

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S RESPONSE TO AFILIAS' ARTICLE 33 APPLICATION

Jeffrey A. LeVee
Eric P. Enson
Kelly M. Watne
JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071
Tel: +1.213.489.3939

Steven L. Smith
David L. Wallach
JONES DAY
555 California Street, 26th Fl.
San Francisco, CA 94104
Tel: +1.415.626.3939

Counsel to Respondent
The Internet Corporation for
Assigned Names and Numbers

TABLE OF CONTENTS

	Page
I. Introduction.....	1
II. The Nature, Scope and Limits of Article 33	3
III. No Additional Award May Properly Be Issued.....	8
A. The Rules Breach Claim	9
1. The Panel Resolved Afilias’ Rules Breach Claim	9
2. The Panel’s Decision Was Not Extra Petita	16
B. The International Law Claim	20
1. Afilias Did Not Assert Any Discrete “International Law Claim”	20
2. The “International Law Claim” Is Just a Repackaging of Afilias’ Rules Breach Claim	23
C. The Disparate Treatment Claim.....	26
IV. Afilias’ Requests for “Interpretations” Should Be Denied.....	29
A. The Scope of a Permissible Request for Interpretation under Article 33	29
B. Afilias’ Requests.....	32
1. The Meaning of “Pronounce”	33
2. Whether the Board Must Always “Pronounce” on Staff Action Before an IRP May Be Filed.....	35
3. The Law Applied by the Panel.....	37
4. The Basis for the Panel’s Ruling that ICANN Has the Expertise to Interpret and Apply the New gTLD Program Rules.....	39
5. The Standard of Proof Applied by the Panel	40
V. ICANN Should Be Awarded Its Costs and Attorneys’ Fees	42
VI. Conclusion	45

I. INTRODUCTION

1. Afilias' Application is an abuse of Article 33. Despite the misleading title of its Application and its disdainful rhetoric, Afilias' does not seek an additional award on any claim purportedly omitted from the Final Decision or an interpretation of any purported ambiguity in the Final Decision. The final paragraph of Afilias' application, which states the "Requested Relief," asks for an "***Amended Final Decision***," not an additional decision. Afilias does this because the remedies that it seeks plainly conflict with the determinations made by the Panel in its Final Decision. To achieve its goals, Afilias would need the Panel to revoke the Final Decision and issue a new one reaching conclusions directly at odds with the reasoning and conclusions of the Final Decision, which the Panel is not at liberty to change.

2. At its core, Afilias' Application asks the Panel to ***reconsider and reverse*** its determination that ICANN—rather than an IRP panel—is charged with interpreting and applying the New gTLD Program Rules¹ and resolving disputes among applicants. Afilias asks the Panel to retract that determination, and again requests that the Panel (not ICANN) act as the decision-maker of first instance for Afilias' complaints against NDC, conclude that NDC violated the New gTLD Program Rules, disqualify NDC's .WEB application, and award .WEB to Afilias. Afilias' Application is an improper request for reconsideration, which is not permitted by Article 33 of the ICDR Rules of Arbitration or the English Arbitration Act 1996 (the "EAA") [CA-124, RLA-91].

3. The Final Decision is ***final*** under English law and international law. This means that Afilias cannot seek reconsideration or revocation of the Final Decision, nor is the Panel empowered to grant such a request. After a final award is issued, an arbitral tribunal is *functus officio* except to the limited extent provided otherwise by the applicable law and arbitration rules. Article 33 and the corresponding provisions of the EAA establish a *narrow* exception to the

¹ Consistent with the Final Decision, as used herein "New gTLD Program Rules" refer to the New gTLD Applicant Guidebook (Ex. C-3) and the Auction Rules for New gTLDs: Indirect Contentions Edition (Ex. C-4).

functus officio doctrine by allowing for clerical corrections, interpretation of ambiguities that interfere with the parties' ability to effectively execute the award, or issuance of an additional award on claims unintentionally omitted from the final award. Article 33 and the EAA do not allow a party to seek, or a tribunal to issue, an amended award that conflicts with and supersedes a final award.

4. Contrary to Afilias' contention, the Panel did not omit to consider and decide the "Rules Breach Claim." On the contrary, the Panel referred to it as a "core claim" in this IRP and fully resolved it. The Panel found partially in favor of Afilias and partially in favor of ICANN on that claim. It found in Afilias' favor by determining that ICANN acted contrary to its Bylaws and Articles by moving forward with a Registry Agreement with NDC without having determined whether NDC breached the New gTLD Program Rules and, if so, whether its application should be disqualified. But the Panel found in ICANN's favor by rejecting Afilias' request that the Panel act as a first instance decision-maker for Afilias' complaints against NDC. The Panel determined that it is for ICANN—not the IRP Panel—to decide in the first instance whether NDC breached the New gTLD Program Rules and the appropriate consequences of any such breach.

5. The Panel also did not omit to decide any "International Law Claim" or "Disparate Treatment Claim." Contrary to its current assertions, Afilias did not assert any such claims in the IRP. Afilias made arguments that relied on international law and allegations of disparate treatment, but those arguments were not discrete claims. The Panel considered Afilias' international law and disparate treatment arguments and dealt with them to the extent necessary and appropriate to resolve the claims to which they pertained.

6. Afilias' requests for interpretation are based on a series of willful misreadings and distortions of the Panel's Final Decision. There is no lack of clarity in the Panel's use of the terms "pronounce" and "pronouncement." The Panel did not hold or suggest that the Board must pronounce on any staff action or inaction before it can be the subject of an IRP. The Panel

clearly set out the applicable law. The Panel also clearly set out the standard of proof that it applied and did not state or suggest that it was applying a heightened standard to any claims or contentions.

7. Afilias' Article 33 Application seethes with contempt for the Panel, the Respondent and the *Amici*, but it fails to show any valid basis under Article 33 for a further award. Accordingly, Afilias' Application must be denied in its entirety, and the Panel should award ICANN its attorneys' fees and costs in responding to the Application.

II. THE NATURE, SCOPE AND LIMITS OF ARTICLE 33

8. Article 33 of the ICDR Rules is a limited exception to the *functus officio* doctrine, under which a panel ceases to have any jurisdiction upon the issuance of a final award.² Article 33(1) allows a party to “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.” [RLA-91]. It accords with Section 57(3)(a) of the EAA [CA-124], which states that a tribunal may “correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or (b) 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.”

9. Article 33(1) and Section 57(3) are narrow.³ They do not allow a party to seek reconsideration, revocation or reversal of the substance of a final award, nor do they give a

² Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA Bull. 441, 441 (2009) [RLA-102] (“The principle that an arbitral tribunal is *functus officio* when it renders its final award is sacrosanct, subject to limited exceptions for correction and interpretation of awards and in some cases to remedial action with respect to awards”); Blackaby Nigel, Constantine Partasides, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 9.18 (6th ed. 2015) [RLA-97] (“Subject to certain exceptions, the delivery of a final award renders the arbitral tribunal *functus officio*: it ceases to have any further jurisdiction in respect of the dispute, and the special relationship that exists between the arbitral tribunal and the parties during the currency of the arbitration ends.”).

³ Gusy and Hosking, *A Guide to the ICDR International Arbitration Rules 289* (2nd Ed., Oxford Univ. Press 2019) [CA-148] (“arbitrators, courts, and commentators are quick to emphasize the very limited scope of an application under Article 33 or its analogous provisions in other rules.”).

tribunal power to grant such a request. “Absent agreement of the parties, the tribunal may only reconsider or review its decision if the matter is remitted following a successful challenge to the award in court, or pursuant to the express powers of correction or reconsideration conferred by S[ection] 57 of the [EAA] or by the arbitral rules which the parties have agreed to govern the reference. Otherwise the tribunal has no authority or power to do so.”⁴

10. The power to correct an award under Article 33(1) extends only to “clerical, typographical, or computation errors”⁵ and the power to interpret is properly applied only to the extent an award is ambiguous in a way that may prevent its effective execution.⁶ “[R]equests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award.”⁷ There is “virtual unanimity” that a request for interpretation “cannot be used to seek revision, reformulation or additional explanations of a given decision.”⁸ The power to

⁴ *Emirates Trading Agency LLC v. Sociedade de Fomento Indust. Private Ltd.* [2015] EWHC (Comm) 1452 [26] (Eng.), [RLA-82].

⁵ ICDR Rules, Art. 33(1). *See also, e.g.*, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.03[B][6] (3rd ed. 2021) [RLA-88] (“It is important, however, that the authority to correct an award be narrowly circumscribed. A correction involves only ministerial, mathematical and similar errors. A request for a correction may not properly involve challenges to the tribunal’s legal reasoning or assessment of the evidence or interpretation of the parties’ submissions.”); *Gold Reserve Inc. v. Venezuela*, Decision Regarding the Claimant’s and the Respondent’s Requests for Corrections, ICSID Case No. ARB(AF)/09/1 ¶ 38 (5 December 2014) [RLA-90] (“The purpose of the correction exception to the *functus officio* principle is to correct obvious omissions or mistakes and avoid a consequence where a party finds itself bound by an award that orders relief the tribunal did not intend to grant. The purpose is therefore to ensure that the true intentions of the tribunal are given effect in the award, but not to alter those intentions, amend the legal analysis, modify reasoning or alter findings... Any purported correcting that goes beyond the scope of the Tribunal’s limited mandate in this regard is likely to be subject to challenge.”).

⁶ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.04[B], [RLA-88] (“A request for interpretation should therefore be available only if a party demonstrates that the award is ambiguous and requires clarification for its effective execution.”); Lew, Mistelis et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION § 24-95 (2003) [RLA-92] (“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.”); Emmanuel Gaillard and John Savage (eds.), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION § 1415 (1999) [RLA- 85] (“The interpretation of an arbitral award is only really helpful where the ruling, which is generally presented in the form of an order, is so ambiguous that the parties could legitimately disagree as to its meaning. By contrast, any obscurity or ambiguity in the grounds for the decision does not warrant a request for interpretation of the award.”).

⁷ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.04[C], [RLA-88].

⁸ *Id.* § 24.04[C] (quoting Procedural Order of 6 January 2003 in ICC Case 11451 [RLA-95], 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) 18-20 (2010)).

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.”⁹ Accordingly, “it is very rare for interpretations to be either sought or granted.”¹⁰

11. The power to issue an additional award under Article 33 and Section 57 “only applies to a *claim* which has been presented to a Tribunal but has not been dealt with, as opposed to an issue which remains undetermined, as part of a claim.”¹¹ A “claim” refers to “a head of claim for damages or some other 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.”¹² An additional award may be sought or granted only with regard to a claim that has been unintentionally omitted; it “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,” such as where a claim is found to be premature.¹³

12. The *infra petita* principle is related to—but distinct from—the power of a tribunal to issue an additional award to deal with a claim unintentionally omitted from a final award. Under this principle, an award may be set aside or remanded if a tribunal fails to consider and

⁹ *Al Hadha Trading Co. v. Tradigrain S.A.*, [2002] Lloyd’s Law Reports 512 [66] [RLA-78] (quoting Mustill & Boyd on Commercial Arbitration); Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.04[C] [RLA-88] (“A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions.”); Lew, Mistelis et al., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION § 24-97 (2003) [RLA-92] (“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.”).

¹⁰ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.04 [RLA-88].

¹¹ *Torch Offshore LLC v. Cable Shipping Inc.*, [2004] EWHC (Comm) 787 [27] (Eng.) (emphasis added), [RLA-100].

¹² *Id.* (“Torch had claimed rescission and that claim had been rejected by the arbitrator. [The arbitrator] could not change his award on that point and there was no room for an application to him to decide that claim, even if he had failed to decide whether there was inducement by the second representation which would have entitled Torch to rescind.”).

¹³ David D. Caron and Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY § 26(4)(B) (2nd ed., 2013) [CA-152]; *see also* Jan Paulsson and Georgios Petrochilos, UNCITRAL ARBITRATION at 355 (2017) [CA-154] (allowance for an additional award “was intended to address instances of obvious omissions where arbitrators have ‘failed to render a complete award’; for example, by failing to fix or apportion arbitration costs or to rule on a particular claim. This provision was not intended to apply, however, where the tribunal deliberately elects not to address a particular claim or issue in the award because it regards it as unnecessary to do so given their decisions on other issues which render further consideration moot.”).

decide all claims properly submitted to it.¹⁴ This is dealt with at Section 68(2)(d) of the EAA, which applies not to an application to the tribunal for an additional award, but to a challenge to the final award in court. That provision states that a “serious irregularity” that may form the basis for challenging a final award includes a “failure by the tribunal to deal with all the issues that were put to it” where such a failure “has caused or will cause substantial injustice.” Section 68(2)(d) refers to “issues,” in contrast to Section 57(3) of the EAA and Article 33(1) of the ICDR Rules, which both refer to “claims.” However, courts have construed “issues” narrowly to include only matters on which the whole of a claim may depend. For example, as *Symbion Power LLC v. Venco Imtiaz Constr. Co.* explains:

(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 demarking issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a “high threshold” that has been said to be required for establishing a serious irregularity [...].

(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 [...].¹⁵

¹⁴ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 25.04[F][4] [RLA-89] (“if a tribunal fails to consider and decide all of the issues that have been submitted to it (so-called “infra petita”), the award may be annulled under at least some national laws.”).

¹⁵ *Symbion Power*, [2017] EWHC (TCC) 348 [54] (Eng.) [RLA-98], quoting *Sec’y of State for the Home Dep’t v. Raytheon Sys. Ltd.*, [2014] EWHC (TCC) 4375 [33] (Eng.) [CA-150]. See also *Checkpoint Ltd. v Strathclyde Pension Fund*, [2003] EWCA (Civ) 84 [48]–[49] (Eng.) [RLA-80] (“The first question that arises is what is meant by ‘all the issues that were put to it [the tribunal]’ in section 68(2)(d), the failure to deal with which would constitute the procedural irregularity. The words must be construed purposively. In my judgment it does not mean each and every point in dispute.” “In my judgment “issues” certainly means the very disputes which the arbitration has to resolve.”); *Buyuk Camlica Shipping Trading & Indus. Co. v. Progress Bulk Carriers Ltd.*, [2010] EWHC (Comm) 442 [28] (Eng.) [RLA-79] (“It may be that the Tribunal did not deal explicitly with all of the Owners' submissions but that does not mean that it did not deal with the issues, let alone the critical issues. A failure to deal with an argument is not the necessary equivalent of a failure to deal with an issue under the section: *Margulead Ltd. v Exide Tech.*, [2004] EWHC (Comm) 1019 (Eng.), [RLA-93]. As Griffiths L.J. said in *Eagil Trust Co. Ltd. v Pigott-Brown*, [1985] 3 All ER (Civ) 119, 122 (Eng.), there is no duty on a judge, in giving reasons, to deal with every argument presented by counsel in support of his case.”), [RLA-81].

13. Further, Section 68(2)(d) of the EAA permits a party to challenge a final award only where a tribunal fails to deal with an issue in any manner whatsoever. It cannot be used to challenge the tribunal’s reasoning or conclusions.¹⁶ *Symbion Power* goes on to explain:

(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

¹⁶ Afilius cites *Metropolitan Property Realizations Ltd. v. Atmore Investments Ltd.*, [2008] EWHC (Ch) 2925 [21] (Eng.) [CA-160] as purportedly holding that under Section 68 of the EAA an arbitral award may be annulled for “glaring illogicality.” (Afilius’ Article 33 Application ¶¶ 58, 87.) However, subsequent decisions have cautioned that *Metropolitan* should not be read in this manner. See, e.g., *UMS Holding Ltd. et al. v Great Station Props. S.A., et al.*, [2017] EWHC (Comm) 2398 [37]-[38] (Eng.) [RLA-100] (“The second additional matter of law is raised by the allegation of the Grigorishin Respondents that certain conclusions were ‘manifestly illogical and cannot rationally be sustained’. These challenges derive from the language used by Sales J. in *Metropolitan Prop. Realizations Ltd.*, [2008] EWHC (Ch) 2925 (Eng.) [CA-160]. . . It seems to me that this decision has to be treated with some care. It is clear that the mere fact that the arbitral tribunal has reached the wrong conclusion cannot constitute a serious irregularity within Section 68 . . . It is also clear that so long as an arbitrator deals with an issue it does not matter that he has done so ‘well, badly, or indifferently’ . . . I therefore have difficulty in accepting that the mere fact that the tribunal’s reasoning is manifestly illogical or cannot rationally be sustained can amount to a serious irregularity. Indeed Mr. Brisby made clear in his reply that he did not contend that illogicality is a free-standing ground for striking down an award. Rather, it may indicate that there has been a failure to address an issue. It seems to me that that is the way in which the decision of Sales J. in *Metropolitan Property Realizations Ltd. v. Atmore Investments Limited* should be understood.”) [CA-160]; see also *Danilina v. Chernukhin*, [2019] EWHC (Comm) 173 [395] (Eng.) [CA-84].

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 [...].

14. Accordingly, challenges in court to awards as *infra petita* are rarely successful. “The presumption is that arbitrators did not decide matters *infra petita*, but rather decided all the disputes submitted to them, including by impliedly rejecting claims and defenses not specifically addressed.”¹⁷ Moreover, courts have rejected challenges on grounds of *infra petita* where an award “rejects all other claims,”¹⁸ as this IRP Panel did in paragraph 14 of the *Dispositif* of the Final Decision.¹⁹

III. NO ADDITIONAL AWARD MAY PROPERLY BE ISSUED

15. As shown above, an additional award may be issued only for a claim that was properly raised by a party and wholly omitted from the final award unintentionally. Afilias asks for an additional award in relation to three purported claims, which it refers to as the “Rules Breach Claim,” the “International Law Claim,” and the “Disparate Treatment Claim.” Not one satisfies the criteria for an additional award.

16. The Final Decision dealt in detail with the Rules Breach Claim and wholly resolved it. Properly understood, Afilias’ complaint is not that the Panel failed to address the Rules Breach Claim, but that Afilias is dissatisfied with the Panel’s decision. Afilias asks the Panel to reconsider its determination that it is for ICANN to decide in the first instance whether NDC violated the New gTLD Program Rules and the consequences of any such violation.

¹⁷ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 25.04[F][4][b], [RLA-89].

¹⁸ *Id.* at § 25.04[F][4][b] & n.878 (citing *Judgment of 10 December 2012*, DFT 4A_635/2012 (Swiss Fed. Trib.) (an award is not *infra petita* where it rejects “all other claims,” without specifically rejecting claim for interest); *see also* Jan Paulsson and Georgios Petrochilos, UNCITRAL ARBITRATION 355 (2017) (tribunals sometimes head-off attempts to challenge an award on the grounds that it failed to resolve all the issues by “record[ing] in the dispositive part of their decision that they thereby reject all other claims and submissions.”), [CA-154].

¹⁹ Final Decision (corrected version) ¶ 413(14) (“For the reasons set out in this Final Decision, the Panel unanimously decides as follows: . . . **Dismisses** all of the Parties’ other claims and requests for relief.”) (emphasis in original). Citations to the Final Decision are to the corrected version dated 15 July 2021.

Afilias asks the Panel to reverse this determination, and again asks the Panel to act as the first instance decision-maker for Afilias' allegations against NDC, decide that NDC violated the New gTLD Program Rules, and then disqualify NDC's application for .WEB and award .WEB to Afilias. This is not a proper request under Article 33 and it must be rejected. The Panel was correct in concluding that ICANN is the first instance decision-maker for disputes under the New gTLD Program. Even more importantly, however, the Panel resolved this issue in the Final Decision and therefore has no power to revisit it in an additional award.

17. With regard to the other two "Claims," Afilias made *arguments* based on international law and allegations of disparate treatment in support of certain claims, and the Final Decision expressly recognizes those arguments and deals with them to the extent necessary and appropriate. Afilias did not, however, assert any discrete "International Law Claim" or "Disparate Treatment Claim," and therefore those matters also cannot properly be addressed in an additional award.

A. The Rules Breach Claim

1. The Panel Resolved Afilias' Rules Breach Claim

18. At paragraph 16 of its Application, Afilias defines its Rules Breach Claim as the claim 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[.]" At paragraph 23, Afilias elaborates that the Rules Breach Claim involved "two fundamental questions": "whether Respondent *was required* to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant." (Emphasis in original.)

19. Afilias wrongly suggests that ICANN never argued that the IRP Panel should not act as the decision-maker of first instance for the Rules Breach Claim.²⁰ On the contrary, ICANN’s principal defense to Afilias’ Rules Breach Claim was that ICANN, not an IRP panel, is the appropriate decision-maker. ICANN argued that the New gTLD Program Rules do not expressly address the propriety of the DAA and other impugned conduct of NDC and, even if it was determined that NDC breached the New gTLD Program Rules, the Rules do not mandate any particular penalty; to the contrary, they grant ICANN broad discretion to determine the appropriate penalty. Indeed, the Guidebook and Auction Rules give ICANN discretion with regard to the interpretation and application of the New gTLD Program Rules – including whether they have been breached and, if so, what penalty, if any, to assess – and state that ICANN has ultimate responsibility for administering the New gTLD Program. Therefore, it is for ICANN—not this IRP Panel—to decide whether NDC violated the New gTLD Program Rules and, if so, the appropriate consequences. Appendix A provides excerpts from ICANN’s submissions in which it made each of these points. ICANN further explained that it had not made a determination on Afilias’ complaints about NDC because .WEB had been on hold for virtually the entire period between the .WEB auction and June 2018 due to, among other things, pending Accountability Mechanisms. ICANN argued that it had acted reasonably and in compliance with its Bylaws and Articles in doing so.

20. Afilias falsely contends that ICANN did not assert “until the late stages of the IRP” that it had made no determination on whether NDC was in violation of the New gTLD Program Rules.²¹ In fact, ICANN made this point explicitly and repeatedly in its Response to the Amended IRP Request, which was its very first pleading before this IRP Panel:

[T]he ICANN Board has not yet had an opportunity to fully evaluate the alleged Guidebook violations – all of which are vigorously denied by NDC and Verisign, and none of which call for an automatic disqualification of NDC – due

²⁰ See, e.g., Afilias’ Article 33 Application ¶¶ 40-44.

²¹ Afilias Article 33 Application ¶ 26.

to the pendency of government investigations and Accountability Mechanisms, including this IRP.²²

[T]he ICANN Board has not fully evaluated the Guidebook violations that Afilias alleges because .WEB has been predominantly on hold since 2016 and no other formal Accountability Mechanism has been invoked calling on the Board to take action. Specifically, the .WEB Contention Set has been on hold from August 2016 through today, with the exception of approximately two weeks in June 2018 after Afilias' DIDP-related Reconsideration Requests.²³

Due to the pendency of DOJ's investigation and a series of Accountability Mechanisms, the Board has not yet had an opportunity to fully address most of the issues that Afilias now pursues in its Amended IRP Request.²⁴

ICANN reiterated this position in each of its subsequent filings.²⁵

21. The Panel itself characterized the dispute over whether ICANN was required to find that NDC breached the New gTLD Rules and disqualify its .WEB application as Afilias' "core claims."

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 auction and deem NDC ineligible to

²² Response to Amended IRP Request ¶ 56.

²³ *Id.* ¶ 62.

²⁴ *Id.* ¶ 66.

²⁵ ICANN's Rejoinder ¶¶ 1 ("What makes this Independent Review Process ("IRP") different from all the others is that ICANN has not fully addressed the ultimate, underlying dispute that Afilias raises in this IRP – namely, whether Nu Dot Co ("NDC"), by virtue of the Domain Acquisition Agreement ("DAA") between NDC and Verisign Inc. ("Verisign"), violated the New gTLD Program ("Program") Applicant Guidebook ("Guidebook") or the Auction Rules and, if so, whether NDC's application should be disqualified or its winning bid for .WEB rejected. This is because .WEB has been mired in legal proceedings from before the .WEB auction was even held, including repeated invocations of ICANN's Accountability Mechanisms and a year-long United States Department of Justice ("DOJ") investigation."), 79 ("ICANN reasonably chose to not take any action in 2016 regarding .WEB because an Accountability Mechanism was pending regarding .WEB. ICANN's Accountability Mechanisms are fundamental safeguards in ensuring that ICANN's model remains effective, and it did not seem prudent for the Board or staff to interfere with or preempt the issues that were the subject of an Accountability Mechanism regarding .WEB that was pending at that time.") & Sec. II(B) ("The ICANN Board Appropriately Chose Not to Make Any Material Decisions Regarding .WEB in November 2016."); ICANN's Post Hearing Brief ¶ 151 ("Testimony during the Hearing confirmed that ICANN has not taken a position on whether NDC violated the Guidebook or the Auction Rules due to pending Accountability Mechanisms and the DOJ's investigation. Ms. Burr's and Mr. Disspain's testimony also explained that ICANN would be best suited to decide this issue because of its far-ranging implications, but also because a unique familiarity with ICANN, the Guidebook and the Program are critically important to making any such decision.").

enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules.²⁶

22. The Panel fully resolved these claims. It found partially in Afiliás' favor and partially in ICANN's favor. The Panel found that the Board acted reasonably in November 2016 by deciding to await the outcome of pending Accountability Mechanisms before determining what action, if any, it should take in response to Afiliás' complaints.²⁷ However, the Panel found that ICANN violated its Bylaws' commitment to operate in an open and transparent manner by not communicating this decision to Afiliás.²⁸ The Panel found that, after taking .WEB off hold in June 2018, ICANN's staff acted inconsistent with the Bylaws and Articles by moving forward with the process for entering a Registry Agreement for .WEB without addressing Afiliás' complaints against NDC.²⁹ The Panel further found that ICANN's Board acted inconsistent with the Bylaws by failing to prevent the staff from moving forward with a Registry Agreement before ICANN had resolved Afiliás' complaints and by failing to pronounce on those complaints while taking the position in the IRP that they presented issues that only ICANN could decide.³⁰ However, the Panel agreed with ICANN that ICANN was vested with the discretion, and thus

²⁶ Final Decision (corrected version) ¶ 254.

²⁷ *Id.* ¶ 331 (“[I]t 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.”).

²⁸ *Id.* ¶ 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.”).

²⁹ *Id.* ¶ 8 (“the Panel finds that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the Board on 9 August 2016, and filed on 3 October 2016 (Articles) and its Bylaws by (a) its staff (Staff) failing to pronounce on the question of whether the Domain Acquisition Agreement 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 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. In the opinion of the Panel, the Respondent in so doing violated its commitment to make decisions by applying documented policies objectively and fairly.”); *see also id.* ¶¶ 344, 413(1) & (2) (*Dispositif*).

³⁰ *Id.*

had the responsibility, to interpret and apply the New gTLD Program Rules and to determine the appropriate remedy in the event that they were violated:

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. The Panel is mindful of the Claimant's contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent's obligation to enforce the New gTLD Program Rules objectively and fairly. Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.
364. In the opinion of the Panel, the foregoing conclusions are consistent with the authority of IRP Panels under Section 4.3(o)(iii) of the Bylaws, which grants the Panel authority to "declare" whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.³¹

23. Thus, Afilias is wrong in contending that the Panel did not resolve the Rules Breach Claim. 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:

³¹ See also *id.* ¶ 9 ("The Panel is also of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules."), ¶ 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.").

The Panel therefore denies the Claimant’s requests for (a) a binding declaration that the Respondent must disqualify NDC’s bid for .WEB for violating the Guidebook and Auction Rules, and (b) an order directing the Respondent to 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.³²

24. In reality, Afiliias’ Application does not seek an **additional** award in respect of the Rules Breach Claim. It seeks a **different** award. Afiliias is dissatisfied with the Final Decision and wants the Panel to reconsider it. Re-arguing its case, Afiliias contends that the Panel should not have determined that ICANN “has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC’s application should be rejected and its bids at the auction disqualified.”³³ Similarly, Afiliias argues that the Panel should not have found that “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[.]”³⁴ Afiliias asks the Panel to reconsider these findings, make contrary findings, and issue a new award that directly conflicts with the Final Decision.³⁵ Afiliias’ arguments are meritless and improper. As shown above, an application under Article 33 cannot be used to seek reconsideration or challenge the factual findings and conclusions of the Final Decision.³⁶

25. Afiliias relies heavily on *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC (Comm) 1354 (Eng.) [CA-155] to argue that the Panel was somehow

³² *Id.* ¶ 9.

³³ Afiliias’ Article 33 Application ¶ 63 (“the assertion that ICANN ‘is the entity with primary responsibility for [the New gTLD] Program’ is irrelevant to the Panel’s mandate in this case. The notion that ICANN or its Board has the ‘requisite knowledge, expertise, and experience, to pronounce in the first instance’ on issues that have been squarely presented to this Panel—so that the Panel should refer these issues back to the ICANN Board if the Board has not yet made any such pronouncements—has no legal or factual basis whatsoever and is entirely inconsistent with this Panel’s mandate. Apart from ICANN’s unsupported assertion, there is nothing in the record before this Panel—and certainly nothing in the Panel’s Decision—to support the notion that the Board has the ‘requisite knowledge, expertise, and experience’ (but this Panel does not) to decide the Dispute submitted to this Panel, in which the Board is accused of having failed to follow its own Articles, Bylaws, and New gTLD Program Rules.”).

³⁴ Final Decision (corrected version) ¶ 348.

³⁵ Afiliias’ Article 33 Application ¶ 54.

³⁶ *Supra* ¶¶ 8-11.

precluded from concluding that ICANN is the proper first instance decision-maker for disputes among applicants under the New gTLD Program.³⁷ In that case, the Claimant asserted that it was owed US\$16.08 million under a contract with the Respondent. The parties were involved in two other contracts under which it was claimed that Claimant owed Respondent US\$5.995 million. Those other contracts had separate dispute resolution agreements and the Respondent refused to expand the arbitrator's jurisdiction to include them. The arbitrator found in Claimant's favor for the entire claimed amount of US\$16.08 million. However, the arbitrator off-set the amounts purportedly owed under the other contracts based on "the hope that the parties would 'resolve by other means any outstanding differences that may remain[.]'"³⁸ The Court annulled the award under Section 68(2)(b) of the EAA, finding that the arbitrator had exceeded his powers by ordering a set off under contracts over which he had no jurisdiction. The Court also commented that the award would be vulnerable under Section 68(2)(d) because the arbitrator failed to finally resolve the issue of how much was owed on the contract under submission because his award was predicated on the hope of a potential future agreement by the parties which may never come to pass.

26. *Ronly Holdings* is inapposite. The Final Decision is not predicated on the assumed terms of some future voluntary resolution among the parties. Nor has the Panel made decisions under contracts outside its jurisdiction. On the contrary, the Panel properly refused Afiliat's request to resolve disputes under instruments outside its jurisdiction, *i.e.*, the Guidebook and Auction Rules. The Panel has jurisdiction only to determine whether ICANN violated its Bylaws and Articles, not whether NDC violated the New gTLD Program Rules. After ICANN makes a decision on whether NDC violated the New gTLD Program Rules, and the consequences for such a violation if one is found, an aggrieved party could potentially bring an IRP contending that the manner in which ICANN made its decision was inconsistent with the

³⁷ Afiliat's Article 33 Application ¶¶ 8 & 9 and n.87.

³⁸ *Id.* at [22].

Bylaws or Articles. But the Panel was correct in resisting Afiliás’ attempt to expand its jurisdiction by arguing that the Bylaws and Articles mandate a particular interpretation and application of the New gTLD Program Rules. As noted above, the Panel instead recognized that its jurisdiction was constrained by “Section 4.3(o)(iii) of the Bylaws, which grants the Panel authority to ‘declare’ whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws,” and found that its determinations were within the bounds of that jurisdictional limitation.³⁹

2. The Panel’s Decision Was Not *Extra Petita*

27. Afiliás contends that the Panel acted *extra petita* in determining at paragraph 362 of the Final Decision “that it is for [ICANN] . . . 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.”⁴⁰ The Panel found that ICANN had not yet pronounced on the propriety of the DAA or on the appropriate consequences should any breach of the New gTLD Program Rules be found.⁴¹ Therefore, the Panel decided that Afiliás’ claim that ICANN breached the Bylaws and Articles by not finding that NDC violated the New gTLD Program Rules and disqualifying NDC was premature.⁴²

28. That decision cannot be revisited through an Article 33 application or otherwise. The mechanism for issuing an additional award “obviously has no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a

³⁹ See *supra* ¶ 22; see also Final Decision (corrected version) ¶ 364.

⁴⁰ Afiliás’ Article 33 Application ¶ 16 n.32; see also *id.* ¶¶ 49, 62.

⁴¹ Final Decision (corrected version) ¶¶ 347 (stating that ICANN “proceed[ed] to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules.”), 348 (ICANN “has made no first instance determination of these allegations”), 351 (“Respondent has not yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB”).

⁴² *Id.* ¶ 413(7).

claim or issue in the award.”⁴³ The Article 33 exception to the *functus officio* doctrine allows an additional award only on a properly asserted claim that was unintentionally omitted from the final award. It does not allow a tribunal to reconsider and reverse a final award, including a final award deciding that a particular claim is premature.

29. *Extra petita* is shorthand for the principle that an arbitration award is invalid where the tribunal exceeds the powers conferred on it under applicable law and the parties’ arbitration agreement. Although the term itself does not appear in English case law, the concept is subsumed under Section 68(2)(b) of the EAA, which states that a court may annul an award for “the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction).”⁴⁴

30. An Award is not “extra petita” merely because the Tribunal has seen fit to issue relief that is different in some way from that sought by the parties. Rather, “extra petita” refers to an award in which a tribunal exceeds its authority by deciding issues not submitted to it or exercising powers withheld from it under the parties’ arbitration agreement or applicable law.⁴⁵ Arbitrators are accorded “substantial discretion in fashioning remedies, including granting relief that neither party has expressly requested.”⁴⁶ “[T]he decisive issue appears to be whether the relief granted by the arbitrators was subsumed within or reasonably related to that requested by the parties.”⁴⁷

31. Afilias mischaracterizes the Panel’s ruling in order to attack it. Afilias argues that the Final Decision is *extra petita* because “[t]here is nothing in any of the documents governing

⁴³ *Supra* at ¶ 11 & n.13 (quoting David D. Caron and Lee M. Caplan, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (B)(1) (2nd ed. 2013)), [CA-152].

⁴⁴ New York Convention, Art. V(1)(c) (1958) (recognition and enforcement may be refused on proof that “[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration”), [CA-94].

⁴⁵ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 25.04[F], [RLA-89].

⁴⁶ *Id.*

⁴⁷ *Id.*

this arbitration (i.e., the Bylaws, the Interim Procedures, or the ICDR Arbitration Rules) that allows this Panel to refer such threshold questions—[i.e., whether NDC breached the New gTLD Program Rules]—to the ICANN Board to ‘pronounce [on] in the first instance.’”⁴⁸ However, the Final Decision was not expressed in these terms. Rather, the Panel:

- a. Declared that ICANN staff acted inconsistent with the Articles and Bylaws by moving to enter a Registry Agreement with NDC without having pronounced on whether the DAA violated the New gTLD Program Rules, and that the ICANN Board acted inconsistent with the Articles and Bylaws by failing to prevent the staff from doing so⁴⁹; and
- b. Rejected Afiliás’ request for a 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.⁵⁰

32. These decisions were clearly within the Panel’s authority under Article 4.3(o)(iii) of the Bylaws to “Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]” The authority to grant declaratory relief necessarily entails the authority to deny such relief where it is found to be inappropriate.

33. Indeed, Afiliás does not appear to contend that either of these determinations was *extra petita*. Rather, Afiliás’ *extra petita* complaint appears to be that the Panel exceeded its authority in paragraph 5 of the *Dispositif*, where the Panel:

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

⁴⁸ Afiliás’ Article 33 Application ¶ 49.

⁴⁹ Final Decision (corrected version) ¶ 413(1).

⁵⁰ *Id.*

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.

34. Afilias' argument is misguided. First, Afilias argued in its Post-Hearing Brief and elsewhere that the Panel has authority to make recommendations to ICANN and its Board.⁵¹ Having affirmatively taken that position, Afilias cannot now take the opposite position merely because the recommendations the Panel chose to make are not to its liking. Second, the Panel's recommendation clearly comes within its authority under Article 4.3(o)(iv) of the Bylaws to "[r]ecommend that ICANN stay any action or decision, or take any necessary interim action, until such time as the opinion of the IRP Panel is considered."

35. Afilias' meritless *extra petita* argument serves only to underscore that Afilias' Article 33 Application is an improper request for reconsideration. By arguing that the Panel's Final Decision should be revoked as *extra petita*, Afilias makes explicit what it strives so hard to keep implicit in the rest of its brief, *i.e.*, that it seeks reversal of the Final Decision, not an additional award from the Panel on a purportedly omitted claim. Afilias seeks to have the Panel reverse its decision to reject Afilias' request for a 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 – a decision that was based on the Panel's finding that it is up to ICANN to decide in the first instances how the New gTLD Program Rules are to be interpreted and applied to NDC's alleged conduct.

36. Article 33 does not authorize Afilias to seek reconsideration and reversal of the Panel's Final Decision, nor does it empower the Panel to grant such a request. The Final Decision is *final*. The Panel cannot revoke or reverse it. The Panel is *functus officio* except for the limited powers reserved by Article 33 to make clerical corrections or issue an interpretation

⁵¹ Afilias' Post Hearing Brief ¶ 240 ("the Panel should order and recommend that ICANN: Reject NDC's application for the .WEB gTLD . . .").

or additional award on an unintentionally omitted claim. To grant Afilias’ request to reconsider the Final Decision and issue a new award inconsistent with the Final Decision would be an act in excess of the Panel’s authority that would itself be subject to annulment under Section 68 of the EAA.

B. The International Law Claim

1. Afilias Did Not Assert Any Discrete “International Law Claim”

37. In its Amended Request for IRP, the only allegation of a breach of international law comes at the very end of Afilias’ introduction, where it asserts without elaboration that “ICANN has also breached its obligations under international and California law to act in good faith.”⁵² Afilias’ only other reference to international law comes in its concluding request for relief, where it seeks an undifferentiated declaration “that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law.”⁵³

38. Afilias’ Revised Statement of Issues—submitted after the Phase II hearing—also includes no “International Law Claim.” Afilias listed five alleged “[b]reaches” of ICANN’s Bylaws on which it sought a decision. The only reference to international law was in the fourth alleged breach (mis-numbered by Afilias as a second No. 2), which poses the issue as follows:

*To the extent ICANN had discretion within its Articles and Bylaws to proceed to finalize a .WEB registry agreement with NDC despite NDC’s violations of the New gTLD Rules, whether ICANN exercised such discretion consistently with its Articles and Bylaws, including, without limitation, its Competition Mandate and the international law obligation of good faith.*⁵⁴

⁵² Afilias’ Amended Request for IRP ¶ 5.

⁵³ *Id.* ¶ 89(1).

⁵⁴ Afilias’ Revised Statement of Issues at 4.

39. The Tribunal resolved this issue in two ways. First, the Tribunal found that ICANN never exercised its discretion to determine whether NDC violated the New gTLD Program Rules and found that the failure to make such a determination, coupled with the staff's conduct in moving forward with a Registry Agreement, constituted a violation of ICANN's Bylaws. Because ICANN had not yet exercised its discretion, however, the Panel found it premature to determine whether ICANN would act inconsistently with its Bylaws if it used its discretion to decide that NDC should not be disqualified.⁵⁵ Second, the Panel explicitly rejected Afilias' claim that ICANN was subject to a "Competition Mandate" that compelled it to reject NDC's application in order to prevent Verisign from operating .WEB.⁵⁶

40. Afilias was well advised in not making a separate "International Law Claim" because the Panel would clearly lack jurisdiction over such a claim. The Panel had jurisdiction to determine whether "Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]"⁵⁷ Section 1.2(a) of the Bylaws commits ICANN to "carrying out its activities in conformity with relevant principles of international law and international conventions." Thus, the Panel could properly consider principles of international law in determining whether an action or inaction by ICANN violated Section 1.2(a). However, the Panel did not have jurisdiction to adjudicate a freestanding international law claim.

41. ICANN made this point in its Post-Hearing brief:

ICANN understands Afilias' references to the AGB and international law as contending that ICANN violated provisions in its Bylaws stating ICANN should make decisions by applying documented policies consistently, neutrally, objectively and fairly, and carry out its activities in accordance with international law. ICANN does not understand Afilias to be asserting a claim that

⁵⁵ Final Decision (corrected version) ¶ 351 ("As seen, the Respondent has not yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB, and therefore this claim, as just summarized, appears to the Panel to be premature.").

⁵⁶ *Id.* ¶ 352 ("the Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transaction or conduct.").

⁵⁷ Bylaws, Art. 4 § 4.3(A), [Ex. C-1].

ICANN violated the Guidebook and/or international law separate and apart from the alleged Articles/Bylaws violations. However, if Afilias were to assert such a claim it would be outside the Panel’s jurisdiction, which is limited to determining if a Covered Action violated the Articles and Bylaws.⁵⁸

42. Afilias made various *arguments* based on international law to support its claim that ICANN violated the Bylaws. But Afilias’ international law arguments added little to the plain terms of the Bylaws. To the extent Afilias assigned any content to the duty of good faith under international law, it was wholly duplicative of California law and other express provisions of ICANN’s Bylaws. In its Amended Request for IRP, Afilias referred interchangeably to the duty of good faith under California and international law.⁵⁹ In its Post-Hearing Brief, Afilias demonstrated that it had done little over the course of the proceeding to develop this concept, arguing again at a detached level that the international law principle of good faith is a “lens” through which the Tribunal should “view all of the provisions of the Bylaws.”⁶⁰ Nowhere did Afilias attempt to establish the international law duty of good faith as the basis for a separate claim.

43. Afilias tries to give heft to its international law arguments by stating that it “elaborated, including with volumes of supporting authority, as to what [] four [] specific facets of international law require.”⁶¹ Afilias cites its Response to the *Amici* Briefs as containing this purported elaboration. But the section of Afilias’ Response to the *Amici* Briefs on which it relies refers to requirements imposed by ICANN’s Bylaws, not separate obligations imposed by international law. Specifically, Afilias refers to the requirements for (1) procedural fairness and

⁵⁸ ICANN’s Post-Hearing Brief, Appendix A n.1.

⁵⁹ See Afilias’ Amended Request for IRP ¶ 5 (“ICANN has also breached its obligations under international and California law to act in good faith.”); Afilias’ Response to Amici Briefs ¶ 144 (“the principle of ‘good faith . . . is found in international law, in the general principles that are the source of international law, and in the corporate law of California.’”).

⁶⁰ Afilias’ Post-Hearing Brief n.203.

⁶¹ Afilias’ Article 33 Application ¶ 75.

due process⁶²; (2) impartiality and non-discriminatory treatment⁶³; (3) openness and transparency⁶⁴; and (4) respect for legitimate expectations.⁶⁵ Afilias bases these requirements on Sections 1.2(a)(v), 2.3, 3.1 and 4.1(c)(i) of the Bylaws and Section 2(III) of the Articles of Incorporation. Afilias does not appear to contend that any of these four “facets” constituted a separate “International Law Claim,” and any such suggestion would need to be rejected. No such claim appears in the Amended Request for IRP, and Afilias did not seek to add new claims in its Response to the *Amici* Brief—which was Afilias’ last submission before the Phase II hearing. Moreover, any attempt at that late stage in the proceeding would have been clearly improper.

44. In short, Afilias made references to international law in asserting its claim that ICANN violated the Articles and Bylaws, but it did not make, much less prosecute, a separate international law claim. This aspect of Afilias’ Article 33 Application is based on a *post hoc* invention, and an additional award cannot and should not be issued to address it.

2. The “International Law Claim” Is Just a Repackaging of Afilias’ Rules Breach Claim

45. In its Article 33 Application, Afilias defines its purported “International Law Claim” as the claim that ICANN violated “relevant principles of international law *by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC.*”⁶⁶ To bring it within the Panel’s jurisdiction, Afilias predicates this claim on Article 1.2(a) of ICANN’s Bylaws. *See supra* ¶ 40. The Panel fully resolved this claim in paragraphs 1 and 2 of the

⁶² Afilias’ Response to the Amici Briefs ¶ 144 (stating that the Bylaws’ requirement for ICANN to conduct its activities with “procedural fairness, transparency, and non-discrimination” “arise from the general principle of good faith, which is considered to be ‘the foundation of all law and all conventions.’”).

⁶³ *Id.* ¶ 148.

⁶⁴ *Id.* ¶¶ 151-154.

⁶⁵ *Id.* ¶ 159.

⁶⁶ Afilias’ Article 33 Application ¶ 71; *see also id.*, ¶ 18 (defining the International Law Claim as “Afilias’ claim that ICANN violated its obligation to conduct its activities in accordance with the relevant principles of international law, and thereby breached its Articles and Bylaws.”).

Dispositif. Paragraph 1 held that ICANN violated its Articles and Bylaws by not enforcing the New gTLD Program Rules and proceeding to delegate .WEB to Afilias. The Panel issued a binding declaration that ICANN violated its Articles and Bylaws by, *inter alia*, “moving to delegate .WEB to NDC in June 2018” without having determined whether the DAA violated the New gTLD Program Rules. In paragraph 2 of the *Dispositif*, the Panel issued a further binding declaration that “in so doing, the Respondent violated its commitment to make decisions by applying documented policies objectively and fairly,” as required by Section 1.2(a)(v) of the Bylaws.

46. Thus, Afilias’ complaint in respect of its “International Law Claim” is difficult to fathom. Its gripe appears to be, not that the Panel omitted to rule on whether any particular conduct of ICANN violated the Articles and Bylaws, but rather that the Panel did not refer to international law in the course of doing so. This complaint is misguided for two reasons.

47. First, the Panel *did* refer to international law. In the section on “Applicable Law,” the Panel referred to and quoted the commitment in Section 1.2(a) of the Bylaws that ICANN must carry out “its activities in conformity with relevant principles of international law and international conventions and local law [. . .].”⁶⁷ Likewise, in setting out the provisions of the Articles and Bylaws relevant to resolving Afilias’ “core claims”—*i.e.*, its Rules Breach Claim (*supra* at ¶ 21)—the Panel identified and quoted Section 1.2(a) of the Bylaws once again, as well as Article 2(III) of the Articles of Incorporation, which is substantially similar. The Panel’s declaration in paragraph 1 of the *Dispositif* that ICANN’s staff and Board had violated ICANN’s Articles and Bylaws, without reference to a specific Article or Bylaws provision, was thus based on the Panel’s prior explication of the commitments and core values, including applicable principles of international law, governing ICANN’s actions and inactions, as set forth in its Articles and Bylaws.

⁶⁷ Final Decision (corrected version) ¶ 28 (brackets and ellipses in original).

48. Second, even if the Panel had omitted any reference to international law, that would not be grounds for an additional award. There is no requirement that an arbitral tribunal or court deal in detail with every argument advanced by a party in its submissions. Such a requirement would serve no legitimate purpose and would be virtually impossible to satisfy where, as here, the parties have submitted hundreds of pages of submissions. In *Symbion Power*, the English High Court explained that “[t]here is a distinction to be drawn between “issues” on the one hand and ‘arguments’, ‘points’, ‘lines of reasoning’ or ‘steps’ in an argument[.]”⁶⁸ “[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 [...]”⁶⁹

49. It is self-evident that the resolution of Afiliás’ claim that ICANN violated its Articles and Bylaws “by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC” did not demand a more in-depth examination of international law because the Panel **granted** that claim. The Panel held that ICANN violated its Articles and Bylaws by “moving to delegate .WEB to NDC in June 2018” without having determined whether the DAA violated the New gTLD Program Rules. Any additional examination of international law could not have impacted the Panel’s conclusion and would therefore have been superfluous.

50. An additional award addressing Afiliás’ international law argument in further detail is not only unnecessary, it is also beyond the scope of the Panel’s authority. The High Court held in *Torch Offshore LLC v. Cable Shipping Inc.* [2004] EWHC (Comm) 787 [27] (Eng.) [RLA-9899] that the power to make an additional award “only applies to a claim which has been presented to a Tribunal but has not been dealt with, as opposed to an issue which

⁶⁸ *Symbion Power*, [2017] EWHC (TCC) 348 [54] (Eng.) [RLA-98] (quoting, *Sec’y of State for the Home Dept. v. Raytheon Sys. Ltd.*, [2014] EWHC (TCC) 4375 [33] (Eng), [CA-150]).

⁶⁹ See also Emmanuel Gaillard and John Savage (eds), *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* § 1417 (1999) [RLA-86] (“In some cases, the arbitral tribunal fails to decide one of the heads of claim. This situation is not to be confused with that where the tribunal does not respond to all the allegations, or even all the arguments put forward by the parties.”).

remains undetermined, as part of a claim.” A “claim” refers to “a head of claim for damages or some other 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.”

51. As shown in paragraph 49 (above), the Panel granted Afiliás’ request for a declaration that ICANN violated its Articles and Bylaws by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC. That general determination thus encompasses Afiliás’ sporadic assertions that, by acting in that manner, ICANN breached its obligations under international and California law to act in good faith. The Panel therefore has no authority to issue an additional or amended award specifically addressing issues already subsumed in the Panel’s binding declaration.

C. The Disparate Treatment Claim

52. Afiliás’ Amended Request for IRP does not state a “Disparate Treatment Claim.” It refers to “disparate treatment” only twice. The first time is in an introductory section describing ICANN, where Afiliás quotes the statement in Section 2.3 of the Bylaws that “ICANN shall not apply its standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”⁷⁰ The second reference is in paragraph 75, under the heading “ICANN’s Failure to Disqualify NDC Breaches ICANN’s Obligation to Apply Documented ICANN Policies Neutrally, Objectively, and Fairly,” where Afiliás quotes Section 2.3 of the Bylaws once again. Thus, to the extent the Amended IRP Request invokes the prohibition on disparate treatment set out in Section 2.3 of the Bylaws, it does so in support of its Rules Breach Claim⁷¹, which the Panel fully resolved. Accordingly, the analysis in paragraphs 47-48 through 50-51 above applies *mutatis mutandis* to Afiliás’ disparate treatment arguments.

⁷⁰ Afiliás’ Amended Request for IRP ¶ 8.

⁷¹ Afiliás’ Application ¶ 21 n.36 (“Afiliás alleged in its Rules Breach Claim that ICANN violated, *inter alia*, its obligation to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling any particular party for discriminatory treatment.”).

Afilias may not properly seek—and the Panel has no authority to grant—an additional award to address an argument that it made in support of a claim that the Final Decision fully resolved.

53. Afilias’ Reply Memorial and List of Phase II issues also do not state any discrete “disparate treatment claim.” Afilias’ Reply Memorial refers to the prohibition on disparate treatment in Section 2.3 of the Bylaws only as support of Afilias’ competition claim. That claim, which the Panel denied as premature while also noting that it was based on a faulty premise, argued that ICANN should subject Verisign to disparate treatment by blocking its potential acquisition of .WEB in order to further ICANN’s purported “competition mandate.”⁷² Afilias’ List of Phase II issues, which it submitted on 13 March 2020, contains no reference to “disparate treatment” at all.

54. Afilias substantially expanded its “disparate treatment” arguments in its Post-Hearing Brief and its accompanying Revised Issues List. Indeed, in its Article 33 Application, the only submissions that Afilias cites as purportedly setting out its “Disparate Treatment Claim” are its Post-Hearing Brief and its Revised Statement of Issues.⁷³ However, to the extent the allegations of disparate treatment asserted for the first time in those pleadings could be considered as discrete claims, they were not properly before the Panel. It should go without stating 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. To do so would violate fundamental notions of due process, including the requirement that each party be given “a reasonable opportunity of putting his case and dealing with that of his opponent.”⁷⁴ It also

⁷² Afilias’ Reply Memorial ¶ 131. In a footnote, Afilias asserts that “[t]o the extent that ICANN has effectively approved the transfer and assignment of NDC’s .WEB registry agreement—when NDC has not yet entered such an agreement and has not yet requested transfer and assignment—ICANN has breached its Articles and Bylaws by, inter alia, failing to apply these documented policies consistently, neutrally, objectively, and fairly, and without singling out any party for disparate treatment.” (*Id.*, n.79.) However, no application to transfer a .WEB registry agreement has been made by NDC or approved by ICANN. Indeed, Afilias recognized this in the sentence to which footnote 79 refers, stating that “the rules and procedures for seeking assignment of an executed gTLD registry agreement are not at issue in this case.” *Id.* ¶ 42.

⁷³ Afilias’ Article 33 Application ¶ 85 & nn.139, 140.

⁷⁴ EAA, Sec. 33(1) [CA-124]; *see also* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), Art. V (recognition and enforcement of an award may be

would violate the arbitral procedure agreed by the parties.⁷⁵ Under Article 4.3(b)(iii) of the Bylaws, the “Claim” over which the Panel has jurisdiction is limited to matters reasonably encompassed within the Amended Request for IRP.⁷⁶

55. It is unclear from Afilias’ Article 33 Application which of its disparate treatment arguments Afilias contends the Panel should have addressed but did not. Afilias’ Article 33 Application does not define the substance of its purported “Disparate Treatment Claim” beyond the generic statement that “ICANN violated its Articles and Bylaws through its disparate treatment of Afilias *vis-à-vis* Verisign and NDC.”⁷⁷ The Panel correctly found that the substance of Afilias’ allegations of disparate treatment were considered by the Panel in analyzing Afilias’ core claims (i.e., the “Rules Breach Claim”) and found that it was therefore unnecessary “based on the allegations of disparate treatment, to add to its findings in relation to the Claimant’s core claims.”⁷⁸

56. Thus, the Panel considered Afilias’ allegations of disparate treatment in the course of determining Afilias’ core claims, found that it was unnecessary to consider them further, and deliberately decided not to make additional findings with respect to them. Afilias is asking the Panel to reconsider and reverse that conclusion. However, a request for an additional award under Article 33 cannot be properly used in this manner. As shown above, the mechanism for

refused where a party was not given a proper opportunity to present its case) [RLA-94]; ICDR Rules, Art. 22(1) (“the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”), [RLA-91].

⁷⁵ New York Convention, Art. V(d) (recognition and enforcement of an award may be refused where the arbitral procedure was not in accordance with the agreement of the parties), [CA-94].

⁷⁶ Bylaws, Art. 4.3, §§ 4.3(b)(iii) (“**Disputes**” are defined as (A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws . . .”); 4.3(d) (“An IRP shall commence with the Claimant’s filing of a written statement of Dispute (a “**Claim**”) with the IRP Provider”); 4.3(g) (the “IRP Panel shall be charged with hearing and resolving the Dispute . . .”). Afilias incorrectly states (Afilias’ Article 33 Application ¶ 11) that the “written statement of Dispute” that constitutes the “Claim” is “the document or documents describing the Covered Actions that the claimant considers has given rise to the Dispute.” However, Section 4.3(d) defines the “written statement of Dispute” as the filing that “commence[s]” the IRP, *i.e.*, the Request for IRP. Thus, the Claim is limited to the claims fairly encompassed in the Amended IRP Request.

⁷⁷ Afilias’ Article 33 Application ¶ 85.

⁷⁸ Final Decision (corrected version) ¶ 350.

issuing an additional award “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.”⁷⁹

IV. AFILIAS’ REQUESTS FOR “INTERPRETATIONS” SHOULD BE DENIED

A. The Scope of a Permissible Request for Interpretation under Article 33

57. A request 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. This principle is stated in numerous leading commentaries. For example:

“The interpretation of an arbitral award is only really helpful where the ruling, which is generally presented in the form of an order, is so ambiguous that the parties could legitimately disagree as to its meaning. By contrast, any obscurity or ambiguity in the grounds for the decision does not warrant a request for interpretation of the award.” Emmanuel Gaillard and John Savage (eds), *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* § 1415 (3rd ed. 1999), [RLA-85].

“A request for interpretation should therefore be available only if a party demonstrates that the award is ambiguous and requires clarification for its effective execution.” Born, *INTERNATIONAL COMMERCIAL ARBITRATION* § 24.04[B]. “In practice, requests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award.” *Id.* § 24.04[C], [RLA-88].

“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.” Lew, Mistelis et al., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* § 24-95 (2003), [RLA-92].

58. Accordingly, “it is very rare for interpretations to be either sought or granted.”⁸⁰

A request for an interpretation may not be used to challenge the tribunal’s reasoning and the power to issue an interpretation does not allow an arbitral tribunal to reconsider its decision or

⁷⁹ *Supra* ¶ 11 & n.13 (quoting David D. Caron and Lee M. Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY*) § 26(4)(B) (2nd ed. 2013), [CA-152].

⁸⁰ Born, *INTERNATIONAL COMMERCIAL ARBITRATION* § 24.04, [RLA-88].

change its mind. This fundamental principle has been recognized by English courts⁸¹, international arbitral tribunals⁸², and leading commentators.⁸³

59. Afiliás asserts that the scope of Article 33 is somehow expanded because IRP decisions are not confidential and the Bylaws state that IRP decisions should reflect a “well-reasoned” application of the Bylaws and Articles and prior IRP decisions under the same or substantially equivalent versions of the Bylaws and Articles.⁸⁴ This argument has no merit. The requirement for an award to be reasoned is a “nearly universal principle” in international arbitration.⁸⁵ Under the ICDR Rules and the EAA, all awards must be reasoned unless agreed otherwise by the parties.⁸⁶ Similarly, every tribunal must apply the law selected by the parties, including any precedential decisions.⁸⁷ No authority or logic supports the contention that these

⁸¹ *Al Hadha Trading Co. v. Tradigrain S.A.*, [2002] Lloyd’s Law Reports 512 [66] [RLA-78] (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.”) (quoting Mustill & Boyd on Commercial Arbitration).

⁸² *Methanex Corp. v. United States*, UNCITRAL, Letter to Parties from Tribunal ¶ 2 (25 Sept 2002) [CA-164] (“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.”).

⁸³ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.04[C] [RLA-88] (“A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions . . . ‘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.”) (quoting Procedural Order of 6 January 2003 in ICC Case 11451, 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) 18-20 (2010)) [RLA-95]; Lew, Mistelis et al., COMPARATIVE INTERNATIONAL ARBITRATION § 24-97 (2003) [RLA-92] (“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.”).

⁸⁴ Afiliás’ Article 33 Application ¶ 93.

⁸⁵ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 23.0 [RLA-87] (“It is now a nearly universal principle that, unless otherwise agreed, international arbitral awards must set forth the reasons for the tribunal’s decision, as well as containing a dispositive section specifying the relief ordered by the tribunal. This requirement for a reasoned award is reflected in international arbitration conventions, national arbitration law and institutional arbitration rules.”).

⁸⁶ ICDR Rules, Art. 30(1) [RLA-91] (“The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.”); EAA, Sec. 52(4) (“The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.”).

⁸⁷ ICDR Rules, Art. 31(1) [RLA-91] (“The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute.”); EAA § 46(1) [CA-124] (“The arbitral tribunal shall decide the dispute—(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute”).

ubiquitous requirements, or the fact that an award may be non-confidential, impliedly abrogates the *functus officio* rule, expands the scope of Article 33, or creates a right to seek reconsideration of a final award.

60. Citing *Methanex v. United States*, Afilius misleadingly asserts that the Panel can and should grant its request even if it does not fall “strictly” within Article 33, because, according to Afilius, it would “do no harm and possibly some good[.]”⁸⁸ But the decision on which Afilius relies stands for the opposite proposition. The *Methanex* tribunal refused a request for interpretation of a Partial Award because it did not fall within the terms of Article 35 of the UNCITRAL Rules. The Tribunal’s comment that “it can do no harm and possibly some good if we were to address certain of the points raised by Methanex” was made as a prelude to examining the grounds on which Methanex sought an interpretation of the Partial Award, which the Tribunal found to be meritless. The comment was not made to justify providing an interpretation of the Partial Award, as Afilius falsely suggests. On the contrary, the *Methanex* tribunal found that the Partial Award was not ambiguous and refused to provide any further interpretation. It admonished Methanex that the Partial Award must be “read as a whole, as applied to this particular case,” and that Methanex was improperly “isolat[ing] one particular paragraph in order to construct an ambiguity which does not in fact exist, or if it did, is irrelevant to the circumstances of this case.”⁸⁹

61. As shown below, Afilius’ requests for interpretation are similarly based on improperly isolating particular words and phrases to create the appearance of ambiguity where none exists. Each request should be rejected.

⁸⁸ Afilius’ Article 33 Application ¶ 92.

⁸⁹ *Methanex Corp. v. United States*, UNCITRAL, Letter to Parties from Tribunal ¶ 8 (25 Sept 2002), [CA-164].

B. Afilias' Requests

62. Afilias broadly makes five requests for interpretation, although several of the requests are then broken down further into a series of interrogatories that Afilias poses to the Panel. In brief, Afilias asks the Panel to:

- a. Define the term “pronounce”;
- b. State whether the “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”;
- c. State what law the Panel applied;
- d. Describe the “legal or evidentiary basis” on which the Panel determined that ICANN has “the requisite knowledge, expertise, and experience to pronounce” on NDC’s alleged violations of the New gTLD Program Rules; and
- e. Describe the standard of proof that the Panel applied.⁹⁰

63. 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 33.⁹¹ And none of the matters for which Afilias seeks further elaboration is necessary for the “effective execution”⁹² of the Final Decision. The purpose of Afilias’ requests clearly is to challenge the Panel’s reasoning and to support Afilias’ illegitimate application for a further award that modifies or reverses the Final Decision. This is an abuse of Article 33 and it should not be countenanced.⁹³ But even if Afilias’ request could be charitably

⁹⁰ Afilias’ Article 33 Application ¶ 94.

⁹¹ Lew, Mistelis et al., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* § 24-95 (2003) [RLA-92] (“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.”).

⁹² Born, *INTERNATIONAL COMMERCIAL ARBITRATION* § 24.04[B], [RLA-88].

⁹³ *Methanex Corp. v. United States*, UNCITRAL, Letter to Parties from Tribunal ¶ 2 (25 Sept 2002) [CA-164] (“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 extent to a request to modify or annul the award or take the form of an appeal or review of the award.”); Born, *INTERNATIONAL COMMERCIAL ARBITRATION*, Chapter 24, § 24.04[C] (“A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions.”), [RLA-88].

construed as seeking “additional explanations” of the Panel’s reasons for its Final Decision—rather than reversal of the Final Decision—that is not a proper function of a request for interpretation.⁹⁴

1. The Meaning of “Pronounce”

64. Afilias tries to fabricate an ambiguity in order to support its request for an “interpretation” of the term “pronounce.” First, Afilias incorrectly asserts that the Panel found that ICANN had “decided the matter of NDC’s application” by proceeding to send a Registry Agreement.⁹⁵ Afilias next argues that the Panel’s finding that ICANN did not “pronounce” on the matter indicates that to “pronounce” means something different than to “decide” or “determine.”⁹⁶ Afilias then purports not to understand the difference between these terms in the context of the Final Decision.

65. Afilias’ argument is based on a false premise. The Panel did not find that ICANN made a decision or determination about whether NDC violated the New gTLD Program Rules. The Panel found precisely the opposite. Although the Panel stated that ICANN’s staff’s conduct in moving forward with a Registry Agreement suggested “some implicit finding that NDC was not in breach of the New gTLD Program Rules,”⁹⁷ it found just three paragraphs later that ICANN in fact had “proceed[ed] to delegation *without addressing* the fundamental question of

⁹⁴ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.04[C] [RLA-88] (“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.”) (quoting Procedural Order of 6 January 2003 in ICC Case 11451 [RLA-95], 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) 18-20 (2010)).); *Feldman v. Mexico*, Correction and Interpretation of the Award, ICSID Case No. ARB(AF)/99/1 (NAFTA) of 13 June 2003 ¶ 10 [RLA-83] (“In view of the Tribunal, this does not concern a question of interpretation under Article 56 of the Arbitration (Additional Facility) Rules. Rather, the Respondent, by asking the Tribunal in its request to explain five different points in connection with the application of NAFTA Article 2105, effectively is seeking a new decision. Therefore the Tribunal denies the Respondent’s request for interpretation”).

⁹⁵ Afilias’ Article 33 Application ¶ 98.

⁹⁶ *Id.*

⁹⁷ Final Decision (corrected version) ¶ 344.

the propriety of the DAA under the New gTLD Program Rules.”⁹⁸ The Panel further found that “Respondent, the entity with primary responsibility for this Program, *has made no first instance determination of these allegations.*”⁹⁹ This is reflected paragraph 1 of the *Dispositif*, which holds that ICANN acted inconsistent with the Bylaws by moving forward with a Registry Agreement without the staff or the Board having pronounced on the allegations against NDC.

66. Read in context, there is no ambiguity in the Panel’s use of the term “pronounce.” It is used interchangeably with “decide,” “determine,” or “resolve.”¹⁰⁰ The Panel determined that ICANN acted inconsistent with its Articles and Bylaws by moving forward with a Registry Agreement with NDC without having decided/pronounced on/resolved whether NDC’s impugned conduct violated the New gTLD Program Rules.¹⁰¹ The Panel further recommended that ICANN stay any action that would further the delegation of .WEB until the Board has considered the Panel’s Final Decision and decided/pronounced on/resolved the question of whether NDC violated the New gTLD Program Rules and, if so, whether NDC’s application should be disqualified.¹⁰²

67. In reality, Afilias is misusing Article 33 to seek a further award on a series of issues that have never been briefed by the parties or put to the Panel. This is evident in the ten interrogatories that Afilias demands the Panel answer, including:

⁹⁸ *Id.* ¶ 347.

⁹⁹ *Id.* ¶ 348.

¹⁰⁰ *See, e.g., id.* ¶ 322 (“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.”).

¹⁰¹ *Id.* ¶ 413(1).

¹⁰² *Id.* ¶ 413(5).

- “What should have been the form and substance of ICANN’s ‘pronouncement’?”
- “Before ICANN issues the ‘pronouncement’ recommended by the Panel, must Afilias and other Internet community members be given an opportunity to be heard by Board?”
- “Must the Respondent’s ‘pronouncement’ be issued following an opportunity for Afilias and other Internet community members to receive and comment on all relevant evidence and argument?”
- “What materials, documentary or otherwise, must ICANN consider before it issues the ‘pronouncement’ recommended by the Panel?”
- “Must the ‘pronouncement’ be issued with findings of fact and conclusions of law”?

68. These interrogatories do not seek an interpretation of the Final Decision. They seek advisory opinions from the Panel on what specific procedures and processes the Board should follow in its consideration and resolution of Afilias’ complaints against NDC. Article 33 cannot be used for this purpose. The Panel has no jurisdiction to provide its advice on such issues. Nor is there anything in the record to assist the Panel in formulating an opinion on these issues. Although the parties vigorously disputed whether the proper first instance decision-maker for disputes under the New gTLD Program Rules is ICANN or an IRP Panel, neither party made submissions or asked for findings as to whether there are any specific processes that ICANN must follow in resolving such disputes or any specific format for presenting its decision (there are not). These questions have never been placed before the Panel.

2. Whether the Board Must Always “Pronounce” on Staff Action Before an IRP May Be Filed

69. Afilias wrongly asserts that the Final Decision somehow holds or suggests 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.”¹⁰³ The passage from the Final Decision that Afilias cites is paragraph 337. Nothing in that paragraph plausibly can be construed as imposing such a requirement.

¹⁰³ Afilias’ Article 33 Application ¶¶ 100, 103.

70. On the contrary, the Panel found in Afiliás' favor with regard to actions and inactions for which the ICANN Board never pronounced. The Panel found that ICANN staff acted inconsistent with the Articles and Bylaws by moving forward with a Registry Agreement for .WEB without having determined whether NDC violated the New gTLD Program Rules. The Panel found that the Board acted inconsistent with the Articles and Bylaws by not preventing this conduct by the staff. The Panel further found that ICANN acted inconsistent with the Articles and Bylaws in preparing and issuing the questionnaire dated 16 September 2016. None of these actions or inactions were submitted to the Board for "pronouncement."

71. This section of Afiliás' brief is primarily devoted to arguing, not that the Final Decision imposed a general "pronouncement" requirement in need of further explication, but rather that the Panel reached the wrong conclusion—or provided insufficient "reasoning or analysis"—in deciding that ICANN is the proper first instance decision-maker to determine whether NDC breached the New gTLD Program Rules and, if so, the appropriate consequences. This argument is misplaced and inappropriate. As shown above, a request for interpretation under Article 33 cannot be used to challenge the substance of a final award. (*See supra* ¶¶ 10 & nn.7-10.)

72. Afiliás' challenge to the substance of the Panel's Final Decision is also meritless. As ICANN explained in its opening statement at the Phase II hearing, Afiliás took a very extreme position in requesting a declaration that ICANN was required to determine that NDC breached the New gTLD Program Rules, disqualify NDC's application and award .WEB to Afiliás.¹⁰⁴ An IRP Panel has jurisdiction only to determine if ICANN violated its Articles and Bylaws. An IRP Panel does not have jurisdiction to resolve disputes under the New gTLD Program Rules. On the contrary, the New gTLD Program Rules state that it is up to ICANN to resolve disputes under the Rules, that ICANN has discretion in doing so, and that ICANN's

¹⁰⁴ Hearing Transcript at 142:16-143:13.

decision is final and binding.¹⁰⁵ To bring its request within the Panel’s jurisdiction, Afilias argued that any exercise of ICANN’s discretion to apply the New gTLD Program Rules in a manner that did not result in NDC’s disqualification necessarily would be inconsistent, biased, subjective and/or unfair, and would therefore violate ICANN’s commitment in Section 4.3(a)(v) of its Bylaws “to apply documented policies consistently, neutrally, objectively, and fairly.” The Panel correctly rejected that extreme position. In accordance with the Guidebook and Auction Rules’ clear mandate, the Panel held that the decision whether NDC violated the New gTLD Program Rules should be made by ICANN, not by an IRP panel.

73. The Panel was correct to reject Afilias’ attempt to expand the Panel’s jurisdiction so as to become a first instance decision-maker for disputes under the New gTLD Program Rules. And while that decision has apparently upset Afilias, it is final and cannot be revisited.

3. The Law Applied by the Panel

74. The Panel directly addressed the governing law at Section I.H of the Final Decision. It found that “[t]he rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures,”¹⁰⁶ including Section 1.2(a) of the Bylaws which requires ICANN to “carry[] out its activities in conformity with relevant principles of international law and international conventions and applicable local law[.]”¹⁰⁷ The Panel further stated that ICANN had taken the position that “in case of ambiguity the Interim Procedures, as

¹⁰⁵ gTLD Applicant Guidebook §§ 1.2.7 [Ex. C-3] (“Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading *may result* in denial of the application.”); 5.1 (“ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program . . . Under exceptional circumstances, the Board *may* individually consider a gTLD application.”), Module 6 ¶ 3 (“Applicant acknowledges and agrees that ICANN has the right not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is *entirely at ICANN’s discretion.*”); Module 6 ¶ 1 (“Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) *may* cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”); Auction Rules for New gTLDs ¶ 72 [Ex. C-4] (“If any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, *ICANN’s decision shall be final and binding.*”) (emphases added).

¹⁰⁶ Final Decision (corrected version) ¶ 27.

¹⁰⁷ *Id.* ¶ 28.

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.”¹⁰⁸

75. Once again, to create ambiguity where none exists, Afilias removes isolated words and phrases in the Final Decision from their context and gives them an interpretation they cannot bear. Afilias wrongly asserts that the Panel determined that “California law is the primary governing law for ICANN” and that “California law serves as a gap filler.”¹⁰⁹ The Panel was not asked by the parties to make determinations to that effect and it did not do so. 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.

76. Afilias asserts that the Panel is so misguided in its statement that Afilias did not express disagreement that California law applies to resolve ambiguities in ICANN’s governing documents that Afilias “can only conclude that the Panel failed to read Claimant’s voluminous submissions on this point.”¹¹⁰ Afilias states that “[c]learly no actual deliberation or analysis by the Panel” went into this point and the Panel’s statement is “a plain abdication of the Panel’s obligation to hear and resolve the issues before it in this IRP.”¹¹¹

77. But Afilias never took the position in its submissions that ambiguities in ICANN’s governing documents are to be resolved by reference to sources other than California law. On the contrary, Afilias affirmatively relied on California law as governing the interpretation of ICANN’s governing documents. For example, Afilias cited the California Court of Appeals decision in *Singh v. Singh* for the statement that “[c]orporate bylaws are interpreted according to the general rules governing construction of statutes and contracts.”¹¹² Afilias also

¹⁰⁸ *Id.* ¶ 29.

¹⁰⁹ Afilias’ Article 33 Application ¶ 104.

¹¹⁰ *Id.* ¶ 105.

¹¹¹ *Id.* ¶ 79.

¹¹² *See, e.g.*, Afilias’ Response to *Amici* Briefs ¶ 218 & n.402.

relied on California law in its arguments concerning the scope of deference to the Board’s business judgment under Section 4.3(i)(iii) of the Bylaws.¹¹³

78. Afilias erroneously contends that the Panel either rejected or failed to consider its submission that “the key law applicable to ICANN includes international law.”¹¹⁴ To the contrary, the Panel repeatedly states in its Final Decision that ICANN must “carry[] out its activities in conformity with relevant principles of international law and international conventions.”¹¹⁵

79. In sum, the Final Decision unambiguously identifies the law that the Panel considered to be applicable. Moreover, Afilias does not contend that a further interpretation on this point is necessary or helpful for the parties to execute the Final Decision. Accordingly, Afilias’ request for an “interpretation” of the law that the Panel found to be applicable should be denied.

4. The Basis for the Panel’s Ruling that ICANN Has the Expertise to Interpret and Apply the New gTLD Program Rules

80. Afilias asks the Panel to issue a further award setting out in detail “the basis on which it determined that ICANN has the ‘knowledge, expertise, and experience’” to act as the first instance decision-maker for disputes among applicants under the New gTLD Program.¹¹⁶ The Panel should deny Afilias’ request.

81. First, this is not a proper subject for an additional award under Article 33. There is “virtual unanimity” that a request for interpretation “cannot be used to seek revision, reformulation or additional explanations of a given decision,”¹¹⁷ which is precisely what Afilias

¹¹³ See, e.g., Afilias’ Response to *Amici* Briefs ¶¶ 169, 175 & n.305; Afilias Post-Hearing Brief ¶¶ 162, 175 & nn.373, 404.

¹¹⁴ Afilias’ Article 33 Application ¶ 104.

¹¹⁵ Final Decision (corrected version) ¶¶ 28, 290, 292.

¹¹⁶ Afilias’ Article 33 Application ¶ 111.

¹¹⁷ Born, INTERNATIONAL COMMERCIAL ARBITRATION § 24.04[C] [RLA- 88] ((quoting Procedural Order of 6 January 2003 in ICC Case 11451 [RLA-95], in ICC, Decisions on ICC Arbitration Procedure: A Selection of

seeks. Nor can there be any contention that an additional explanation on this point is necessary for the parties to execute the Final Decision.¹¹⁸

82. Second, that ICANN is the entity with the knowledge, expertise and experience to administer the New gTLD Program and resolve disputes among applicants is self-evident. Not only did ICANN, with extensive input from the Internet community, create the New gTLD Program, but the Guidebook and the Auction Rules state that ICANN has ultimate responsibility for the New gTLD Program and for resolving disputes under the New gTLD Program Rules.¹¹⁹ By contrast, an IRP Panel is not charged with resolving disputes under the New gTLD Program Rules and has no jurisdiction to do so.

5. The Standard of Proof Applied by the Panel

83. At paragraph 32 of the Final Decision, the Panel set out the standard of proof, citing paragraph 6.87 of REDFERN AND HUNTER ON INTERNATIONAL COMMERCIAL ARBITRATION:

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, “the 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.”

84. Afiliás misconstrues this passage as stating the Panel “applied a heightened standard of proof to some of the issues before it, in light of allegations of dishonesty or fraud.”¹²⁰ This is neither a reasonable nor accurate interpretation. The reference in the second sentence to

Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003-2004) 18-20 (2010)).

¹¹⁸ *Supra* ¶ 59.

¹¹⁹ *Supra* ¶ 72 & n.105.

¹²⁰ Afiliás’ Article 33 Application ¶ 112.

“ensur[ing] that the standard is met” clearly is not a separate, heightened standard; it is a reference to the standard defined in the first sentence, *i.e.*, the “balance of probabilities.”

85. If there were any doubt—and there cannot reasonably be any—it is dispelled by reviewing of the passage from Redfern and Hunter from which the Panel quotes:

The practice of arbitral tribunals in international arbitrations is to assess the weight to be given to the evidence presented in favour of any particular proposition by reference to the nature of the proposition to be proved. For example, if the weather at a particular airport on a particular day is an important element in the factual matrix, it is probably sufficient to produce a copy of a contemporary report from a reputable newspaper, rather than to engage a meteorological expert to advise the tribunal.

In general, the 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. A classic example of this general rule involves allegations of fraud or illegality. ***Whilst the standard will remain the ‘balance of probabilities’, an arbitral tribunal is likely to look even more closely at the evidence to determine whether such a standard has been adequately met.***¹²¹

86. Redfern and Hunter go on to quote from the House of Lords decision in *Secretary of State for the Home Department v Rehman*:¹²²

The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Sexual Abuse, Standard of Proof) (Minors)* [1996] AC 563 at 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

¹²¹ Blackaby Nigel, Constantine Partasides, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶¶ 6.86-6.87 (6th ed. 2015) (emphasis added), [RLA-96].

¹²² *Sec’y of State*, [2001] UKHL 47, at [140]–[141], [RLA-98].

87. Thus, the Final Decision clearly does not apply “a heightened standard of proof to some of the issues,” as Afilias contends. It applies the “balance of probabilities” in the normal manner under which more startling propositions—such as allegations of fraud—require more cogent evidence. Accordingly, Afilias’ request that the Panel identify the issues to which it applied a heightened standard of proof, and its related request that the Panel state whether the application of a heightened standard affected its resolution of eight particular questions,¹²³ must be denied.

V. ICANN SHOULD BE AWARDED ITS COSTS AND ATTORNEYS’ FEES

88. Under Article 4.3(r) of the Bylaws, ICANN bears all administrative costs of maintaining the IRP mechanism (including compensation of the Panel members), and each party bears its own legal expenses. However, “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.” Article 4.3(t) requires the Panel to “specifically designate the prevailing party as to each part of a Claim.” In the Final Decision, the Panel rejected ICANN’s argument that Article 4.3(r) allows shifting of costs and fees only when a Claim or defense is found as a whole to be frivolous or abusive. The Panel found instead that, read in light of Article 4.3(t) and the general “practice of international arbitration,” Article 4.3(r) allows for cost shifting separately for “each part of a Claim.”¹²⁴

89. The Panel applied Article 4.3(r) to shift legal fees in connection with Afilias’ Request for Emergency Interim Relief. Neither the Panel nor the Emergency Panelist ruled on the merits of Afilias’ Request for Emergency Interim Relief because, after Afilias filed its Request, ICANN voluntarily agreed to the relief sought. Nevertheless, the Panel held that

¹²³ Afilias’ Article 33 Application ¶ 114.

¹²⁴ Final Decision (corrected version) ¶ 396.

Afilias' Request for Emergency Interim Relief was a "part of a Claim" for which costs may be shifted.¹²⁵

90. Under these principles, ICANN is entitled to recover its costs and legal fees in responding to Afilias' Article 33 Application. Afilias' Article 33 Application is at least as much a "part of a Claim" as its Request for Emergency Interim Relief. Indeed, unlike its Request for Emergency Interim Relief, Afilias' Article 33 Application seeks an amended Final Decision on the merits of various issues, including advisory opinions on matters that Afilias has never previously raised. Article 33(4) of the ICDR Rules expressly grants the Panel authority to shift costs and legal fees in connection with an Article 33 Application, which underscores and buttresses the conclusion that such an application is a "part of a Claim" as to which costs and fees may be shifted.

91. Afilias' Application is abusive, even putting aside its derisive tone. The Panel defined "abusive" under Article 4.3(r) as a "wrong or improper use or action."¹²⁶ As shown above, Afilias' Application is unquestionably an improper use of Article 33. Under the guise of seeking an additional award, Afilias improperly seeks reconsideration of core elements of the Final Decision, including the Panel's rejection of Afilias' request for an order declaring NDC in breach of the New gTLD Program Rules, disqualifying NDC's application for .WEB, and awarding .WEB to Afilias. Further, under the guise of seeking an "interpretation" of the Final Decision, Afilias improperly requests 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, including whether the ICANN Board must follow specific processes and procedures in assessing whether NDC violated the New gTLD Program Rules. Afilias implicitly acknowledges that its Application is improper by contending that it should be granted even though it does not fall

¹²⁵ Final Decision (corrected version) ¶ 407.

¹²⁶ *Id.* ¶ 401.

“strictly” within Article 33.¹²⁷ Afilias bases this argument on a deceptive citation to *Methanex v. United States* in which Afilias isolates a phrase from the tribunal’s decision and then construes it in a way that is the exact opposite of how the tribunal meant it.¹²⁸

92. Afilias’ Application is also “frivolous.” The Final Decision defines “frivolous” under Article 4.3(r) as having “little weight or importance,” “no sound basis (as in fact or law),” “lacking in seriousness,” or “clearly insufficient on its face and [] not controvert[ing] the material points of the opposite pleading.”¹²⁹ Afilias’ Application has no sound basis and is clearly insufficient because it is based on a series of indefensible and willful misreadings of the Final Decision. Afilias falsely asserts that the Panel omitted to resolve its Rules Breach Claim. As shown above, however, the Panel characterized the Rules Breach Claim as the “core claim” and fully resolved it by ruling partially in Afilias’ favor and partially in ICANN’s favor. Afilias also falsely contends that the Panel failed to resolve its “International Law Claim” and “Disparate Treatment Claim,” but no such discrete claims were asserted. Finally, Afilias takes isolated words and phrases out of context to manufacture ambiguities where none exists and then uses those contrived ambiguities to request “interpretations” resolving issues never properly put to the Panel or briefed by the parties.

93. Accordingly, Afilias should be ordered to pay ICANN’s legal fees and costs incurred as a result of Afilias’ Article 33 Application, including the Panel’s fees in resolving the Application. ICANN has incurred US\$236,884 in legal fees opposing Afilias’ Article 33 Application, as set out in Appendix B. This sum is reasonable. Afilias’ Application consists of 68 pages of text with over 200 footnotes. It cites 17 new authorities comprising more than 170 pages. Further, Afilias’ application seeks far-reaching relief, including reversal of the Final Decision and additional rulings on numerous issues. Thus, although it is wholly lacking in merit,

¹²⁷ Afilias’ Article 33 Application ¶ 92.

¹²⁸ *See supra* ¶ 60.

¹²⁹ Final Decision (corrected version) ¶ 401.

ICANN had no reasonable choice but to take Afiliás' Application seriously and respond accordingly.

VI. CONCLUSION.

94. For the foregoing reasons, Afiliás' Article 33 Application should be denied in its entirety and ICANN should be awarded its costs and legal fees incurred as a result of Afiliás' Application, including the Panel's fees in resolving the Application.

Dated: August 6, 2021

By: /s/ Steven L. Smith
Steven L. Smith

Counsel for Respondent ICANN