

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

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

DECISION ON PHASE I

12 February 2020

Members of the IRP Panel

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

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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I. INTRODUCTION

A. Overview

1. The Claimant is one of seven entities that submitted an application to the Respondent for the right to operate the registry of the .WEB generic Top-Level Domain (**gTLD**), pursuant to the rules and procedures set out in the Respondent's New gTLD Applicant Guidebook (**AGB**) and the Auction Rules for New gTLDs (**Auction Rules**). Under the AGB and Auction Rules, in the event of multiple applicants for the same gTLD, the applicants are placed in a "contention set" for resolution privately or, if this first option fails, through an auction administered by the Respondent.
2. On 27 and 28 July 2016, the Respondent conducted an auction among the seven applicants for the .WEB gTLD. Nu Dotco, LLC (**NDC**) won the auction while the Claimant was the second-highest bidder.
3. Shortly after the .WEB auction, it was revealed that NDC and VeriSign, Inc. (**VeriSign**) had entered into an agreement under which VeriSign undertook to provide funds for NDC's bid for the .WEB gTLD, while NDC undertook, if its application proved to be successful, to transfer and assign its registry operating rights in respect of the .WEB gTLD to VeriSign upon receipt from the Respondent of its actual or deemed consent to this assignment¹ (**Domain Acquisition Agreement**).
4. The Claimant initiated the present Independent Review Process (**IRP**) on 14 November 2018. On the merits, the Claimant is seeking, among others, binding declarations that the Respondent must disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel, proceed with contracting the Registry

¹ Third Party Designated Confidential Information Redacted

Agreement for .WEB with the Claimant. As a result of the agreement described in paragraphs 61-64 below, it has been agreed that the merits of the dispute would be the subject of Phase II of the IRP.

5. This decision of the Independent Review Panel (**Panel**) concludes Phase I of the IRP, and determines the requests respectively submitted by VeriSign and NDC (collectively, the **Applicant Amici**) to participate as *amici* in the present IRP. Those requests are based on Rule 7 of the *Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process*, adopted by the Respondent's board (**Board**) on 25 October 2018 (**Interim Procedures**).
6. The Claimant opposes the Applicant *Amici*'s requests. The Claimant contends that the manner in which the *amicus* provisions were added to Rule 7 of the Interim Procedures violated the Respondent's *Bylaws For Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**). On that basis, the Claimant asks that the *amicus* provisions of Rule 7 be declared unenforceable and, consequently, that the Applicant *Amici* not be allowed to participate in this IRP. Alternatively, the Claimant asks that its Rule 7 claim be joined to the other claims to be decided in Phase II and that the Applicant *Amici* be allowed to participate in the IRP provisionally, within the limited terms of Rule 7.
7. After careful consideration of the facts, the applicable law and the submissions made by the Parties and Applicant *Amici*, the Panel unanimously decides to grant the Applicant *Amici*'s applications to participate in Phase II of this IRP, on the terms and upon the conditions set out in this decision. The Panel does so on the basis of the Claimant's alternative request for relief. Accordingly, and to the extent that the Claimant wishes to

maintain its Rule 7 claim, the Panel joins those aspects of this claim over which it has jurisdiction to the claims to be decided in Phase II.

B. The Parties

8. The Claimant in the IRP is Afilias Domains No. 3 Limited (**Afilias** or **Claimant**), a legal entity organized under the laws of the Republic of Ireland with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several generic gTLD registries. gTLDs represent the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG”. The Claimant’s parent company, Afilias, Inc., is a United States corporation that is the world’s second-largest Internet domain name registry.
9. Afilias is represented in the IRP by Arif Hyder Ali, Alexandre de Gramont and Rose Marie Wong, of Dechert LLP, and by Ethan Litwin of Constantine Cannon LLP.
10. The Respondent is the Internet Corporation for Assigned Names and Numbers (**ICANN** or **Respondent**), a not-for-profit corporation organized under the laws of the State of California. ICANN oversees the technical coordination of the Internet’s domain name system (**DNS**) on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as “icann.org” into numeric IP addresses understood by computers.
11. ICANN’s core mission, as described in its Bylaws, is to ensure the stable and secure operation of the Internet’s unique identifier system. To that end, ICANN contracts with entities that operate gTLDs.
12. ICANN is represented in the IRP by Jeffrey A. LeVee, Steven L. Smith, David L. Wallach, Eric P. Enson and Kelly M. Ozurovich, of Jones Day LLP.

C. The IRP Panel

13. On 26 November 2018, Afiliat nominated Professor Catherine Kessedjian as a panelist for the IRP. On 13 December 2018, the International Centre for Dispute Resolution (**ICDR**) appointed Prof. Kessedjian on this IRP Panel and her appointment was reaffirmed by the ICDR on 4 January 2019.
14. On 18 January 2019, ICANN nominated Mr. Richard Chernick as a panelist for the IRP and he was appointed to that position by the ICDR on 19 February 2019.
15. On 17 July 2019, the Parties nominated Mr. Pierre Bienvenu, Ad. E., to serve as the IRP Panel Chair. Mr. Bienvenu accepted the nomination on 23 July 2019 and he was appointed by the ICDR on 9 August 2019.
16. In September 2019, with the consent of the Parties, Ms. Virginie Blanchette-Séguin was appointed as Administrative Secretary to the IRP Panel.

D. The Applicant *Amici*

17. VeriSign is a publicly traded company organized under the laws of the State of Delaware. VeriSign operates, among others, the registries for the .COM, .NET and .NAME gTLDs.
18. VeriSign is represented in this IRP by Ronald L. Johnston, James S. Blackburn and Maria Chedid, of Arnold & Porter Kaye Scholer LLP.
19. NDC is a limited liability company organised under the laws of the State of Delaware. The Claimant avers that NDC was established as a special purpose vehicle to acquire gTLDs in the new gTLD Program.
20. NDC is represented in this IRP by Charles Elder and Steven Marenberg, of Irell & Manella LLP.

E. Place (Legal Seat) of the IRP

21. The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 August 2019, the Respondent has confirmed its agreement with this proposal.

F. Language of the Proceedings

22. In accordance with Section 4.3(l) of the Bylaws, the language of the proceedings of this IRP is English.

G. Jurisdiction of the Panel

23. The Claimant's Request for IRP is submitted pursuant to Article 4, Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR, and the Interim Procedures. Section 4.3 provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction that violated the *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers* as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles of Incorporation**) or the Bylaws.
24. In the course of the preparatory hearing of 5 September 2019, each of the Parties and Applicant *Amici* confirmed its consent to the Applicant *Amici's* requests being determined by the Panel in Phase I of the IRP.

H. Applicable Law

25. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures (subject to the Claimant's challenge of Rule 7 of the Interim Procedures).

26. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles of Incorporation is to the same effect as Section 1.2(a) of the Bylaws.
27. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles of Incorporation and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.
28. As will be seen, the Panel’s conclusions in regard to Phase I issues give effect to the relevant provisions of Rule 7 of the Interim Procedures, properly interpreted, and do not engage any divergence of views between the Parties and the Applicant *Amici* as to the applicable law.

I. Burden and Standard of Proof

29. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.
30. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of

dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”²

31. The authors of the same textbook observe that modern international arbitral tribunals tend to “accord greater weight to the contents of contemporary documents than to oral testimony given, possibly years after the event, by witnesses who have obviously been ‘prepared’ by lawyers representing the parties.” In the opinion of these authors, “[i]n international arbitrations, the best evidence that can be presented in relation to any issue of fact is almost invariably contained in the documents that came into existence at the time of the events giving rise to the dispute.”³

32. These principles were applied by the Panel in considering the issues in dispute in Phase I of this IRP.

II. HISTORY OF THE PROCEEDINGS

33. The Parties have provided the Panel with a history of the proceedings as of 23 August 2019, from which the Panel draws in this section of its decision to provide context for its decision on Phase I.

34. The IRP is comprised of the following three interrelated aspects:

² See, generally, Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford, Oxford University Press, 2015, para. 6.87.

³ *Ibid*, para. 6.90.

- **First**, the overall IRP, in which Afilias argues that ICANN violated its Articles of Incorporation, Bylaws and other governance documents in its administration of the policies and processes to award the .WEB gTLD.
- **Second**, the Request for Emergency Panelist and Interim Measures of Protection (**Emergency Interim Relief Request**) before Mr. Kenneth B. Reisenfeld, the Emergency Panelist, concerning Afilias' emergency request for a stay of all ICANN actions that further the delegation of the .WEB gTLD during the pendency of the IRP.
- And, **third**, NDC's and VeriSign's requests to participate in the IRP, including the request for Emergency Interim Relief, as *amici*, which first proceeded before Mr. Scott Donahey, the Procedures Officer.

35. The Panel further describes each of the three aspects of the IRP in the paragraphs below.

A. The Overall IRP

36. On 18 June 2018, Afilias invoked ICANN's Cooperative Engagement Process (**CEP**) after learning that ICANN had removed the .WEB gTLD contention set's "on-hold" status. A CEP is intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in an IRP. The Parties participated in the CEP process until 13 November 2018. It is of relevance to the issues in dispute in Phase I to note that the fact that Afilias had invoked a CEP in relation to the status of the .WEB gTLD was disclosed on ICANN's website on 20 June 2018.

37. As already mentioned, Afilias filed its request for IRP with the ICDR on 14 November 2018. From November 2018 to March 2019, the Parties principally focused on the requests for Emergency Interim Relief and the possible participation of

the Applicant *Amici* in the proceedings, both of which are described below. Following a request by ICANN and the Parties' failure to reach agreement, the ICDR extended ICANN's deadline for submitting its Answer to Afilias' Request for IRP to 25 January 2019.

38. Pursuant to an order from the Emergency Panelist dated 3 December 2018, ICANN produced documents to Afilias on 18 December 2018, subject to confidentiality restrictions ordered by the Emergency Panelist. Afilias then took the position that the documents produced to it by ICANN warranted the amendment of its Request for IRP. Accordingly, on 29 January 2019, the Parties agreed again to postpone the deadline for the submission of ICANN's Answer until after Afilias filed its Amended Request for IRP.
39. On 21 March 2019, Afilias filed its Amended Request for IRP with the ICDR. On 31 May 2019, ICANN submitted its Answer to the Amended Request for IRP to the ICDR. Since ICANN's Answer, the Parties have submitted no other significant filings to the ICDR in the IRP main proceeding.

B. The Emergency Interim Relief Request

40. On the same day that Afilias filed its Request for IRP, ICANN informed Afilias that it would only keep the .WEB gTLD contention set "on-hold" until 27 November 2018, so as to allow Afilias time to file a request for emergency interim relief, barring which ICANN would take the .WEB gTLD contention set off of its "on hold" status. Afilias filed its Emergency Interim Relief Request with the ICDR on 27 November 2018. The Emergency Interim Relief Request seeks to stay all ICANN actions that would further the delegation of the .WEB gTLD.
41. On 28 November 2018, the ICDR appointed Mr. Reisenfeld as the Emergency Panelist for the Emergency Interim Relief Request. Following a scheduling conference with the

Parties on 30 November 2018, Mr. Reisenfeld issued the Emergency Panelist's Scheduling Order No. 1 (**Order No. 1**) on 3 December 2018. The order, among other procedural issues: (1) acknowledged ICANN's commitment to "keep the .WEB registration process 'on hold' pending a decision on the Interim Request for Emergency Relief"; (2) sought guidance regarding the potential participation of *amicus curiae* and (3) stated that ICANN had agreed to produce documents responsive to a narrow list of requests for documents necessary for Afiliás' Emergency Interim Relief Request.

42. On 3 December 2018, in response to Order No. 1, Afiliás submitted a narrowed Request for the Production of Documents to which ICANN submitted objections. Mr. Reisenfeld granted Afiliás' requests – subject to a protective order – in his 12 December 2018 Decision on Afiliás' Request for the Production of Documents.
43. On 14 December 2018, following Mr. Reisenfeld's decision, ICANN submitted its own Request for Production of Documents in order to seek information regarding the merits of the dispute. Afiliás objected to ICANN's requests on 18 December 2018. On the same day Afiliás objected to ICANN's document requests, ICANN filed its Response to the Emergency Interim Relief Request and produced documents in response to Afiliás' document requests. ICANN's production is covered by a protective order finalized by the Parties on the same day. As part of this document production process, ICANN produced the Domain Acquisition Agreement entered into between VeriSign and NDC in connection with the .WEB gTLD.
44. On 26 December 2018, Mr. Reisenfeld issued a decision on ICANN's Request for Production of Documents, denying some of ICANN's requests. Afiliás later informed both ICANN and Mr. Reisenfeld that it possessed no documents responsive to ICANN's document requests, as modified by Mr. Reisenfeld's decision.

45. On 3 January 2019, Afilias challenged the Domain Acquisition Agreement's confidentiality designation under the Parties' protective order on the ground that it needed to discuss the document with its general counsel. On 8 January 2019, ICANN informed Mr. Reisenfeld that it objected to Afilias' confidentiality challenge. The Parties resolved the confidentiality designation issue on 15 January 2019, when ICANN informed Afilias and Mr. Reisenfeld that VeriSign and NDC agreed to let Afilias disclose the Domain Acquisition Agreement to its general counsel.
46. While the requests for participation of *amicus curiae* remained pending, Afilias' Emergency Interim Relief Request also remained pending before Mr. Reisenfeld. However, on 23 January 2019, the Parties requested that Mr. Reisenfeld postpone further activity until the requests for participation as *amici* are resolved. On 21 March 2019, ICANN confirmed that it would keep the .WEB contention set "on hold" until there is a decision on the Emergency Interim Relief Request.
47. This Panel having since been appointed to determine the IRP, the Parties have expressed their understanding that, absent party agreement, it will be for this Panel to resolve the Emergency Interim Relief Request. In the meantime, the .WEB gTLD contention set remains on hold.

C. Requests for Participation as *Amicus Curiae*

48. On 5 December 2018, VeriSign and NDC informed the ICDR that they intended to submit requests to participate as *amici* in the IRP, including the Emergency Interim Relief Request. On 8 December 2018, Afilias objected to their participation in the IRP as *amici*. On 11 December 2018, VeriSign and NDC each filed with the ICDR a Request to Participate as *amicus* in the IRP. ICANN indicated that it supported those applications.

49. Pursuant to Rule 7 of the Interim Procedures, a Procedures Officer must be appointed to consider any requests to participate in an IRP as *amicus curiae*. ICANN argued that Mr. Reisenfeld should serve as the Procedures Officer, but Afilias objected to his appointment to serve in this capacity. On 13 December 2018, the ICDR decided to appoint a separate Procedures Officer and, on 21 December 2018, Mr. Scott Donahey was appointed in this role. The Parties and the Applicant *Amici* did not object to Mr. Donahey's appointment.
50. On 5 January 2019, after participating in a conference call with the Parties and the Applicant *Amici*, Mr. Donahey issued a Memorandum of Conference Call No. 1 (**Memorandum No. 1**). That memorandum requested that the Parties and the Applicant *Amici* brief the legislative history of the *amicus* language in the Interim Procedures.
51. In response, Mr. Donahey received several submissions from the Parties and the Applicant *Amici*. ICANN filed its response to Memorandum No. 1 and to the Requests to Participate as *Amicus Curiae* on 17 January 2019. Afilias responded to the Requests to Participate as *Amicus Curiae* on 28 January 2019. ICANN, VeriSign, and NDC filed Replies on 5 February 2019, and Afilias filed a Sur-Reply on 12 February 2019.
52. Meanwhile, Mr. Donahey addressed procedural issues for the *amicus curiae* hearing to be held before him in late February 2019. On 31 January 2019, Mr. Donahey declared that VeriSign and NDC could participate in the hearing on their applications for *amicus curiae* status.
53. On 15 February 2019, Mr. Donahey declared that he had no power to grant Afilias' request to cross-examine two of the witnesses that had filed statements in support of ICANN's and VeriSign's submissions to Mr. Donahey, namely Ms. Samantha Eisner,

Deputy General Counsel of ICANN, and Mr. David McAuley, Senior International Policy & Business Development Manager at VeriSign.

54. On 21 February 2019, Mr. Donahey held a telephonic hearing, during which counsel for the Parties and Applicant *Amici* made oral presentations on the latter's applications for *amicus curiae* status. A transcript of that hearing was prepared.
55. Mr. Donahey issued a Declaration of the Procedures Officer (**PO Declaration**) one week later, on 28 February 2019. The PO Declaration found that "the issues raised in the present matter are of such importance to the global Internet community and Claimants (*sic*) that they should not be decided by a 'Procedures Officer,' and therefore the issues raised are hereby referred to [...] the IRP Panel for determination."⁴
56. On 8 March 2019, ICANN requested that the ICDR appoint a new Procedures Officer on the ground that Mr. Donahey had not resolved the *amicus curiae* issue. Afilias objected to ICANN's request on 14 March 2019. On 9 April 2019, after the Parties exchanged several letters on this issue, the ICDR denied ICANN's request for the appointment of a new procedures officer. Meanwhile, the Procedures Officer issued on 31 March 2019 an Order denying ICANN's request that the Procedures Officer make three corrections to his Declaration.
57. Mr. Donahey having taken the position that he had completed his service as Procedures Officer on the basis of his Declaration, when this Panel was finally constituted in August 2019, the Applicant *Amici*'s requests to participate in the IRP (including in the Emergency Interim Relief Request) were still pending, and the scope of their possible participation in the IRP remained to be decided.

⁴ PO Declaration, p. 38.

58. On 20 August 2019, the Panel issued its first communication to the Parties, confirming that a preparatory conference would be held on 5 September 2019. In this letter, the Panel listed a number of procedural issues to be discussed and determined at the preparatory conference. The Panel invited the Parties to consult each other and report any agreement reached in respect of these issues in advance of the preparatory conference, failing which the Parties were asked to provide the Panel with their respective proposals together with an explanation of any difference between them.
59. On 26 August 2019, the Applicant *Amici* wrote to the Panel to request the opportunity to participate in the preparatory conference of 5 September 2019, noting that one of the first issues needing to be resolved by the Panel was their requests to participate in the IRP as *amici*. By letter dated 30 August 2019, the Claimant informed the Panel that it opposed VeriSign's and NDC's requests to participate in the IRP, including the scheduled preparatory conference. In the submission of the Claimant, "[n]on-party should not be allowed to participate in the first procedural conference with the Panel absent agreement from both Parties". In this same letter, the Claimant recalled its opposition to the participation of NDC and VeriSign as *amici* in the IRP. The Claimant added, without prejudice to that position, that it had advised ICANN that it would be willing to negotiate an agreement by which VeriSign and NDC would be allowed to participate in the IRP with all the rights, obligations, and responsibilities of a Party, including their agreement to be bound by the Panel's determinations in the IRP. To the extent the proposed *amici* need to be consulted on any procedural issues that may affect them, such consultation can and should be held separately. The Claimant, in its 30 August 2019 letter, also informed the Panel of the Claimant's position on the various procedural issues listed in the Panel's 20 August letter.

60. Later on 30 August 2019, the Respondent responded to the Panel's letter of 20 August 2019 as well as to the Claimant's letter submitted earlier that day. With respect to the participation of the Applicants in the 5 September 2019 preparatory conference, ICANN advised that it believed the involvement of the Applicant *Amici* would be helpful in light of their pending requests to participate in the IRP. ICANN also set out its position in respect of the issues listed in the Panel's 20 August letter.
61. One of the points on which the Parties expressed agreement on 30 August 2019 was that there should be a bifurcated Phase I in these proceedings to address (1) the Claimant's claim that ICANN violated its Bylaws in adopting the *amicus curiae* provisions of the Interim Procedures, and that VeriSign and NDC should be prohibited from participating in the IRP on that basis; and (2) should that claim fail, the extent to which NDC and/or VeriSign should be permitted to participate in the IRP as *amici*.
62. On 4 September 2019, the Panel informed the Parties of its decision to allow counsel for the Applicant *Amici* to attend the preparatory conference for the limited purpose of giving them an opportunity to state their position on the procedural framework for Phase I of the proceedings. As proposed by the Parties in their respective letters of 30 August 2019, the Panel further advised that it would defer consideration of the procedural rules and timetable applicable to Phase II of the IRP until after the resolution of the Applicant *Amici's* requests to participate in the IRP.
63. A further point agreed between the Parties on 30 August 2019 was that the record for the determination of Phase I issues would be the record that was before the Procedures Officer, including the latter's Declaration (even though the Parties differ as to the relevance of the Declaration for the determination of Phase I issues). At the request of

the Panel, on 17 September 2019, the Parties provided the Panel with an agreed list of the constituent elements of the record for Phase I.⁵

64. The preparatory conference was held, as scheduled, on 5 September 2019. It was attended by counsel for the Parties and the Applicant *Amici*. By letter dated 9 September 2019, the Panel provided a summary of the procedure applicable to Phase I of the IRP, confirming that it would be devoted exclusively to the Panel's consideration of the Applicant *Amici*'s respective requests to participate as *amici* in the IRP, and of the Claimant's objections thereto.
65. Additional written submissions on Phase I issues were made by each of the Parties and Applicant *Amici* on 27 September 2019. On 2 October 2019, a telephonic hearing was held during which counsel for each of the Parties and the Applicant *Amici* presented additional oral submissions in relation to Phase I issues. At the request of the Panel, an agreed transcript of the hearing was subsequently prepared and provided to the Panel on 20 November 2019.
66. By letter dated 9 October 2019, the Panel invited the Parties and Applicant *Amici* to submit post-hearing submissions on the following three subject matters: 1) the status of the IRP Implementation Oversight Team (**IOT**) and its relationship with ICANN and its Board, including the recourses available to a party wishing to challenge the IOT's conduct or decisions; 2) the timeliness of Afiliias' Rule 7 claim, in light of the arguments set out in paragraphs 31 and 32 of ICANN's Supplemental Brief; and 3) the relevance (if any) to the resolution of Phase I issues, of the authority given to IRP Panels under

⁵ The Claimant sought leave, on 30 September 2019, to add to the Phase I record an email dated 12 October 2018 from Ms. Eisner to Mr. McAuley. The Respondent objected to that request. The Panel was not convinced that the addition of a single document to the record would prejudice ICANN or the Applicant *Amici* and therefore allowed the Claimant's request in spite of the Respondent's objection. Accordingly, the email in question was added to the record for Phase I.

Section 4.3(o)(v) of the Bylaws, to "take such other actions as are necessary for the efficient resolution of Disputes". The Parties and Applicant *Amici* submitted post-hearing briefs on these issues on 15 November 2019.

67. On 18 November 2019, ICANN requested the permission to file additional submissions in reply to the arguments made by Afilias in its post-hearing brief in opposition to ICANN's request that the Panel dismiss as time-barred Afilias' Rule 7 claim. The Panel granted that request and ICANN submitted its additional submissions on 27 November 2019. As allowed by the Panel, Afilias filed a rebuttal to ICANN's additional submission on the issue of the alleged untimeliness of the Rule 7 claim on 3 December 2019. On 13 December 2019, the Panel declared that the filing of Afilias' rebuttal completed the round of post-hearing submissions in relation to Phase I, whereupon the Panel took Phase I under advisement.

III. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT

68. In connection with the IRP, the Parties and the Applicant *Amici* have each submitted to the Panel one supplemental brief and one post-hearing brief. As just mentioned, ICANN and Afilias also filed additional submissions on the issue of the alleged untimeliness of the Rule 7 claim.
69. The record before the Panel on Phase I issues also include the submissions made and the evidence adduced by the Parties and Applicant *Amici* before the Procedures Officer. The submissions are listed in the Parties' agreed list dated 17 September 2019 of the elements of the record for Phase I. As for the evidence, it consists of the documentary and witness evidence that was before the Procedures Officer, as set out in the 17 September 2019 agreed list. In addition to the declarations of Ms. Eisner and Mr. McAuley, already referred to above, a declaration of Mr. Rasco, Chief Financial

Officer and manager for NDC, was submitted to the Procedures Office in support of NDC's Request to Participate as *Amicus Curiae* in Independent Review Process, dated 5 February 2019.

70. The submissions made in relation to Phase I are voluminous. The Panel summarizes these submissions below, beginning with the Applicant *Amici*, followed first by ICANN (which supports the proposed *Amici*'s requests for participation) and then by Afilias. Where appropriate, the Panel refers in its analysis to those parts of the submissions and evidence found by the Panel to be most pertinent to its analysis of the Phase I issues. In reaching its conclusions, however, the Panel has considered all of the Parties' submissions and evidence in relation to Phase I.
71. In order to provide context for the submissions summarized below, the Panel reproduces the provisions of Rule 7 of the Interim Procedures, which are central to the Phase I issues (emphasis in the original):

7. Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for

consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.⁴ The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

4 During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

72. The Procedures Officer questioned the Parties about the portions of the text of Rule 7 that are underlined. ICANN explained in response⁶:

ICANN's investigation of this issue, including its review of the IRP-IOT's meeting transcripts, meeting minutes, and email correspondence, does not indicate that any special meaning should be taken from the underlining beyond the fact that those words were added over the weeks leading up to the 21 October 2018 deadline for final IRP-IOT comment and approval. Indeed, the underlined text tracks directly to the edits that Ms. Eisner drafted between 16 and 19 October 2018, and, as such, it likely is nothing more than a remnant of the drafting process. These edits were not posted for public comment, so no public comments address them.⁷

A. VeriSign

⁶ Response to Procedures Officer's Questions Concerning the Drafting History of the Supplementary Procedures, dated 16 January 2019,

⁷ Afilias agrees that the underlining was not intended to convey any emphasis to the underscored language. See Dechert's letter of 28 January 2019, at p. 6, attached to Afilias' Response to VeriSign and NDC's Requests to participate as *amici*.

73. In its submissions in support of its request to participate as *amicus curiae* in the IRP, VeriSign first underscores that it is not contested that the two Applicant *Amici* meet the criteria to qualify as *amici* under Rule 7 of the Interim Procedures. Rather, Afilias' contention is that Rule 7 had been adopted in violation of the Bylaws.
74. VeriSign stresses that the relief sought by Afilias in the IRP would impact the Applicant *Amici*'s own rights and economic interests. Accordingly, they are "indispensable parties" to the IRP that are entitled to participate fully in the proceedings. VeriSign submits that Rule 7 gives the Panel the flexibility to permit the Applicant *Amici* to participate to the extent that the dispute places their conduct in issue or may affect their interests. VeriSign argues in this regard that the relief sought by Afilias in this IRP would impact VeriSign's interests far more than those of ICANN.
75. VeriSign submits that the only question for the Panel is the scope of the Applicant *Amici*'s participation in the IRP. According to VeriSign, nothing less than "full participation" – including the right to present arguments and evidence – is required to ensure fundamental fairness and due process. VeriSign rejects the position advanced in the alternative by Afilias that the Applicant *Amici*'s participation should be restricted to the traditional *amicus* role of submitting written briefs. VeriSign contends that the Bylaws and Rule 7 favour broad participation and do not limit the scope of *amicus* participation in such manner. VeriSign therefore invites the Panel to exercise its discretion to allow broad participation, taking into account that the Applicant *Amici* have a material interest in the dispute.
76. According to VeriSign, the drafting history of Rule 7 confirms that it is designed to accommodate broader third party involvement than the expression "*amicus curiae*" is traditionally understood to include. VeriSign argues that norms of international arbitration

do not dictate the scope of *amicus* participation, and that such norms do not restrict *amicus* participation to the filing of written submissions. In that respect, it states that an IRP – as ICANN’s accountability mechanism – is distinct from international arbitration, which generally is a confidential process.

77. VeriSign states that the PO Declaration inaccurately describes the positions of the Parties and of the Applicant *Amici*, does not decide the issue, and is therefore not relevant to the matters presently before the Panel.
78. In its post-hearing brief, VeriSign argues that, while the IOT was formed pursuant to a directive in the Bylaws, the IOT is part of the ICANN *community* rather than an arm of ICANN itself. VeriSign adds that the IOT is neither the Board nor a Board committee or Staff as defined in the Bylaws. VeriSign stresses that the IOT lacks authority to implement process changes without ICANN’s approval. On that basis, VeriSign submits that an IRP could not be brought directly based on the conduct of members of the IOT. According to VeriSign, the proper means to challenge IOT’s actions would have been the filing of a complaint to ICANN’s Office of Ombudsman or to its Complaints Office, or simply raising concerns with the IOT itself.
79. VeriSign contends that Afiliás’ claim was time-barred under Rule 4 of the Interim Procedures as it is based on conduct that occurred “more than three years ago”. VeriSign argues that even if the limitation period started on the date of the adoption of the Interim Procedures by the Board, Afiliás’ claim would still be time-barred.
80. Lastly, VeriSign submits that Section 4.3(o)(v) of the Bylaws gives broad discretion to the Panel to grant *amicus* status to the Applicant *Amici* and to tailor the scope of their participation. According to VeriSign, the Panel is not constrained by Rule 7 of the Interim Procedures and could accept *amici* submissions even if Rule 7 did not exist.

81. VeriSign also argues that Section 4.3(o)(v) undermines any claim that Afilias has standing as a “Claimant” to challenge the adoption of Rule 7. In that respect, VeriSign contends that the increased costs that Afilias claims it will incur as a result of the Applicant *Amici*’s participation is not an injury or harm directly or causally connected to the alleged violations.

82. For those reasons, VeriSign requests that the Applicant *Amici* be allowed to “participate fully” in the proceedings as *amici*.

B. NDC

83. NDC generally echoes the arguments put forward by VeriSign. NDC notes that Afilias does not dispute that Rule 7 allows NDC to participate in the IRP as *amicus*. The key question for the Panel is therefore the scope of its participation. Like VeriSign, NDC contends that due process requires that it be allowed to participate in the IRP in order to protect its interests. NDC adds that the Panel would benefit from its active participation in the IRP as NDC can offer first-hand evidence rebutting Afilias’ argument that NDC experienced a change of control. NDC also avers that it has knowledge of misconduct on the part of Afilias during the blackout period that preceded the auction that would disqualify Afilias from the right to operate the .WEB gTLD.

84. NDC also argues that if it is not entitled to fully participate as the real party in interest, any decision rendered by this Panel would be unenforceable, rendering the IRP a waste of time. NDC further argues that the IRP context calls for broader participation than is typically contemplated for an *amicus* in litigation or arbitration, as an *amicus* brief is traditionally filed by a non-party that does not have a direct legal or financial interest in the outcome of a proceeding. NDC disputes Afilias’ assertion that NDC’s interests are aligned to those of ICANN.

85. NDC avers that in view of the fact that one of Afilias' officers seconded the resolution to adopt the Interim Procedures, Afilias cannot now contend that the Board acted improperly in adopting them. According to NDC, the Interim Procedures have been properly adopted, are fair, and protect due process. In any event, NDC claims that it should not be prejudiced by any possible impropriety in the adoption of Rule 7. NDC notes that it is not itself accused of any wrongdoing in the adoption of the Interim Procedures, and it rejects as ill-founded the contention that NDC should be "vicariously estopped" from participating in the IRP as an *amicus*.
86. NDC submits that the scope of its participation must be sufficiently broad to protect the Applicant *Amici*'s rights and give the Panel the benefit of their perspective and evidence. In that respect, NDC relies on the call for "broad participation" in Rule 7. NDC submits that the Panel has discretion to give the Applicant *Amici* broader participation rights than are typically seen in international arbitration, all the while noting that the trend in international arbitration is to allow increased participation by non-parties.
87. NDC also contends that its participation in the IRP as an *amicus* should include the right to oppose Afilias' petition for emergency relief since Rule 7 permits *amici* to participate in proceedings "before the IRP Panel", without any carve-out.
88. In lieu of filing a post-hearing brief of its own, NDC adopted the arguments put forward in VeriSign's post-hearing brief.
89. In sum, NDC asks, in respect of all phases of the IRP, to be permitted to participate in all briefing and argument in the IRP, including in connection with Afilias' request for interim relief, and to submit evidence defending NDC's own conduct and proving Afilias' disqualifying misconduct.

C. ICANN

90. ICANN submits that Afiliias' challenge to Rule 7 has no merit. ICANN observes that the arguments that Afiliias presents to the Panel in support of that challenge are based on technical defects in the rule-making process and, as such, are fundamentally different from the arguments grounded on equity that it presented to the Procedures Officer. ICANN asserts that Afiliias made that change to bring its claim within the Panel's jurisdiction.
91. ICANN submits that it did not violate its Bylaws by approving the Interim Procedures. First, ICANN notes that the Bylaws do not require a particular quorum for meetings of the IOT. Second, it argues that the Bylaws did not mandate that every provision of the rules of procedures be based on international arbitration norms and, in any event, that *amicus* participation is not foreign to international arbitration. Third, ICANN contends that its Bylaws do not mandate a second public comment period for Rule 7. Fourth, it argues that the Bylaws also did not impose a positive obligation on the Board to withhold approval of the Interim Procedures, even in the face of alleged defects in the rule-making process.
92. ICANN further argues that the Panel does not have jurisdiction to invalidate Rule 7 or to declare it unenforceable. According to ICANN, if the Panel finds that there is merit to Afiliias' claim that ICANN violated its Bylaws, the proper remedy is to issue a declaration to that effect. It would then be to the Board to decide what action to take.
93. On the timeliness issue, ICANN argues that Afiliias did not bring its Rule 7 claim within 120 days of it becoming aware of the material effect of the action giving rise to the dispute, as required by Rule 4 of the Interim Procedures. In ICANN's view, the material

effect of the Board's challenged action – *i.e.* that Rule 7 would apply to IRPs – was immediately within Afilias' knowledge.

94. ICANN also argues that Afilias' request for costs in relation to the requests for participation of the Applicant *Amici* is baseless as it does not contend that ICANN's defences are frivolous or abusive.
95. ICANN submits that the PO Declaration includes inaccuracies and should have no import because the Procedures Officer made no conclusions, other than the one to the effect that the matters raised by Afilias' challenge to Rule 7 were too important for him to decide.
96. In the submission of ICANN, the participation of the Applicant *Amici* in the IRP should be broad in scope and in nature. ICANN argues that, in addition to falling within categories of mandatory *amici* under Rule 7, the Applicant *Amici* have a material interest relevant to the dispute, especially in light of Afilias' contentions regarding their alleged wrongdoings. ICANN argues that the Applicant *Amici*'s rights of participation should reflect the fact that the relief sought by Afilias would deprive NDC of its right as the winning bidder in the .WEB contention set.
97. More specifically, ICANN urges that the Applicant *Amici* be given the right to (1) submit written briefs addressing the merits of Afilias' Amended Request; (2) submit evidence and written witness statements; (3) cross-examine Afilias' witnesses; (4) participate in the IRP hearing; and (5) participate in post-hearing briefs. In response to a question from the Panel at the hearing, counsel for ICANN reserved the latter's position as to whether it would be permissible for the Applicant *Amici* to assert a claim in the IRP, as they

propose to do by requesting that Afilias be disqualified from the right to operate the .WEB gTLD.⁸

98. In ICANN's view, international arbitration practice provides little helpful guidance in the context of an IRP, as *amicus* participation is a relatively new and still evolving development in international arbitration. ICANN argues that an IRP is a unique accountability mechanism customized in light of ICANN's "quasi-public role" in the global Internet community.
99. ICANN contends that there are three reasons why the Panel does not have authority to nullify, invalidate or disregard Rule 7 of the Interim Procedures: (1) the conduct of the IOT is not a "Covered Action", (2) the Panel's only authority is to declare whether a Covered Action violated the Articles of Incorporation or the Bylaws, and (3) the Panel is not authorized to replace the Board's reasonable judgment if its action or inaction is within the realm of reasonable business judgment.
100. According to ICANN, the Panel's authority under section 4.3(o)(v) cannot be read to conflict with, or to supplant the specific provisions of Rule 7 governing *amicus* participation.
101. ICANN submits that the means available to a person wishing to challenge the IOT's decisions include active participation or the filing either of a complaint to ICANN's Ombudsman or a request to the Board to reconsider its approval of the recommendation made by the IOT.

⁸ See transcript of the hearing on Phase I, p. 22

102. For those reasons, ICANN states that the Panel should reject Afilias' challenge to Rule 7 and issue an order allowing participation by the Applicant *Amici* to the extent noted above.

D. Afilias

103. Afilias argues that the Procedures Officer's findings of fact demonstrate multiple violations of ICANN's Bylaws and rulemaking practices. First, there was no consultation between the IOT and a Standing Panel – none existed – to develop rules that conform to international arbitration norms in respect of Rule 7. Second, the IOT violated its own quorum rules. Third, the IOT violated its own protocols by adopting significant changes to Rule 7 without a second round of public comments. Fourth, the IOT violated its working rules by sending a draft set of rules to the Board for approval even though that draft contained new language that was never discussed within the IOT. According to Afilias, these violations were designed to provide disparate and preferable treatment to the Applicant *Amici*.

104. If the Panel is not prepared to rule on its Rule 7 claim, Afilias invites the Panel in the alternative to join that claim to the other claims to be decided in Phase II, and to allow the Applicant *Amici* to participate on a provisional and limited basis.

105. Afilias emphasizes the fact that, while the Applicant *Amici* demand rights of participation equivalent to those of a party, they refuse to accept the consequences of party participation, including to be bound by the Panel's determination. Afilias argues that the Applicant *Amici*'s demands are inconsistent with the scope of *amicus* participation as contemplated by the IOT or as reflected in norms of international arbitration. In that regard, Afilias first states that IOT members uniformly understood that *amicus* participation would be limited to the submission of "friend of the court" briefs. Second,

Afilias contends that no form of international arbitration endorses the scope of *amicus* participation sought by the Applicant *Amici*. Third, responding to a statement made by Mr. McAuley, Afilias states that, even in litigation before the United States federal courts, *amicus* participation does not rise to the level of a named party or real party in interest.

106. Regarding the status of the IOT, Afilias notes in its post-hearing brief that its claim is not limited to the conduct of the IOT. Afilias contends that Mr. McAuley instigated the “eleventh-hour” changes to Rule 7 with the knowledge and assistance of ICANN’s personnel, namely Ms. Eisner. Second, Afilias contends that the IOT is part of ICANN as it is a creation of its Bylaws. Third, Afilias submits that ICANN cannot avoid its accountability to the Internet community simply by outsourcing critical projects. In Afilias’ view, ICANN’s position that the IOT’s conduct is not subject to challenge through an IRP would leave a party wishing to challenge the IOT’s decisions with no recourse.
107. Turning to the timeliness issue, Afilias contends that the 120-day limitation period provided for in Rule 4 starts when a claimant becomes aware of the material effect of the action giving rise to the dispute. Afilias submits that when ICANN approved the *amicus* provisions, Afilias had no reason to know that its adoption process violated the Bylaws. Afilias further stresses that the documentation that ICANN made available was incomplete until April-May 2019, after the Procedures Officer issued his Declaration. In any event, Afilias’ claim would not be time-barred even if the starting point of the limitation period were held to be 5 December 2018, when the Applicant *Amici* announced their intention to the ICDR to submit applications to participate as *amici*. Finally, Afilias asserts that its claim includes the Board’s failure to address violations of its Bylaws, the material impact of which failure continues to this day. In any event, Afilias submits that ICANN consented to Afilias submitting its claim after 28 February 2018, and therefore that it is equitably estopped from contesting the timeliness of Afilias’ claims.

108. With respect to the Panel's authority, under Section 4.3(o)(v) of the Bylaws, to take such actions as are necessary for the efficient resolution of disputes, Afilias argues that these provisions must be read in the context of the entire document, including the provisions on the final resolution of disputes. In Afilias' submission, the Applicant *Amici's* position that they can participate fully in the IRP without being bound by the IRP's decision cannot be reconciled with those provisions. According to Afilias, footnote 4 that accompanies Rule 7 cannot be read to broaden *amicus* participation beyond the filing of written briefings. Finally, Afilias reiterates that it would not object to the full participation of the Applicant *Amici* on the condition that they agree to be bound by the Panel's conclusions.

109. All in all, Afilias requests that the Panel find that the *amicus* provisions of Rule 7 were adopted in violation of the Bylaws and are therefore unenforceable on that basis. Afilias submits that the Applicant *Amici's* applications must therefore be denied. In the alternative, Afilias asks that the Applicant *Amici's* participation be limited to "written briefing(s)", as specifically provided for in Rule 7, or that the Panel condition their fuller participation on their commitment to be bound by the Panel's resolution of this IRP.

IV. ANALYSIS

110. It is common ground between the Parties that, assuming Rule 7 to be valid, the Applicant *Amici* are entitled to participate in this IRP under the *amicus curiae* provisions of Rule 7, more particularly under Rule 7, para. (ii) insofar as NDC is concerned, and Rule 7, para. (iii) insofar as VeriSign is concerned. The dispute arises from Afilias' Rule 7 claim and the divergence between the Claimant and the other Phase I participants as to the extent of the participation rights sought by the Applicant *Amici*. The Panel therefore begins its analysis by addressing Afilias' Rule 7 claim.

A. Afilias' Rule 7 Claim

111. Before the Procedures Officer, Afilias submitted that the Applicant *Amici's* requests should be denied as an exercise of the Procedures Officer's inherent equitable authority by reason of VeriSign's misconduct in the rule-making process of Rule 7. Before this Panel, Afilias' Rule 7 claim is put forward on a different legal basis. Afilias contends that ICANN violated its Bylaws by approving Rule 7, and requests a declaration that Rule 7 is unenforceable, and, consequently, that the Applicant *Amici* cannot participate as *amicus* in this IRP.
112. In support of its claim that ICANN violated its Bylaws, Afilias invokes VeriSign's alleged interference, through Mr. McAuley, in the contents of Rule 7.⁹ In addition, Afilias relies on alleged defects in the rule-making process of Rule 7. The defects in question concern the lack of quorum at IOT meetings; the contention that the type of *amicus* participation provided for in Rule 7 departs from international arbitration norms; the failure to have put Rule 7 out for a second public comment round; and the (allegedly inaccurate) recital, in the IOT's representations to the Board, of the drafting principles that guided the IOT in the preparation of the draft Supplementary Procedures, the implication being that, had the position been described accurately, the Board would have withheld approval of the draft Interim Procedures.¹⁰
113. The nature of Afilias' contentions in support of its Rule 7 claim raises the question of whether the actions being challenged by this claim fall within the definition of "Covered Actions". ICANN and VeriSign submit that they do not and, on that basis, challenge the jurisdiction of the Panel to hear Afilias' Rule 7 claim. ICANN also submits that the Rule 7

⁹ Amended Request for IRP, para. 84; see also Afilias Phase I Post-Hearing Brief [PHB], paras. 3-4.

¹⁰ *Id.*, para. 86.

claim is time-barred and, in any event, that the Panel does not have the authority to declare Rule 7 “unenforceable”. The Panel begins by addressing the jurisdictional issue.

1. Jurisdiction of the Panel

114. The IRP is “intended to hear and resolve Disputes”, for a number of stated “Purposes of the IRP”. These purposes are listed in Section 4.3(a) and include “ensur[ing] that ICANN [...] complies with its Articles of Incorporation and Bylaws”.¹¹
115. The term Disputes is defined as including three types of claims. The only one relevant for present purposes is the following: “Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws [...]”.¹²
116. The expression Covered Actions is defined as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”.¹³
117. Since many of Afiliás’ submissions in support of its Rule 7 claim are directed at the actions of the IOT, the Panel considers first whether the IOT falls within the enumeration “Board, individual Directors, Officers or Staff members.” The Panel then turns to the alleged involvement of Ms. Eisner in the drafting of Rule 7 as a potential jurisdictional basis for Afiliás’ Rule 7 claim.

(a) Composition and Status of the IOT

118. In December 2014, a working group of ICANN members was formed to develop a set of proposed enhancements to ICANN’s accountability to the Internet community. The

¹¹ Bylaws, Section 4.3(a)(i).

¹² *Id.*, Section 4.3(b)(iii)(A).

¹³ *Id.*, Section 4.3(b)(ii).

working group was called the Cross Community Working Group on ICANN Accountability, or CCWG-Accountability. By the month of August 2015, the CCWG Accountability had already foreshadowed, in draft proposed recommendations, that detailed rules for the implementation of the IRP would need to be created by ICANN through a cross-community working group. Accordingly, in November 2015, the co-chairs of the CCWG-Accountability sought volunteers from the Internet community to serve on the IOT for that purpose. All volunteers who came forward were accepted as members of the IOT, and the team held its first meeting on 14 January 2016.¹⁴

119. The IOT consisted of approximately 25 members recruited, in the manner just described, from the Internet community. It also included Ms. Eisner, who served as ICANN staff liaison to the IOT, as well as representatives from ICANN's outside counsel, Jones Day. The firm Sidley Austin was hired as independent counsel to assist the IOT in drafting the Interim Supplementary Procedures.
120. The first chairperson of the IOT was J. Beckwith ("**Becky**") Burr. Upon her appointment to the ICANN Board in November 2016, Ms. Burr resigned as chairperson of the IOT and she was eventually succeeded in that position by Mr. McAuley, of VeriSign.
121. In February 2016, the CCWG-Accountability issued a set of recommendations, referred to as WorkStream 1, to enhance ICANN's existing IRP process. As did its draft recommendations of August 2015, these recommendations included the creation of updated rules of procedure governing IRPs.
122. Shortly thereafter, on 27 May 2016, ICANN's Board adopted new bylaws. These reflected the recommendations of the CCWG-Accountability in that they included, as part

¹⁴ ICANN PHB, paras. 3-6.

of Section 4.3 dealing with the Independent Review Process for Covered Actions, provisions for the creation of a Standing Panel¹⁵ and the establishment of an IRP Implementation Oversight Team.¹⁶

123. ICANN avers in its post-hearing brief that the Bylaws' reference to the establishment of an IOT "is a reference to the IRP-IOT that already existed [...]. There was never any intention to reconstitute the IRP-IOT following adoption of the Bylaws".¹⁷ Be that as it may, as explained later in this decision, the IOT as composed at the time proceeded with the drafting of Interim Procedures, and a first draft was circulated to IOT members in July 2016.
124. Turning to the ICANN Board, its general function is to exercise the powers, control the property and conduct the business and affairs of ICANN.¹⁸ The Board consists of sixteen voting directors – the Directors referred to in the definition of "Covered Actions" – and four non-voting liaisons.¹⁹
125. As can be seen, the IOT and the ICANN Board are separate and distinct entities. Under the Bylaws, the IOT exists in order to develop rules of procedure to be submitted for approval by the Board.²⁰

¹⁵ Bylaws, Section 4.3(j).

¹⁶ See *id.*, Section 4.3(n).

¹⁷ ICANN PHB, para. 6.

¹⁸ Bylaws, Section 2.1.

¹⁹ *Id.*, Section 7.1.

²⁰ *Id.*, Section 4.3(n)(i)-(ii).

126. Nor can the IOT be equated with ICANN's Staff. Staff is a defined term under the Bylaws, said to "include employees and individual long-term paid contractors".²¹ As just seen, the IOT is, for the most part, composed not of employees of ICANN but of Internet community volunteers. While Ms. Eisner serves on the IOT as ICANN staff liaison, this does not, in the opinion of the Panel, make the IOT a part of ICANN's Staff.
127. Since the IOT is not an individual Director or Officer either, the conclusion must be that actions of the IOT – as distinct from actions of the Board – are not Covered Actions. Accordingly, to the extent Afilias' Rule 7 claim challenges actions of the IOT, it does not fall within the jurisdiction of the Panel.
128. Afilias contends that the IOT can only be viewed "as part of ICANN".²² That may be so in a loose sense, and indeed there is no denying that the IOT is a creation of the Bylaws, which require it to draft rules of procedure for the IRP. However, the question that falls to be determined is whether the IRP is the appropriate accountability mechanism, under the Bylaws, to control the actions of the IOT. The Panel decides that it is not.
129. The Panel questioned the Parties and the Applicant *Amici* as to the recourse available to a party wishing to challenge the IOT's conduct or decisions. ICANN's submission in response was that the principal means to do so is through active participation and, as appropriate, the filing of a complaint with the ICANN Ombudsman, whose remit includes alleged unfair treatment by an "ICANN constituent body",²³ including the IOT. ICANN also says that the IOT can be challenged indirectly, by the filing of a Reconsideration

²¹ *Id.*, Section 4.2(a).

²² Afilias PHB, paras. 5-8. In its PHB, VeriSign submits that the IOT is part of the ICANN *community* rather than an arm of ICANN itself. VeriSign PHB, para. 5.

²³ Bylaws, Section 5.2.

Request under Section 4.2 of the Bylaws asking that the Board reconsider its approval of an IOT recommendation.²⁴

130. Having regard to the definition of Covered Actions, the Panel concludes that actions of the IOT do not fall within the definition of “Covered Actions” and, as such, cannot be challenged through an IRP.

(b) Alleged Involvement of ICANN Staff

131. Afilias argues that, contrary to ICANN’s submissions, its Rule 7 claim is not limited to the conduct of the IOT. Afilias avers that, while Mr. McAuley instigated the changes to Rule 7, he did so with the knowledge and assistance of ICANN’s personnel – namely Ms. Eisner – and that both she and Mr. Bernard Turcotte – an ICANN contractor supporting the IOT – were involved in crafting the procedure that allowed Mr. McAuley to deem the draft Rules approved by the IOT by 23:59 UTC on 21 October 2018.²⁵ Afilias thus contends: “Given that Ms. Eisner is an ICANN Deputy General Counsel and staff liaison to the IOT, Afilias’ claims expressly encompass the actions of ICANN staff.”²⁶
132. The Panel accepts this submission. Afilias made clear, in its Amended Request, that its Rule 7 claim included the contention that VeriSign, “with the knowledge and assistance of ICANN personnel”,²⁷ exploited its leadership position on the IOT to secure an absolute right to participate in this IRP. “Personnel” clearly encompasses employees of ICANN, such as Ms. Eisner. To the extent that Afilias’ Rule 7 claim impugns the actions of ICANN’s Staff and asserts that these actions violated the Articles of Incorporation or

²⁴ ICANN PHB, paras. 11-14.

²⁵ See below, para. 165.

²⁶ Afilias PHB, paras. 2-4.

²⁷ Amended Request for IRP, para. 84 [emphasis added].

Bylaws, it falls within both the definition of Covered Actions and the jurisdiction of the Panel in this IRP.

(c) Conclusions on Jurisdiction

133. In respect of Afiliás' Rule 7 claim, the Panel therefore concludes that it has jurisdiction over any actions or failures to act alleged to violate the Articles of Incorporation or Bylaws:

- (a) committed by the Board; or
- (b) committed by Staff members of ICANN;

but not over actions or failures to act committed by the IOT as such.

2. Timeliness of the Rule 7 Claim

134. Rule 4 of the Interim Procedures provides that a "CLAIMANT shall file a written statement of a DISPUTE [...] no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE [...]".

135. ICANN takes the position that "the 'material effect' of the asserted violation must be the Board's allegedly wrongful adoption of Rule 7 [...] on October 25, 2018."²⁸ According to ICANN, the "material effect of the Board's adoption of Rule 7 was that Rule 7 would apply to future IRPs, including this IRP."²⁹

136. Afiliás contends for its part that it had no reason to know about the drafting history of Rule 7 when ICANN approved the Interim Procedures on 25 October 2018. Nor did it

²⁸ ICANN's Supplemental Brief, para. 32.

²⁹ ICANN's Response to Afiliás' Post-Hearing Arguments Regarding Time-Bar Issues, dated 27 November 2019, para. 5.

have reason to know that that process violated the Bylaws, let alone have any awareness of the material effect of these violations.³⁰

137. In the opinion of the Panel, the earliest date on which Afiliias could have become aware of the material effect of the impugned actions of the Board or ICANN's Staff insofar as the *amicus* provisions of Rule 7 are concerned is 5 December 2018, when its counsel received copy of counsel's letter advising the ICDR that VeriSign and NDC intended to submit applications to participate in the IRP as *amici*, relying on the impugned provisions of Rule 7.³¹ Afiliias' Rule 7 claim having been filed on 21 March 2019, it was filed within the delay provided for in Rule 4 of the Interim Procedures. ICANN's contention that Afiliias' Rule 7 claim is time-barred is therefore rejected.

3. Merits of the Rule 7 Claim

138. The Panel turns to consider the merits of those aspects of the Rule 7 claim over which the Panel has determined it has jurisdiction. The first aspect concerns VeriSign's alleged interference – through Mr. McAuley and allegedly with the knowledge and assistance of ICANN's personnel – in the rule-making process of Rule 7, in order to secure an absolute right in favour of the Applicant *Amici* to participate in this IRP. Consideration of this aspect of the Rule 7 claim requires the Panel to review the drafting history of Rule 7, to which the Panel now turns.

³⁰ Afiliias PHB, para. 11.

³¹ Letter on behalf of NDC and VeriSign to ICDR, 5 December 2018, Ex. C-85.

(a) Drafting History of Rule 7

139. The first draft of the proposed Updated Supplementary Procedures was circulated to the IOT by Becky Burr on 19 July 2016.³² These had apparently been drafted by Sidley Austin.³³ Rule 7 in this initial draft did not contemplate *amicus curiae* participation in an IRP, although that possibility had been alluded to in the IOT meeting of 1 June 2016.³⁴ Rule 7, in this initial draft, read as follows:³⁵

7. Consolidation, Intervention, and Joinder

[At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.]

³² ICANN's Response to Procedures Officer's Questions dated 16 January 2019, para. 8.

³³ Draft as of 19 July 2016 – Updates to ICDR Supplementary Procedures, Ex. 226. See Declaration of David McAuley of 5 February 2019, para. 10 [**McAuley Declaration**].

³⁴ IOT Meeting #3 of 1 June 2016, Transcript, Ex. 225, p. 26.

³⁵ Draft as of 19 July 2016 – Updates to ICDR Supplementary Procedures, Ex. 226, pp. 6-7 [brackets in the original].

140. Between 20 July 2016 and early November 2016, while several drafts of the Supplementary Procedures were prepared and circulated, the text of Rule 7 remained largely unchanged save for the addition of a third paragraph setting page limits to the written briefings contemplated by its provisions.
141. On 2 November 2016, draft Updated Supplementary Procedures dated 31 October 2016 were reviewed and approved for publication by the CCWG-Accountability and, on 28 November 2016, these were published for public comment pursuant to Section 4.3(n)(ii) of the Bylaws. The version of Rule 7 published for public comment, reproduced below, was very similar to the version of the first draft.³⁶

7. Consolidation, Intervention, and Joinder

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements

³⁶ Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, Ex. 235, p. 8 [reference omitted].

set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

142. In the notice published with the public comment version of the draft Updated Supplementary Procedures, it was stated that the IOT would consider making amendments to the draft in light of the comments received.
143. During the consultation period, which closed on 1 February 2017,³⁷ the IOT received a number of comments pertaining to Rule 7. Three of these urged that participation rights be granted to other entities than those contemplated in the public comment draft of Rule 7.³⁸
144. The public comments gave rise to further discussions at the IOT and consideration was given to allowing certain interested parties to participate in IRPs as *amici*. More specifically, between the months of May and October 2017, the IOT considered different iterations of Rule 7 designed to provide participation rights to entities involved in the underlying action that is the subject of the IRP.
145. On 8 May 2018, Ms. Eisner circulated to the IOT a new version of the draft Interim Supplementary Rules dated 1 May 2018 which redlined the modifications made to the version posted for public comments in November 2016.³⁹ Reproduced below is the text of the revised Intervention and Joinder section in the 1 May 2018 draft of Rule 7:

³⁷ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 November 2016), Ex. 221.

³⁸ See Afilias' Supplemental Brief, paras. 10-11.

³⁹ Ms. Eisner's email to the IOT dated 8 May 2018, Ex. 248; Draft set of interim procedures of 1 May 2018, Ex. 1.

7. Consolidation, Intervention and Joinder

[...]

Intervention and Joinder

If a person, group, or entity participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)) (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an *amicus*, as per the following:

i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.

ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an *amicus*.

Any person, group, or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly or causally connected to the alleged violation at issue in the DISPUTE.

[...]

146. In regard to this 1 May 2018 draft, Afiliias emphasizes that it only concerned participation rights in IRPs where the underlying proceeding is a “process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)”, not an underlying proceeding like the one that gave rise to this IRP.⁴⁰

147. Between May 2018 and September 2018, the IOT continued to discuss the Interim Supplementary Procedures and draft revisions were prepared by both Sidley Austin and

⁴⁰ Afiliias’ Supplemental Brief, para. 14.

ICANN.⁴¹ In the course of the IOT meeting of 7 June 2018, a person who identified herself as “Liz from ICANN”⁴² addressed Rule 7 and said that, while “there [was] still some work that need[ed] development”, they “seem[ed] to have agreed upon” the version that had been circulated on 8 May 2018.⁴³

148. On 20 June 2018, ICANN disclosed on its website that Afilias had initiated a CEP with ICANN over .WEB. On 30 August 2018, counsel for the Applicant *Amici* wrote to Afilias noting that they had been advised that Afilias had invoked the CEP and, should the CEP prove unsuccessful, planned to initiate an IRP. Counsel added that VeriSign and NDC intended to take legal action against Afilias to protect their business interests.⁴⁴
149. On 5 October 2018, Mr. Turcotte wrote to IOT members on behalf of Mr. McAuley to circulate a revised draft dated 25 September 2018⁴⁵. The revised language of Rule 7 in that draft provided for *amicus* participation in an IRP by “[a]ny person, group, or entity that has a material interest relevant to the DISPUTE”.⁴⁶

⁴¹ Declaration of Samantha Eisner of 16 January 2019, para. 4 [**Eisner Declaration**]

⁴² This is most likely a reference to Elizabeth Le, copied on some of the email exchanges concerning Rule 7, including on Ms. Eisner’s email to Mr. McAuley dated 16 October 2018, Ex. 2 to the Eisner Declaration.

⁴³ IOT Meeting #41 of 7 June 2018, Transcript, Ex. 255, p. 12.

⁴⁴ Afilias’ Supplemental Brief, para. 16.

⁴⁵ Afilias’ Supplemental Brief, para. 17; Afilias’ Response dated 28 January 2019, para. 51; ICANN’s Response to Procedures Officer’s Questions, para. 34.

⁴⁶ Draft of ICDR Interim Procedures dated 25 September 2018, Ex. 256, p. 10 (redline of changes from the version of 1 May 2018).

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

150. During the IOT meeting held four days later, on 9 October 2018, Mr. McAuley – speaking not as chair but as a participant - expressed the view that it was “essential that a person or entity have a right to join an IRP if they feel that a significant – if they claim that a significant interest they have relates to the subject of the IRP. And that adjudicating the IRP in their absence would impair their ability to protect that.” He added that he “would be happy to provide specific language with respect to this concept.”⁴⁷

⁴⁷ IOT Meeting #42 of 9 October 2018, Transcript, Ex. 202, p. 15.

151. On 10 October 2018, in conjunction with its CEP, Afilias provided to ICANN's in-house counsel a draft of its IRP Request.⁴⁸ Afilias avers that, much like the IRP Request it ultimately filed on 14 November 2018, this draft contained multiple references to VeriSign.
152. On 11 October 2018, Mr. McAuley proposed modifications to the Intervention portion of Rule 7 to broaden opportunities to intervene in an IRP as a party, rather than as an *amicus*. Mr. McAuley also suggested language removing the Procedures Officer's discretion to grant (or not) requests for intervention by entities claiming a significant interest relating to the subject matter of the IRP. The modifications suggested by Mr. McAuley on 11 October 2018 are redlined in the excerpt below.⁴⁹

Rule (7): Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.
[...]

Intervention

[...]

⁴⁸ Letter dated 8 December 2018 from Arif Hyder Ali (Counsel for Claimant) to the ICDR, pp. 2-3; Eisner Declaration, para. 6.

⁴⁹ Mr. McAuley's email to the IOT dated 11 October 2018, Ex. 258; Draft for Rule 7 attached to Mr. McAuley's email to the IOT dated 11 October 2018, Ex. 258 [Mr. McAuley's modifications are redlined].

In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.

[...]

153. During the IOT meeting held later on the same day, Mr. McAuley explained that, in his view, persons who have contracts with ICANN have to be able to protect their interest in competitive situations. In response, Ms. Eisner expressed concern about granting intervener status to persons claiming significant interest if they do not qualify as claimants under the Bylaws. She suggested granting them *amicus* status instead.⁵⁰ Mr. McAuley then indicated that he was willing to consider alternative language to be drafted by Ms. Eisner.
154. The following day, on 12 October 2018, Ms. Eisner sent an email to Mr. McAuley expressing concern about the removal of the Procedures Officer's discretion and the expansion of participation rights beyond the outcome of the public comments and of what was discussed by the IOT. This email is the one document that, upon application by the Claimant, the Panel agreed to add to the record even though it was not before the Procedures Officer.⁵¹ Since much reliance was placed on it by Afiliac, the Panel reproduces it in full:

⁵⁰ IOT Meeting #43 of 11 October 2018, Transcript, Ex. 205, pp. 12-14.

⁵¹ Ms. Eisner's email to Mr. McAuley dated 12 October 2018. See above, para. 65, footnote 6.

Hi David -

I sat down with this and tried to develop some language, but realized that this is a really tricky definitional issue. Without being extremely careful, we'd be granting anyone that says that they have an interest in the case the right to participate, which then takes away the discretion from the panel on a much broader basis than is currently allowed, so we'd need to flag that change through ICDR.

As I was thinking through all of this, I realized that giving this participation as of right based on "significant interest" is also broader than what the IOT discussed in outcomes of the public comment. As I understand, we agreed as an IOT, and we have reflected in the rules, that those who participate in underlying panels should have the ability to participate as of right (either as claimant, where we've identified that they meet the material harm threshold) or as an amicus (also reflected in there). We did not have comments on, nor agree as an IOT (from what I can tell) that having an interest that might be impaired by, or is similar to that which is under discussion should give a right to participation.

I don't have an objection to continuing this conversation for the final set of rules, but I think that from the principles laid out for the interim set, this inclusion goes far beyond. Working on it to a short time frame also increases the possibility that we make it too broad, and make it very difficult to tailor in a final rule set. Finally, depending on the scope of the final rule we'd propose, we'd then have to see how significant a change it is from what was posted for comment previously.

In the interim, my thought is that the rules are broad enough that they give a very good opportunity for people to preserve their rights through the IRP. If a party could be a claimant, they can initiate an IRP and seek consolidation, even if joinder is denied under discretion of the panelist. The amicus rules are quite broad as well.

Please let me know your thoughts on this,

Thanks,

Sam

155. On 16 October 2018, Ms. Eisner sent an email to Mr. McAuley with further suggested changes to Rule 7. More specifically, Ms. Eisner introduced in this 16 October 2018 draft two categories of entities deemed to have a material interest in the Disputes. These are: (a) in an IRP arising out of an application for a new gTLD, persons who were part of a contention set for the new gTLD; and (b) persons whose actions are significantly referred to in the briefings before the IRP panel. The language underlined in the excerpt

quoted below of the 16 October 2018 draft indicates a modification from the *amicus curiae* provisions of the draft dated 25 September 2018:⁵²

Here is a proposed addition (in underline), including a footnote, for the *amicus* section:

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.^[1] The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in considering the scope of briefing available from *amicus curiae*, the IRP PANEL shall also consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES.

156. Neither Ms. Eisner nor Mr. McAuley describe in their respective declarations the discussions that took place between them between 12 and 16 October 2018, as

⁵² Ms. Eisner's email to Mr. McAuley dated 16 October 2018, Ex. 2 to the Eisner Declaration.

Ms. Eisner, to quote from her declaration, was seeking to “provide additional definition to the “material interest” requirement” through revisions to the *amicus* provisions of Rule 7.⁵³ However, the fact that such discussions took place is established by a draft email to the IOT that Mr. McAuley sent to Ms. Eisner and Mr. Turcotte on 17 October 2018, which included the following paragraphs:

I would like to note one particular area – that of Joinder etc. (Rule 7). You may recall that I, wearing my **participant** (not leader) hat, had suggested certain text and with Malcom’s help we seemed to have achieved compromise.

As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list – a way to try to take advantage of board action at next week’s meeting.

157. Afilias characterizes as “bespoke” the language added to Rule 7 by Ms. Eisner on 16 October 2018 to describe the two categories of parties deemed to have a material interest relevant to the Dispute. In this regard, the Claimant avers: “Unsurprisingly, these two 11th hour additions to Rule 7 provide the textual basis for VeriSign’s and NDC’s applications before this Panel.”⁵⁴
158. In her declaration, Ms. Eisner denies Afilias’ contention that these revisions to Rule 7 had been added by Mr. McAuley following Afilias’ CEP and threatened IRP. She states: “Those Rule 7 provisions were drafted by me; and I was not aware of Afilias’ draft IRP Request when I drafted them and proposed them to the IRP-IOT.”⁵⁵

⁵³ See Eisner Declaration, para. 5

⁵⁴ Afilias’ Supplemental Brief, para. 20

⁵⁵ Eisner Declaration, para. 6.

159. As for Mr. McAuley, he says of Ms. Eisner's revisions of 16 October 2018:⁵⁶

This language was developed by Ms. Eisner alone. I never suggested to Ms. Eisner that she should add these two categories of persons who would be deemed to have a material interest for purposes of *amicus* participation.

160. In the same declaration, Mr. McAuley states:⁵⁷

...to the best of my knowledge and belief, I was not aware that Afilius had filed a [CEP] [...] while any of the proceedings described in this declaration were ongoing. [...] None of my proposed edits or comments to the Interim Supplementary Procedures were made because of a CEP or IRP by Afilius with respect to .web.

161. Ms. Eisner and Mr. McAuley exchanged further emails in the course of the three days following her sending her 16 October 2018 draft, during which her proposed revisions were "refin[ed]".⁵⁸ Thus, on 17 October 2018, Mr. McAuley sent an email to Ms. Eisner with suggested language for Rule 7 reinforcing the Procedures Officer's lack of discretion to allow *amicus* participation by the two categories of persons, groups or entities deemed to have a material interest in the Dispute. Mr. McAuley's proposed modifications to the draft of 16 October 2018 appear in red in the excerpt below:⁵⁹

⁵⁶ McAuley Declaration, para. 26

⁵⁷ *Id.*, para. 32.

⁵⁸ Eisner Declaration, para. 5.

⁵⁹ Attachment to Mr. McAuley's email to Ms. Eisner and Mr. Turcotte dated 17 October 2018, Ex. 3 to the Eisner Declaration.

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP shall be deemed to have a material interest relevant to the DISPUTE and shall be permitted to ~~may~~ participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity shall be deemed to have a material interest relevant to the DISPUTE and ~~may~~ shall be permitted to participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.[1] The *amicus curiae* shall be informed of the proceedings in the same manner as the parties thereto. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in considering the scope of briefing available from *amicus curiae*, the IRP PANEL shall ~~also~~ consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES. In addition, the IRP PANEL shall allow persons, groups or entities with a material interest relevant to the DISPUTE to participate broadly as an *amicus curiae* consistent with ICANN's pertinent bylaws, including, without limitation, Bylaw Sections 4.3(a) and 4.3(n)(iv)(B).

162. On 18 October 2018, Ms. Eisner replied to Mr. McAuley with a further redline. She explained that her modifications adopted his language removing discretion regarding *amicus* participation, restructured the provision and shortened the footnote.⁶⁰

Hi David -

Thanks for your language. Attached is a further redline. The first paragraph appears to have a lot of changes, but what it does is:

- 1) adopt your language of "shall participate";
- 2) makes that language applicable to all three types of situations; and
- 3) is reframed in a bulleted list so as to avoid repeating the same participation right 3 times.

You'll see my comment that I do not recommend accepting the line regarding how *amicus* are informed. It creates a lot of vagueness in the document, and the procedures don't have other discussion about how parties are "informed". Again, this is something that we can continue discussing for the final set.

Finally, I reorganized the footnote to return to one sentence, as there was some duplication and reference to Bylaws sections that do not appear to apply to *amicus*. In this reorganization, I incorporate that concept of "broad participation" that was not in my previous sentence.

Please let us know your thoughts. It would be good if we could get this out either later today or by tomorrow .

Thanks,

Sam

163. Attached to that email was a redline, where Ms. Eisner's modifications are in blue and Mr. McAuley's in red. This draft also shows how the language of the footnote to Rule 7 evolved.⁶¹

⁶⁰ Ms. Eisner's email to Mr. McAuley dated 18 October 2018, Ex. 4 to the Eisner Declaration.

⁶¹ Attachment to Ms. Eisner's email to Mr. McAuley dated 18 October 2018, Ex. 4 to the Eisner Declaration.

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. The following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, if requested, shall be permitted to participate as an *amicus* before the IRP PANEL.:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. ~~shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and~~
- iii. ~~shall be deemed to have a material interest relevant to the DISPUTE and shall be permitted to~~ may participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity, shall be deemed to have a material interest relevant to the DISPUTE and may shall be permitted to participate as an *amicus* before the IRP PANEL.

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All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its

discretion. [1] The *amicus curiae* shall be informed of the proceedings in the same manner as the parties thereto. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

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Commented [SE1]: The procedures do not discuss what it means to be "informed" of proceedings, so I recommend removal, as this could lead to vagueness. I'm also not sure what this means. ICANN will always maintain the online docket of filings and orders. If this is anticipating different notification requirements on ICDR, we'd have to obtain that authorization before we could put this into effect.

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[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of briefing available participation from *amicus curiae*, the IRP PANEL shall also lean in favor of allowing broad participation of an *amicus curiae* as needed to further consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES. In addition, the IRP PANEL shall allow persons, groups or entities with a material interest relevant to the DISPUTE to participate broadly as an *amicus curiae* consistent with ICANN's pertinent bylaws, including, without limitation, Bylaw Sections 4.3(a) and 4.3(m)(iv)(B).

Commented [SE2]: They have to have a material interest to be an *amicus*, so nothing is added by this phrase.

Commented [SE3]: Reference to 4.3(a) is captured above.

Commented [SE4]: This refers to setting of rules for joinder and consolidation, which is handled separately in these procedures and reference thereto would likely lead to confusion.

164. Mr. McAuley and Ms. Eisner continued to exchange emails with further minor suggestions on 18 October 2018.⁶² The following day, that exchange ended with Mr. McAuley's suggestion to add a phrase in order to avoid excluding non-listed persons from the *amicus* provision. His addition appears in red in the excerpt below:⁶³

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, if requested, shall be permitted to participate as an *amicus* before the IRP PANEL:

165. Later on 19 October 2018, Mr. Turcotte, on behalf of Mr. McAuley, sent the last version of the draft Interim Supplementary Procedures to the IOT members, and asked them to revert back to him by 23:59 UTC on 21 October 2018.⁶⁴ The revised language was deemed approved by the lack of comments from members of the IOT within the time allowed. Afilias points to the fact that 19 October 2018 being a Friday, IOT members were only given two days over a week-end to react to Mr. Turcotte's email.

166. On 22 October 2018, the draft Interim Supplementary Procedures as circulated by Mr. Turcotte were sent to the Board for consideration. The preamble to the Interim

⁶² Mr. McAuley's email to Ms. Eisner dated 18 October 2018, Ex. 5 to the Eisner Declaration; Ms. Eisner's email to Mr. McAuley dated 18 October 2018, Ex. 6 to the Eisner Declaration.

⁶³ Mr. McAuley's email to Ms. Eisner dated 19 October 2018, Ex. 7 to the Eisner Declaration.

⁶⁴ Mr. Turcotte email to the IOT dated 19 October 2018, Ex. 262.

Supplementary Procedures as presented to the Board for adoption contains the following representations of the IOT:⁶⁵

In drafting these Interim Supplementary Procedures, the IRP IOT applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016;; (2) to the extent public comments received in response to the Updated Supplementary Procedures reflected clear movement away from either the current Supplementary Procedures or the Updated Supplementary Procedures, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IRP IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

167. Afiliias contends that, insofar as Rule 7 was concerned, each one of the three representations made in this communication to the Board was false.⁶⁶
168. Before completing this description of the evolution of Rule 7, it bears mentioning, as the Procedures Officer found and as admitted by ICANN, that the meetings of the IOT were sparsely attended and, on occasion, that the IOT was unable to muster a quorum.⁶⁷
169. By way of example, the Procedures Officer noted that at the IOT meeting of 11 October 2018, “[i]n addition to an ICANN consultant, an ICANN counsel, a partner of the Jones Day law firm [counsel to ICANN], an ICANN Research Analyst, and an ICANN

⁶⁵ ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 October 2018), Ex. 314, p. 62.

⁶⁶ Afiliias’ Supplemental Brief, para. 28.

⁶⁷ PO Declaration, paras. 83-85. See also ICANN PHB, para. 9.

Projects and Operations Assistant, only two other people spoke at the meeting: David McAuley and Malcolm Huty.”⁶⁸

170. Mr. McAuley acknowledged in his declaration that IOT members did not regularly attend telephonic meetings. Nevertheless, he sought to situate this state of affairs in a broader context.⁶⁹

All IRP-IOT meetings are open to all members of the IRP-IOT committee, although it is not uncommon for members to skip some of the telephonic meetings. However, all committee members are included on all IRP-IOT correspondence, including any drafts of the Update Supplementary Procedures, and are able to and are encouraged by me to comment on the telephone and by email on issues being considered by the committee. The meetings themselves are transcribed by an automated transcription service and the meeting transcriptions, and correspondence among the IRP-IOT members, along with any documents considered during those meetings, are publicly posted on ICANN’s website at <https://community.icann.org/display/IRPIOT/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home> and <https://mmm.icann.org/pipermail/iot>.

171. The Interim Supplementary Procedures were adopted by a resolution of the Board on 25 October 2018.⁷⁰

(b) Observations as to the Development of the *Amicus* Provisions of Rule 7

172. The parties and the Applicant *Amici* have made detailed submissions concerning virtually every step in the evolution of Rule 7. The Panel does not consider it necessary

⁶⁸ PO Declaration, para. 87.

⁶⁹ McAuley Declaration, para. 9.

⁷⁰ ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 October 2018), Ex. 0314.

to get into the *minutiae* of each of the drafts, as the following observations suffice to ground its reasons for decision.

173. Beginning with Mr. McAuley's draft of 25 September 2018, a series of changes were introduced to Rule 7 that had the effect of both broadening the circumstances in which interested parties could seek to participate in an IRP and narrowing down the discretion of the Procedures Officer presented with a request to participate by an interested party.
174. In the 16 October 2018 draft prepared by Ms. Eisner, it was proposed that two specific categories of entities be deemed to have a material interest relevant to the Dispute that would justify their participation as *amici*. The first – qualifying an entity that was part of a contention set for the string at issue in an IRP relating to an application arising out of ICANN's New gTLD Program – reflected the circumstances in which NDC found itself after Afilias' CEP was made public, and Afilias announced it might initiate an IRP; the second – qualifying a person external to the Dispute if the briefings before the IRP significantly refer to actions taken by that person – reflected the circumstances in which VeriSign would likely find itself after the initiation of Afilias' IRP, based on the text of Afilias' CEP of 18 June 2018 and the draft IRP shared with ICANN on 10 October 2018.
175. The two categories of interested parties added to Rule 7 on 16 October 2018 and deemed to have a material interest in the Dispute are quite specific. In the experience of the Panel, they are couched in language that is not typical of legal texts used to describe parties that may claim intervenor status or request *amicus* participation in legal proceedings. Although it is not inconceivable that it be so, it would be a surprising coincidence, in light of the documentary evidence just reviewed, if the articulation of these two categories of potential *amici*, at the time that it occurred, were wholly unrelated to Afilias' CEP, made public shortly before, and its impending IRP, a draft of

which had been shared with ICANN less than a week before these categories came to being. All the more so given that the documentary evidence establishes that Ms. Eisner and Mr. McAuley were in contact while Ms. Eisner was developing the language by which these new categories of entities were added to Rule 7.

176. The questions raised by the specificity of these two additional grounds for *amici* participation are all the more serious considering the persistence with which Mr. McAuley, in his last exchanges with Ms. Eisner, sought to constrain the discretion of the Procedures Officer when he or she would be presented with an application by entities meeting those conditions.
177. The full picture arising from the record before the Panel, however, is more complex. On the other side of the ledger, there are two witness declarations that directly contradict the inference that the Panel is asked to draw from the documentary evidence. First, there is the declaration of Ms. Eisner, who holds the position of Deputy General Counsel of ICANN and is an attorney in good standing licensed to practice in California; and second, the declaration of Mr. McAuley, Senior International Policy and Business Development Manager at VeriSign.
178. In her declaration, Ms. Eisner responds to Afiliias' contention that the portions of Rule 7 relied upon by the Applicant *Amici* were added by Mr. McAuley in response to Afiliias' CEP and in reaction to the draft IRP Request that Afiliias provided to ICANN's in-house counsel on 10 October 2018. She states, as already noted, that the relevant Rule 7 provisions "were drafted by me; and I was not aware of Afiliias' draft IRP Request when I drafted them and proposed them to the IRP-IOT."⁷¹

⁷¹ Eisner Declaration, para. 6.

179. Mr. McAuley, for his part, states in his declaration:⁷²

While I understand generally that ICANN identifies publicly matter subject to the Cooperative Engagement Process (“CEP”), to the best of my knowledge and belief, I was not aware that Afilias had filed a [CEP] on any subject, including with respect to the .web gTLD while any of the proceedings described in this declaration were ongoing. [...] I first learned that Afilias had filed an IRP regarding .web a couple of weeks after it had been filed. None of my proposed edits or comments to the Interim Supplementary Procedures were made because of a CEP or IRP by Afilias with respect to .web.

180. Afilias sought leave from the Procedures Officer to cross-examine Ms. Eisner and Mr. McAuley. That request was denied. No such request was presented to this Panel, which was asked to decide all Phase I issues on the basis of the record before the Procedures Officer. In the result, the Panel is therefore left with the invitation, based on submissions interpreting a trail of documents, to make findings of fact that are contradicted by two witness declarations, in circumstances where the witnesses in question did not appear before the Panel and were not cross-examined on their evidence.

181. The Panel has referred earlier in these reasons to the pre-eminence of documents as a means of evidence when international arbitral tribunals are called upon to reconstitute past events. However, where, as in the present case, documents raise serious questions without providing definitive answers, the Panel is not prepared to make findings of fact that are inconsistent with declarations affirmed by witnesses whose evidence has not been subject to cross-examination. Before making findings of fact that necessarily imply that the evidence of a witness is untruthful, the Panel considers it the duty of any adjudicator, save in the clearest of cases, to require that the party urging that these

⁷² McAuley Declaration, para. 32 [emphasis added].

findings be made first put its case and the documents on which it is based to the witness in cross-examination. All the more so, if the findings of fact in question relate to alleged misconduct by the witness.

(c) Conclusions as to the Involvement of ICANN Staff in the Drafting of Rule 7

182. For the reasons just given, the Panel declines in this decision to make a finding as to the propriety of the involvement of ICANN's Staff in the development of the *amicus* provisions of Rule 7, and Afilias' contention that its action violated the Articles of Incorporation or Bylaws.
183. In its Supplemental Brief in connection with the Applicant *Amici's* requests, Afilias has requested, as principal relief, that the Panel find that the *amicus* provisions of Rule 7 were adopted by ICANN in violation of its Bylaws and, consequently, that VeriSign's and NDC's applications be denied. Afilias has also presented the following, alternative requested relief:⁷³

Second, and in the alternative, if the Panel is not prepared to decide Afilias' claim that ICANN violated its Bylaws in adopting the *amicus* provisions in this Phase I, it should join that claim to the other claims to be decided in Phase II, and allow the Applicants to participate as *amici* on a provisional basis.

184. As reflected in the next section of this decision, the Panel's opinion as to the nature and breadth of the *amicus* participation that should be afforded to the Applicant *Amici* in this case – whether it be under the provisions of Rule 7, properly interpreted, as an exercise of the Panel's discretion under Section 4.3(o)(v) of the Bylaws, or under relevant principles of international law – broadly accords with the *amici* participation rights that Afilias is prepared to concede as part of its alternative relief. This being the case, the

⁷³ Afilias' Supplemental Brief, para. 3.

Panel has decided to grant Afiliias' alternative request for relief, and to join those aspects of the Rule 7 claim over which the Panel has jurisdiction (to the extent Afiliias chooses to maintain them) to the other claims to be decided in Phase II.

(d) Other Aspects of Afiliias' Rule 7 Claim

185. To the extent that there remain aspects of Afiliias' Rule 7 claim that fall within the jurisdiction of the Panel, as determined in this decision, these are also joined to Afiliias' other claims to be determined in Phase II of this IRP.

B. Amicus Participation of the Applicant *Amici* in the IRP

186. As noted already, it is common ground, assuming Rule 7 to be valid, that that Applicant *Amici* are entitled to participate in the IRP as *amici*. The Panel turns now to considering the specific participation rights that are being sought by the Applicant *Amici*. As mentioned, these include submitting written briefs with respect to their alleged misconduct; submitting evidence in the form of witness statements and exhibits; responding to the Claimant's arguments and evidence; participating at the hearing; allowing their witnesses to be cross-examined and being entitled to cross-examine the other Parties' witnesses; making arguments at the hearing and submitting post-hearing submissions with respect to their alleged wrongdoing.⁷⁴

187. The Panel has also noted, above, that the Applicant *Amici* propose to adduce evidence of what they claim was unlawful conduct on the part of Afiliias that would disqualify it from the right to operate the .WEB gTLD. To that extent, the Applicant *Amici* are seeking the right themselves to advance a claim in the IRP.

⁷⁴ Transcript of the hearing on Phase I, pp. 21-23.

188. ICANN's counsel also suggested, at the hearing, that if the Applicant *Amici* were permitted the type of broad participation they are seeking, then it would be appropriate that both of them be subject to the provisions of the Interim Procedures relating to Exchange of Information. This means that they would be subject to document requests, and that Afilias would in turn be subject to document requests by both ICANN and the Applicant *Amici*.⁷⁵
189. The Panel is unable to reconcile the type of participation rights being sought by the Applicant *Amici* with the terms of the Interim Procedures. Rule 7 contemplates the participation of a person, group or entity as *amicus curiae*. Its provisions make it clear that any person participating as an *amicus* “may submit to the IRP PANEL written briefing(s) on the DISPUTE or such other discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion” (emphasis added).
190. With respect to footnote 4 of Rule 7, relied upon by the Applicant *Amici* and ICANN, the Panel is of the view that the exhortation to “lean in favour of allowing broad participation” must be read in context, in accordance with the well-accepted rule of construction calling for contextual interpretation. The footnote in question comes at the end of the above-quoted sentence, which contains two references to “briefing”, and the footnote itself refers to the participation of (or from) “*amicus curiae*”, an expression normally used to designate a friend of the court having, as a non-disputing party, a status different from that of a party. In reality, the participation rights being sought by the Applicant *Amici* are

⁷⁵ *Id.*, p. 23.

those of a disputing party, and they are not sought by entities claiming to be “friends of the court”.

191. A further obstacle to the broad interpretation of Rule 7 urged by the Applicant *Amici* and ICANN arises from a comparison of the *amicus* provisions with the provisions of Rule 7 dealing with interventions. The Intervention provisions include, as regards to the status of the intervener, the following sentence (emphasis added):

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT.

192. No such provisions exist in relation to an *amicus curiae*, consistent with the usual limited scope of the participation of such a non-disputing party.

193. The Intervention section of Rule 7 also includes provisions dealing with the materials to be made available to interveners and entities whose claims have been consolidated:

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated...

194. In sharp contrast, the *amicus* provisions of Rule 7 provide:

The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

195. The conclusions the Panel draws from its review of the provisions of Rule 7, read as a whole, are the following:

- *Amici* are not treated as parties, unlike interveners or parties whose cases are consolidated.

- *Amici* do not have a *right* to access the full record of the IRP, unlike interveners or parties whose cases are consolidated.
- *Amici* are permitted to submit “written briefings on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing”.
- Unlike an intervener, who becomes a Claimant and is bound by the outcome of the IRP, Rule 7 does not provide that an *amicus* will be bound by the outcome of a case in which it participates, and the Applicant *Amici* have made clear that they did not accept to be bound by the result of this IRP.
- The provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to *Parties*, and the Panel can find no basis in Rules 7 or 8 for the submission that *Afilias* may be subject to motions for exchange of documents by the Applicant *Amici*.
- Nowhere in the Interim Procedures can the Panel find support for the proposition that an *amicus* allowed to participate in an IRP may be afforded the right to assert claims of its own in the IRP.

196. Much reliance was placed by the Applicant *Amici* on *Micula v. Romania*, an ICSID arbitration in which the European Community (**EC**) was allowed to participate as a non-disputing party by the filing of written submissions.⁷⁶ The Panel observes that in its letter allowing the participation of the EC, the *Micula* Tribunal noted:

⁷⁶ *Ioan Micula v. Romania, Final Award*, ICSID Case No. ARB-05-20 (11 December 2013), para. 36.

... The European Community shall act as *amicus curiae* not as *amicus actoris vel rei*. In other words, the non-disputing party shall remain a friend of the court and not a friend to either party.⁷⁷

197. The participation rights accorded to the EC as a non-disputing party in *Micula* included the right to file a written submission of 40 pages in length, supported by exhibits, to be focussed on assisting the Tribunal in the determination of the factual and legal issues arising in the case. The EC was given access to the Parties' pleadings and the Tribunal reserved the possibility of requesting the EC to produce "any document or evidentiary material that the Tribunal deem[ed] useful for the resolution of [the] dispute, or which has been requested by either Party."⁷⁸ Provision was also made for any person who participated in the elaboration of the EC's written submission "to be called to provide clarifications on that submission at the hearing, as may be required by the Tribunal of its own initiative or at the request of the Parties."⁷⁹
198. In the opinion of the Panel, this precedent illustrates the distinction existing between cases in which *amicus* participation has been admitted, and the type of participation rights sought by the Applicant *Amici* in this case. At the Phase I hearing, the Panel asked all participating parties whether they had knowledge of any precedent where a person granted the status of *amicus* was afforded the broad participation rights that were being sought by the Applicant *Amici* in this case. None were cited, beyond the Applicant *Amici's* reference to *Micula*.
199. In *Methanex Corp. v. United States of America*, a NAFTA Chapter 11 arbitration governed by the UNICITRAL Arbitration Rules, the Tribunal was presented with petitions

⁷⁷ *Id.*, para. 27.

⁷⁸ *Id.*, para. 36(5).

⁷⁹ *Id.*, para. 36(7).

on behalf of non-governmental organizations requesting permissions to submit *amicus curiae* briefs to the Tribunal, to have observer status, and to make oral submissions at oral hearings. The petitions invoked the immense public importance of the case and the critical impact of the Tribunal's decision on environmental and other public welfare law-making in the NAFTA region. The Tribunal noted that the rules applicable in that case did not empower the Tribunal to add parties, nor to accord to persons who are not parties the substantive status, rights, or privileges of a disputing party. The Tribunal added that it was called upon to decide a substantive dispute between the claimant and the respondent, and that it had no mandate to decide any other substantive dispute or to determine the legal rights of third persons. The Tribunal further reasoned that if it could not, without the consent of the parties, directly add another person as a party, it was equally precluded from achieving this result *indirectly*, by exercising a power over the conduct of the arbitration.⁸⁰

200. In the opinion of the Panel, this reasoning applies to the type of broad participation rights that are being sought by the Applicant *Amici* in this case. To paraphrase the *Methanex* Tribunal, if the Panel cannot add VeriSign and NDC as parties to the IRP, by granting them intervener status or otherwise, the Panel cannot accept the invitation to achieve this result indirectly, by granting them the rights and privileges of parties while they would not, like parties or interveners, be bound by the Panel's decision.
201. It was urged that the Panel needs the assistance of the Applicant *Amici* to pronounce upon the allegations of wrongdoing levelled against them by the Claimant. In the Panel's

⁸⁰ (UNCITRAL NAFTA Ch. 11), Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*" (15 January 2001), para. 29. In the end, the *Methanex* Tribunal decided that it had the power to accept *amicus* written submissions from the petitioners, and deferred to a later stage of the proceedings the decision of whether or not to receive them.

view, this assistance can be provided by granting them the type of *amicus* participation contemplated by Rule 7. Moreover, there is no suggestion that ICANN is unwilling to adduce, in Phase II, evidence relevant to those allegations of wrongdoing from witnesses under the control of the Applicant *Amici*. Nor is it alleged that ICANN is unprepared to accept VeriSign and NDC's offer of support to marshal this evidence. All indications are rather to the contrary, as evidenced by the positions adopted by these three participants before the Procedures Officer and throughout Phase I of this IRP.

202. When all is said and done, it is a striking feature of the Applicant *Amici*'s requests that while they are seeking the broadest participation rights in respect of what would be the core issues of Phase II, they insist that they would not be bound by the Panel's decision. The Panel can find no basis in Rule 7 to accede to such requests.

203. Having considered all relevant circumstances, the Panel has decided that the Applicant *Amici* shall be allowed to participate in this IRP as *amicus*. Except for commercially sensitive or privileged material, the *Amici* shall be given access to all briefings and materials related to the IRP and shall be allowed to attend procedural and merits hearings. The Panel will shortly hold an early preparatory conference to identify, in consultation with the Parties, the issues that fall to be determined in Phase II. Once those issues have been identified, the Panel will decide, in consultation with the Parties and the *Amici*, the questions as to which the *Amici* will be permitted to submit briefings to the Panel, as well as the deadlines, page limits and other modalities of the filing of those briefings and supporting exhibits related to the IRP. The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s). The *Amici* shall bear the full costs of their participation in the IRP.

V. COSTS

204. The costs in respect of Phase I of this IRP are deferred to the Panel's Decision in Phase II of the IRP.

VI. DISPOSITIF

205. For the reasons set out in this Decision, the Panel unanimously decides as follows:

(a) Afilias' alternative request for relief is hereby granted, and those aspects of Afilias' Rule 7 claim over which the Tribunal has determined it has jurisdiction are hereby joined to Afilias' other claims in Phase II;

(b) Nu Dotco, LLC's and VeriSign, Inc.'s respective Requests to participate as *amici* in this IRP are granted, in part, as follows:

(i) NU DOTCO, LLC and VeriSign, Inc. (the ***Amici***) are hereby allowed to participate as *amici* in this IRP;

(ii) Except for commercially sensitive or privileged material, the *Amici* shall be given access to all briefings and materials related to the IRP, and shall be allowed to attend procedural and merits hearings;

(iii) The Panel will shortly hold a preparatory conference to identify, in consultation with the Parties, the issues that fall to be determined in Phase II. Once these issues have been identified, the Panel will decide, in consultation with the Parties and the *Amici*, the questions as to which the *Amici* will be permitted to submit briefings to the Panel, as well as the deadlines, page limits and other modalities of the filing of those briefings and supporting exhibits related to the IRP;

(iv) The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s);

(v) The *Amici* shall bear the full costs of their participation in the IRP.

(c) The costs in relation to Phase I of this IRP are deferred to the Panel's Decision in Phase II of the IRP.

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

Place of the IRP: London, England



Catherine Kessedjian



Richard Chernick

Pierre Bienvenu Ad. E., Chair

Dated: _____

(iv) The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s);

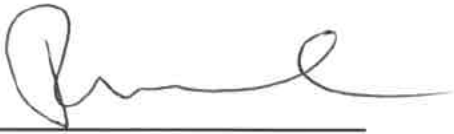
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Place of the IRP: London, England

Catherine Kessedjian



Richard Chernick

Pierre Bienvenu Ad. E., Chair

Dated: _____

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(v) The *Amici* shall bear the full costs of their participation in the IRP.

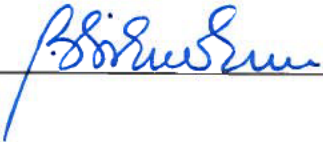
(c) The costs in relation to Phase I of this IRP are deferred to the Panel's Decision in Phase II of the IRP.

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

Place of the IRP: London, England

Catherine Kessedjian

Richard Chernick



Pierre Bienvenu Ad. E., Chair

Dated: 12 February 2020