. A request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim, but with one or more arguments or grounds put forward in support of a claim.
132. In the present case, the Panel was well aware of the provisions of Section 1.2(a) of the Bylaws, and the Claimant's arguments based on certain principles of international law. The Final Decision explicitly refers to both Section 1.2(a)¹⁸⁶ and the Claimant's arguments based on principles of international law.¹⁸⁷ The Panel found in favor of the Claimant by the application of the Respondent's commitments, under the Bylaws, to make decisions by applying documented policies objectively and fairly (*Dispositif*, para. 2) and to operate in an open and transparent manner and consistent with procedures to ensure fairness (*Dispositif*, para. 3). The fact that the Panel did not explicitly take the further step to articulate how these same findings in relation to the same claim could find support in certain principles of international law does not provide a ground for a request for an additional decision.
133. The Claimant not having presented an international law claim that was separate and distinct from the Claimant's core claims, it cannot be argued in relation to the Claimant's international law arguments that a claim was "presented but omitted from the award", as required by Article 33 of the ICDR Rules. The Panel is of the view that it has fully dealt with and resolved the Claimant's core claims, and must therefore reject the request for an additional decision in respect of what is now described as the "International Law Claim".

3. The "Disparate Treatment Claim"

134. The Claimant defines the "Disparate Treatment Claim" as follows:

Claimant's claim that ICANN breached its Articles and Bylaws by treating Affiliates inequitably and disparately when compared to the manner in which it treated NDC and non-applicant Verisign.¹⁸⁸

¹⁸⁶ See, among others, para. 28 of the Final Decision. See also para. 290, where the Panel quotes Article 2, paragraph III of the Respondent's Articles.

¹⁸⁷ See paras. 129, 131, 194-196, 200 and 221 of the Final Decision. The Panel noted in para. 195 of the Final Decision that the requirement under the Bylaws to afford impartial and non-discriminatory treatment was "consistent with the principles of impartiality and non-discrimination under international law."

¹⁸⁸ Application, para. 4. See also para. 85.

135. In respect of the Claimant's allegation of disparate treatment, the Panel stated the following in the Final Decision:

350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims, such as turning to Verisign rather than NDC to obtain information about NDC's arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afiliias' letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach. 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.¹⁸⁹

136. This paragraph makes clear that the Panel's decision not to make further findings in relation to what the Claimant describes as the Disparate Treatment Claim was deliberate. Equally clear is the fact that the Panel considered the allegation of disparate treatment and provided reasons for its decision in regard thereto: the allegation of disparate treatment supported the Claimant's core claims; the Panel had fully disposed of those claims; and the Panel therefore "[did] not consider it necessary to add to its findings in relation to the Claimant's core claims". As explained previously in this decision, such a conclusion cannot be revisited in the context of a request for an additional award.¹⁹⁰
137. Having already fully exercised its authority in the Final Decision in relation to the allegation of disparate treatment, the Panel is *functus officio* and without any authority to issue an additional decision regarding what the Claimant describes in the Application as the Disparate Treatment Claim.

4. Conclusion

138. For all of these reasons, the Panel must decline to issue an additional decision in respect of the three (3) "claims" that the Claimant contends had been presented but allegedly omitted by the Panel in the Final Decision. In the Panel's opinion, the first two (2) "claims" set out in the Application are *post hoc* constructs that seek to repackage the claims actually presented to the Panel and recast the manner in which they were advanced. The Panel is of the view that these "claims" were not actually presented as distinct claims, nor were "omitted" within the meaning of Article 33 of the ICDR Rules. As for the allegation of disparate treatment, the Final Decision evidences that it was considered and dealt with to the extent the Panel felt it necessary. Moreover, and in any event, an attestation of the Panel's resolution of *all* claims that had been put before it is

¹⁸⁹ Final Decision, para. 350.

¹⁹⁰ See, in the context of Article 39 of the UNCITRAL Rules: Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

provided in the last paragraph of the Final Decision's *Dispositif*, in which the Panel "[d]ismiss[ed] all of the Parties' other claims and requests for relief".

C. Afilias' Requests for Interpretation of the Final Decision

139. The five (5) "issues" which the Claimant contends are "vague, ambiguous, confusing, and/or contradictory"¹⁹¹ and requiring interpretation are the following:

- a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?¹⁹²
- b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?¹⁹³
- c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?¹⁹⁴
- d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?¹⁹⁵
- e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?¹⁹⁶

140. The Panel addresses each of these requests for interpretation in turn.

¹⁹¹ Application, para. 94.

¹⁹² *Ibid*, paras. 94 and 95-99.

¹⁹³ *Ibid*, paras. 94 and 100-103.

¹⁹⁴ *Ibid*, paras. 94 and 104-107.

¹⁹⁵ *Ibid*, paras. 94 and 108-111.

¹⁹⁶ *Ibid*, paras. 94, 112-114.

1. Alleged Ambiguity of the term “Pronounce”

141. Afiliás argues that there is ambiguity as to the scope and meaning of the terms “pronounce” and “pronouncement” as used by the Panel in the Final Decision.¹⁹⁷ Its request for interpretation of these terms includes the request “that the Panel address the following questions regarding the nature of a ‘pronouncement’”:

- a) What constitutes a “pronouncement” and what is the foundation in ICANN’s documents or applicable law for the “pronouncement” requirement, particularly in light of the Bylaws’ definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
- b) What should have been the form and substance of ICANN’s “pronouncement” on Afiliás’ complaints?
- c) On what sources did the Panel rely to fashion its “pronouncement” remedy?
- d) Before ICANN issues the “pronouncement” recommended by the Panel, must Afiliás and other Internet community members be given an opportunity to be heard by the Board?
- e) Must the Respondent’s “pronouncement” be issued following an opportunity for Afiliás and other Internet community members to receive and comment on all relevant evidence and argument?
- f) What materials, documentary or otherwise, must ICANN consider before it issues the “pronouncement” recommended by the Panel?
- g) Must the “pronouncement” be issued in a written form and made public on ICANN’s website?
- h) Must the “pronouncement” be issued with full and adequate supporting reasoning following Board deliberation?
- i) Must the “pronouncement” be issued with findings of fact and conclusions of law?
- j) Must the “pronouncement” be issued without the participation of Board members with conflicts of interest?¹⁹⁸

142. The terms “pronounce” or “pronouncement” are used throughout the Final Decision, including in the following two (2) sub-paragraphs of the *Dispositif*.¹⁹⁹

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its Bylaws for Internet Corporation for Assigned Names and Numbers, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (Staff) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the “Confirmation of Understanding” executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken “off hold”; and (b) its Board, having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not

¹⁹⁷ Application, paras. 95-99.

¹⁹⁸ *Ibid*, para. 99.

¹⁹⁹ Final Decision, para. 413 [emphasis added].

pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program;

[...]

5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;

143. The context for the declarations and the recommendation just quoted – and the use therein of the terms “pronounce” and “pronouncement” – is provided in the following extracts of the Final Decision:²⁰⁰

299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent 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.

300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.

[...]

322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and “others in the contention set” were worthy of the Respondent's consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent's contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent represented that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism. Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD Program, but also to disseminate the Respondent's position on those questions within the Internet community and allow market participants to act accordingly.

²⁰⁰ Final Decision, paras. 299-300, 322, 330-331, 335, 344, 347-347 and 352 [emphasis added, except in para. 330 where the emphasis is in the original].

[...]

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC's bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a "pending question, one on which the Board had not pronounced and had decided not to address." [emphasis added] Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

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. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.

[...]

335. In the opinion of the Panel, the Respondent's decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett's letter of 16 September 2016, the text in the introduction to the attached Questionnaire, and Mr. Atallah's letter of 30 September 2016. The Panel also finds this conduct to be inconsistent with the Board's decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated by the Respondent in this IRP.

[...]

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on whether NDC violated the Guidebook".

[...]

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.

348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent's failure to disqualify NDC's application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and 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.

[...]

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. [...]

144. In the opinion of the Panel, there is and can be no ambiguity as to the meaning of the words “pronounce” and “pronouncement” in the Final Decision when read in their proper context. These words are used by the Panel interchangeably with the words “decide” (paras. 322 and 352), “resolve” (para. 322) and “determine” (para. 352), thus confirming that they are to be given their usual dictionary meaning, *to wit*: “to give a judgement, or opinion or statement formally, officially or publicly”;²⁰¹ “to formally state an official opinion or decision”²⁰²; “to utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a Court is said to ‘pronounce’ judgment or a sentence”.²⁰³
145. The Panel notes that Google’s English dictionary provided by Oxford Languages lists among the synonyms of the verb “to pronounce” the verbs: “to declare”, “to rule”, “to adjudicate”, and “to judge”.²⁰⁴ That the verb “to pronounce” and the noun “pronouncement” were used in the Final Decision in the sense just indicated is also confirmed by the fact that the word “pronounce” is used in paragraph 413(1) of the Final Decision, quoted above, to refer to the decision that the Panel itself was invited to make by the Claimant in this IRP.
146. Finally, the Panel observes that when the word “pronounced” was used by a member of the Panel to seek confirmation from Mr. Disspain, a long-time serving member of the Respondent’s Board, that after the November 2016 Board workshop he knew that the question of whether NDC’s bid was compliant with the New gTLD Program Rules had been raised by Afiliias and was a “*pending question, one on which the Board had not pronounced and had decided not to address*”,²⁰⁵ Mr. Disspain had no difficulty understanding the question, and neither the Claimant nor the Defendant raised objection that it somehow lacked clarity.

²⁰¹ Oxford Learner’s Dictionaries, s.v. “Pronounce”, <https://www.oxfordlearnersdictionaries.com/us/definition/english/pronounce> (“to give a judgement, opinion or statement formally, officially or publicly”).

²⁰² MacMillan Dictionary, s.v. “Pronounce”, <https://www.macmillandictionary.com/us/dictionary/american/pronounce> (“to formally state an official opinion or decision”).

²⁰³ The Law Dictionary (on-line version), s.v. “Pronounce”, <https://thelawdictionary.org/pronounce> (“To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to ‘pronounce’ judgment or a sentence.”)

²⁰⁴ Google Dictionary provided by Oxford Languages, s.v. “Pronounce”, https://www.google.com/search?q=pronounce+meaning&rlz=1C1GCEB_enCA924CA924&ei=ZuuwYfvdAbOcptQPn8iNgAo&ved=0ahUKEwj7qJaf3dT0AhUzjokEHR9kA6AQ4dUDCA4&uact=5&og=pronounce+meaning&gs_lcp=Cgdnd3Mtd2l6EAMyCAgAEAcQChAeMgglABAHEAoQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB46BAgAEBM6BggAEB4QEzoiCAAQBR AeEBM6CAgAEAcQHhATSgQIQRgASgQIRhgAUMQCWN8EYMcn aAFwAHgAqAFkiAGYApIBazluMZgBAKABAcABAQ&scient=qws-wiz.

²⁰⁵ Merits hearing transcript, 7 August 2020 (Mr. Disspain), pp. 976-977, quoted in Final Decision, para. 330, and quoted above in this decision at para. 143. See also Merits hearing transcript, 7 August 2020 (Mr. Rasco), pp. 898.

147. In their Submission on the Application, the *Amici* refer to a press release dated 9 June 2021 issued by counsel for the Claimant announcing that they had “[...] Secure[d] Another Victory Against ICANN in .Web Arbitration”. This press release concerns the Final Decision and it describes in terms free from ambiguity the Panel’s decision that the Respondent’s Board should consider and pronounce upon the Claimant’s claims:

The ICDR Panel has directed ICANN’s Board to conduct an objective and fair review of Afiliias’ Complaints, consider whether NDC violated ICANN’s rules and what the consequences should be if a determination of illegality is made.²⁰⁶

148. For all of the above reasons, the Panel has no hesitation in rejecting outright the contention that the terms “pronounce” or “pronouncement” as used in the Final Decision raise any ambiguity. By way of consequence, the Panel must deny the request for an interpretation of those terms.

149. The Panel also denies as falling manifestly outside the scope of Article 33 the Claimant’s request that the Panel address the ten (10) questions said to regard the “nature of a ‘pronouncement’”. As the Respondent correctly notes, many of those questions seek advisory opinions from the Panel on the procedures and processes that the Board should follow when it comes to consider and resolve the Claimant’s complaints against NDC and the DAA, issues as to which neither party made submissions or sought findings or declarations and which are not addressed in the Final Decision.²⁰⁷

2. Alleged Ambiguity as to the Purported Requirement of a Pronouncement as a Pre-Condition to Asserting a Claim in an IRP

150. The Claimant’s second request for interpretation comes in the form of three (3) questions:

Did the Panel determine that the Board must always “pronounce” on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel’s observations that some sort of decision on Afiliias’ complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?²⁰⁸

151. This second request for interpretation seeks to build on the Claimant’s assertion that the effect of the Final Decision is that the impugned action or inaction of the Respondent’s Staff must first be submitted to the Board for pronouncement before an IRP may be pursued.²⁰⁹ On the basis of that assertion, Afiliias requests “that the Panel provide an interpretation that explains whether its

²⁰⁶ See *Amici’s* Submission, para. 19, fn. 27.

²⁰⁷ Response, para. 68.

²⁰⁸ Application, para. 94.

²⁰⁹ *Ibid*, paras. 100 and 103.

decision to remand to the Board for “pronouncement” assumes or requires that all future IRP challenges to Staff action or inaction must first be pronounced upon by the Board.”²¹⁰

152. However, not only does the Claimant fail to support its basic assertion by reference to specific language in the Final Decision, the assertion is actually disproved by some of the Panel’s actual findings in the Final Decision. Indeed, and as the Respondent observes, “the Panel found in Afllias’ favor with regard to actions and inactions [of the Staff] for which the ICANN Board never pronounced.”²¹¹ For example, the Panel found that the Staff had acted contrary to the Respondent’s Articles and Bylaws by preparing and issuing the Questionnaire of 16 September 2016 and, in June 2018, by moving toward the delegation of .WEB without the question of whether NDC had violated the New gTLD Program Rules having been determined. These Staff actions or inactions had not previously been submitted to the Board for pronouncement, and the Panel’s findings in relation thereto therefore contradict and disprove the assertion and associated concerns on which this second request for interpretation is premised.
153. This suffices for the Panel to find that the Claimant’s second request for interpretation is based on a false premise and, in any event, that it fails to identify an ambiguity in the Final Decision requiring clarification or interpretation.

3. Alleged Ambiguity as to the Law Applied by the Panel

154. The Claimant’s third request for interpretation of the Final Decision concerns to the law applied by the Panel in this IRP. The Claimant contends that the Final Decision is vague and ambiguous as to the actual law applied by the Panel and requests the Panel:

...to provide an interpretation of its decision on the applicable law that clarifies (a) whether it held that California law is the sole law applicable to ICANN, (b) what specific law, if any, it applied to interpret the obligations contained in ICANN’s Articles and Bylaws, and (c) whether international law is an independent source of obligation in light of the Articles’ and Bylaws’ requirement that ICANN “shall conduct its activities in conformity with relevant principles of international law.”²¹²

155. The Application asserts that the Panel “apparently determined that California law should be applied to the Dispute”.²¹³ After reproaching the Panel for recording in the Final Decision that the Claimant “did not express disagreement with ICANN’s position” concerning the application of California law,²¹⁴ the Claimant goes on further to assert that the Panel “does not identify the substantive law

²¹⁰ Application, para. 103.

²¹¹ Response, para. 70.

²¹² Application, para. 107.

²¹³ *Ibid*, para. 104.

²¹⁴ *Ibid*, paras. 105-106.

(if any) it deemed applicable” to its rulings (other than those on privilege issues and the substance of the business judgment rule).²¹⁵

156. These assertions completely distort the Final Decision in so far as the applicable law is concerned.
157. Before quoting the relevant section of the Final Decision on the Applicable Law, it bears recalling that this IRP proceeded in two (2) phases, and that while the Final Decision completed Phase II, it was the Final Decision *in the IRP*. As a consequence, some sections of the Introduction to the Final Decision relate to Phase I, some to Phase II, while others relate to the IRP as a whole. This explains why certain paragraphs of the Final Decision reproduce entire paragraphs from the Decision in Phase I, while others, in order to abbreviate the Final Decision, incorporate by reference whole sections of the Phase I Decision.²¹⁶
158. The Panel reproduces below in full the Applicable Law section of the Final Decision:

H. Applicable Law

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.

28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.

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

30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.²¹⁷

159. As indicated in the above quoted paragraphs, the only issues that the Panel stated were resolved applying California law were the issues of privilege that arose in the document production phase of this IRP.²¹⁸ As for the statement the Claimant reproaches the Panel for having repeated in the Final Decision, namely that the Claimant “did not express disagreement with ICANN’s position”, paragraph 29 of the Final Decision states explicitly that it was made in answer to a question at the hearing on Phase I and that it concerned the law applicable to the interpretation of the Interim

²¹⁵ Application, paras. 104-106; see also paras. 78-79.

²¹⁶ See, for example, para. 35 of the Final Decision which incorporates by reference paras. 33-67 of the Phase I Decision.

²¹⁷ Final Decision, paras. 27-30 [emphasis added].

²¹⁸ *Ibid*, para. 30. This is further elaborated on in paragraph 59 of the Final Decision. The Panel also declined the Respondent’s invitation to apply California law to determine the meaning of the terms “frivolous” and “abusive” as used in Section 4.3 (r) of the Bylaws (Final Decision, para. 400).

Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, in case of ambiguity. As the Claimant itself notes in the Application, paragraph 29 of the Final Decision reproduced *verbatim* paragraph 27 of the Phase I Decision and concerned issues that had been discussed in Phase I.²¹⁹

160. As regards the other issues in dispute, the first paragraph of the Applicable Law section of the Final Decision states that the “rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures”, while the next paragraph quotes extensively from Section 1.2(a) of the Bylaws, including its reference to relevant principles of international law.
161. In the Panel’s opinion, the Final Decision is explicit as to the rules that the Panel has applied to arrive at its various findings and conclusions and, consistent with paragraph 28 of the Final Decision, these rules are, in the main, those set out in the Bylaws and the Interim Procedures. As regards the Respondent’s time limitations defence, the Panel identified the relevant rule of the Interim Procedures in the section of the Final Decision entitled “Applicable Time Limitation Rule”.²²⁰ In so far as the merits of the Claimant’s claims are concerned, “the key standards against which the Respondent has determined that its conduct should be assessed” are set out in the section of the Final Decision entitled “Relevant Provisions of the Articles and Bylaws”,²²¹ many of which are quoted in full.
162. In the Panel’s opinion, in regard to the law applied by the Panel in this IRP, the Application fails to identify any ambiguity requiring clarification or interpretation. The Claimant’s third request for interpretation must therefore be denied.

4. Alleged Ambiguity as to the Basis for the Determination Concerning ICANN’s Knowledge, Expertise and Experience

163. The Claimant’s fourth request for interpretation of the Final Decision is directed to an alleged ambiguity as to the basis for the Panel’s determination concerning ICANN’s knowledge, expertise and experience. However, instead of pointing to language that, by reason of its alleged ambiguity, might require clarification or interpretation,²²² the Claimant criticizes that determination and seeks an explanation as to the basis on which it was made:

²¹⁹ Application, para. 79.

²²⁰ Final Decision, paras. 259-268.

²²¹ *Ibid*, paras. 289-296.

²²² In regard to the Respondent’s knowledge, expertise and experience with the gTDL Program Rules, the Panel noted that the Guidebook and Auction Rules “originate from the Respondent and it is the Respondent that is entrusted with responsibility for the implementation of the gTDL Program in accordance with the gTLD Program Rules [...]” (Final Decision, para. 299). The Respondent does not cite this observation in its discussion of its fourth request for interpretation, nor does it refer to the

Afilias requests the Panel to provide an interpretation that clarifies the basis on which it determined that ICANN has the “knowledge, expertise, and experience” that uniquely qualifies it, as opposed to the Panel, to “pronounce” on Afilias’ complaints regarding ICANN’s obligations with respect to NDC’s violations of the New gTLD Program Rules.²²³

164. This is not a proper request for interpretation. As noted earlier in this decision, a request for interpretation may not be used to challenge the tribunal’s reasoning or dispositions, to seek revision, reformulation or additional explanations of a given decision, or “to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question.”²²⁴
165. This suffices to dispose of the Claimant’s fourth request for interpretation, which must be denied as being unauthorized under Article 33 of the ICDR Rules.

5. Alleged Ambiguity as to the Standard and Burden of Proof Applied by the Panel

166. Finally, the Claimant argues that there is an ambiguity in the Final Decision as to the standard and burden of proof applied by the Panel. In the Claimant’s submission, the ambiguity stems from paragraphs 32 and 33 of the Final Decision, which the Panel cites below along with paragraph 31, which introduces the section of the Final Decision entitled “Burden and Standard of Proof”:

I. Burden and Standard of Proof

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.

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

33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.²²⁵

167. In relation to this last request for interpretation, the Claimant begins by asserting, based on the above-quoted language of paragraph 32, that “the Panel state[d] that it applied a heightened standard of proof to some issues before it, in light of allegations of dishonesty or fraud”.

evidence of Ms. Christine Willett and Ms. Samantha Eisner, two (2) members of the Respondent’s Staff, or that of Ms. J. Beckwith Burr and Mr. Christopher Disspain, two (2) Board members, all of whom filed witness statements and testified at the evidentiary hearing (see Final Decision, paras. 68 and 70).

²²³ Application, para. 111 [emphasis added].

²²⁴ Stuart Isaacs, “Chapter 22: Life after Death: The Arbitral Tribunal’s Role Following its Final Award” in Neil Kaplan & Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration*, Kluwer Law International, 2018, p. 367.

²²⁵ Final Decision, paras. 31-33.

The Claimant goes on to state that the Panel failed to identify at any point in the Decision the issues to which it applied these principles such that “the standard of proof applicable to the issues ultimately resolved in the *Dispositif* is left indeterminable.”²²⁶ Based on that reasoning, the Claimant requests that:

... the Panel provide this interpretation regarding the following issues:

a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afiliás' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?

b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?

c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?

d) Whether the failure to disclose the “decision” from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?

e) Whether the failure to “pronounce” on Afiliás' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

f) Whether proceeding toward delegation of .WEB to NDC without a “pronouncement” violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

g) Whether the disparate treatment of Afiliás violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?

h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?²²⁷

168. The Panel finds no basis in paragraph 32 or elsewhere in the Final Decision for the Claimant's assertion that the Panel “applied a *heightened standard* of proof to some of the issues before it, in light of allegations of dishonesty or fraud”, and the Claimant does not cite any. To the contrary, paragraph 32 identifies *one* standard of proof – the balance of probabilities – and adds that allegations of dishonesty or fraud will attract close scrutiny to ensure “*that the standard is met*”.²²⁸ The Panel goes on to state that “these principles were applied by the Panel in considering *the issues in dispute in Phase II of this IRP*”,²²⁹ without differentiating among these issues.

169. Nowhere in the Final Decision is there any suggestion that the Panel applied a different standard of proof than the standard identified in paragraph 32, or that it was felt appropriate to apply to any

²²⁶ Final Decision, paras. 112-113.

²²⁷ Afiliás' Article 33 Application, para. 114.

²²⁸ Final Decision, para. 32 [emphasis added].

²²⁹ *Ibid*, para. 33 [emphasis added].

of the issues determined by the Panel close scrutiny to ensure that the standard was met. Indeed, the only explicit reference to the standard of proof in the Final Decision (other than in paragraph 32) provides confirmation that the standard applied was that identified in that paragraph.

[...] Having considered the witness and documentary evidence on [the Respondent's pre-auction investigation], which is preponderant, the Panel finds [...].²³⁰

170. As discussed in the Decision on Phase I, the Claimant had made allegations of misconduct on the part of the Respondent and members of its Staff in relation to the adoption of Rule 7 of the Interim Procedures. The Respondent's good faith in the enactment of Rule 4 was also impugned by the Claimant in its submissions concerning the time limitation defence. However, and for reasons set out in the Final Decision, the Panel did not make any finding in relation to the Rule 7 Claim²³¹ or the Claimant's allegations concerning the adoption of Rule 4.²³²
171. In sum, and contrary to the Claimant's assertions, the Panel did not apply a "heightened standard of proof to some of the issues". Accordingly, and quite aside from the Claimant's failure to identify any ambiguity requiring interpretation or clarification, there is no basis for the Claimant's request that the Panel identify the issues as to which it applied a heightened standard of proof, nor for its request that the Panel address the eight (8) questions listed as part of its fifth request for interpretation.
172. For these reasons, the Claimant's fifth request for interpretation is denied.

6. Conclusion

173. For the reasons explained in this section, the Panel declines to provide an interpretation of the Final Decision regarding the five (5) issues identified in the Application. In the Panel's opinion, none of those five (5) requests meets the requirements for interpretation of an award set out in Article 33 of the ICDR Rules.

D. Costs

174. The Respondent claims its costs and legal fees incurred as a result of the Application, as well as the Panel's fees in resolving the Application. According to the Respondent, the Application is both "frivolous" and "abusive" as these terms were defined by the Panel in the Final Decision.

²³⁰ Final Decision, para. 298. Inexplicably, the Claimant includes a request for interpretation regarding the standard applied to that issue in the list of questions cited in the text at para. 167 (see para. b).

²³¹ Final Decision, paras. 7, 355-357 and 413(9).

²³² *Ibid*, paras. 282-284.

175. The Claimant accepts that the Panel has the power to allocate the costs of the Application as between the Parties, and agrees with the Respondent that the “frivolous or abusive” standard set out in Section 4.3(r) of the Bylaws applies.²³³ However, the Claimant urges that the Application is neither frivolous, nor abusive.
176. Article 33 (4) of the ICDR Rules, already cited, provides that the parties are responsible for all costs associated with any request for interpretation, correction, or an additional award, and that the Tribunal “may allocate such costs.”
177. Section 4.3(r) of the Bylaws reads as follows:
- (r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, 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.²³⁴
178. In the Final Decision, the Panel defined frivolous as used in Section 4.3(r) as “of little weight or importance”, “having no sound basis (as in fact or law)”, “lacking in seriousness” or “clearly insufficient on its face”.²³⁵ As for the term “abusive”, the Panel defined it as “characterized by wrong or improper use or action”.²³⁶
179. The Panel has dismissed the Application in its entirety. In the opinion of the Panel, under the guise of seeking an additional decision, the Application is seeking reconsideration of core elements of the Final Decision. Likewise, under the guise of seeking interpretation, the Application is requesting additional declarations and advisory opinions on a number of questions, some of which had not been discussed in the proceedings leading to the Final Decision.
180. In such circumstances, the Panel cannot escape the conclusion that the Application is “frivolous” in the sense of it “having no sound basis (as in fact or law)”. This finding suffices to entitle the Respondent to the cost shifting decision it is seeking and obviates the necessity of determining whether the Application is also “abusive”.
181. The Respondent avers that it has incurred US \$236,884.39 in legal fees opposing Afiliás’ Article 33 Application and submits that this sum is reasonable. The Respondent points out that the Application consisted of 68 pages of text with over 200 footnotes; cited 17 new authorities comprising more

²³³ Afiliás’ Reply, para. 131.

²³⁴ Bylaws, Section 4.3(r) [emphasis added].

²³⁵ Final Decision, para. 401.

²³⁶ *Ibid.*

than 170 pages; and sought far-reaching relief, all of which required the Respondent to take the Application seriously and respond accordingly. A schedule of fees incurred in responding to the Application was attached as Appendix B to the Response. In regard to the amount claimed by the Respondent for its legal fees, the Panel notes that while the Claimant has denied that the Application is frivolous or abusive, it did not challenge the reasonableness of the amount of fees claimed by the Respondent.

182. The Panel finds that the amount of fees incurred by the Respondent to respond to the Application, as detailed in Appendix B to the Response, is reasonable. Considering the Panel's above finding in paragraph 180, the Panel considers that the Respondent, which is clearly "the prevailing party" in respect of the Application, should be reimbursed its legal fees under Section 4.3(r) of the Bylaws, and the Panel so orders.
183. The ICDR has informed the Panel that the fees and expenses of the Panelists in relation to the Application total US \$140,335.30, and that there are no administrative fees of the ICDR in relation to the Application. The ICDR has further advised that the entire advance on non-party costs in relation to the Application has been paid by the Respondent.
184. Considering the outcome of the IRP as a whole, including the findings of breach of the Articles and Bylaws by the Respondent as set out in the Final Decision, the Panel denies the Respondent's claim that the Claimant also be made to bear the fees of the Panel members in relation to the Application, which, as part of the administrative costs of the IRP, shall be borne by the Respondent in accordance with the default rule set out in Section 4.3 (r) of the Bylaws.

V. **DISPOSITIF**

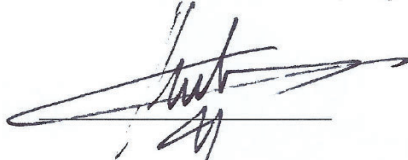
185. For the reasons set out in this decision, the Panel hereby unanimously:

1. **Denies** in its entirety Afiliat Domains No. 3 Limited's Rule 33 Application for an Additional Decision and for Interpretation, dated 21 June 2021 (**Application**);
2. **Grants** the Respondent's request that the Panel shift liability for the legal fees incurred by the Respondent in connection with the Application, **fixes** at US \$236,884.39 the amount of the legal fees to be reimbursed to the Respondent by the Claimant on account of those legal fees, and **orders** the Claimant to pay this amount to the Respondent within thirty (30) days of the date of notification of this decision, after which 30-day period this amount shall bear interest at the rate of 10% *per annum*;
3. **Fixes** the costs of the Application, consisting of the fees and expenses of the Panel members, at US \$140,335.30;
4. **Denies** the Respondent's request that the Claimant bear the fees of the Panel members in connection with the Application, and **declares** that the costs of

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England



Catherine Kessedjian

Richard Chernick

Pierre Bienvenu, Ad. E., Chair

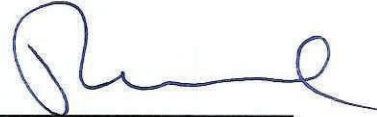
Dated: 21 December 2021

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

Catherine Kessedjian



Richard Chernick

Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

Catherine Kessedjian

Richard Chernick



Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021