

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/385/ICANN/2

HOTEL CONSUMER PROTECTION COALITION

(USA)

vs/

BOOKING.COM B.V

(THE NETHERLANDS)

(Consolidated with case No. EXP/447/ICANN/64

HOTREC, HOTELS, RESTAURANTS & CAFES IN EUROPE (BELGIUM) vs/
BOOKING.COM B.V. (THE NETHERLANDS))

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

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- v -

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EXPERT DETERMINATION

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This expert determination is made in expertise proceedings pursuant to Module 3 of the gTLD Applicant Guidebook (“Guidebook”) and its Attachment, the New gTLD Dispute Resolution Procedure (the “Procedure”). These proceedings take place under the International Chamber of Commerce (“ICC”) Rules for Expertise (in force as from 1 January 2003) (the “Rules”), as supplemented by the ICC Practice Note on the Administration of Cases under the Procedure (the “ICC Practice Note”).

1. INTRODUCTION

- 1.1 The Internet Corporation for Assigned Names and Numbers (“ICANN”) has implemented a program for the introduction of new generic Top-Level Domain Names (“gTLDs”). Further to this program, parties may apply for new gTLDs in accordance with the terms and conditions set by ICANN. Procedure, article 1(a).
- 1.2 The program includes a dispute resolution procedure for resolving disputes between a party who applies for a new gTLD and a party who objects to the application – namely, the Procedure. *Id.*, article 1(b). The Procedure provides that dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (a “DRSP”) in accordance with the Procedure and the applicable DRSP rules identified in article 4(b) of the Procedure. *Id.*, article 1(c).
- 1.3 By applying for a new gTLD, an applicant accepts the applicability of the Procedure and the applicable DRSP rules. An objector likewise accepts the applicability of the Procedure and the applicable DRSP rules by filing an objection to an application for a new gTLD. The parties cannot derogate from the Procedure without the express approval of ICANN and cannot derogate from the applicable DRSP rules without the express approval of the relevant DRSP. *Id.*, article 1(d).
- 1.4 There are four types of objections a party may raise against an application for a new gTLD. *Id.*, article 2(e). One of these is known as a “Community Objection”. A Community Objection is an objection that there is substantial opposition to the application from a significant portion of the community to which the string (i.e., the new gTLD) may be explicitly or implicitly targeted. *Id.*, article 2(e)(iv). The Hotel Consumer Protection

Coalition (the “Objector”) has raised this type of objection against the application of Booking.com B.V. (the “Applicant”) for the new gTLD “.HOTELS” (the “Application”).

1.5 Pursuant to articles 3(d) and 4(b)(iv) of the Procedure, Community Objections shall be administered by the ICC International Centre for Expertise (the “Centre”) in accordance with the Rules, as supplemented by the ICC as needed. The ICC Practice Note is such a supplement to the Rules. In the event of any discrepancy between the Procedure and the Rules, the Procedure shall prevail. *Id.*, article 4(c). In all cases, the expert shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its case. *Id.*, article 4(e).

1.6 The Objector’s contact details are as follows:

HOTEL CONSUMER PROTECTION COALITION
Attn: Mr. Michael Menis, InterContinental Hotels Group
Three Ravinia Drive, Suite 100
Atlanta, GA 30346, USA
Email: michael.menis@ihg.com

1.7 The Objector is represented by:

Mr. Douglas M. Isenberg
THE GIGALAW FIRM
5555 Glenridge Connector, Suite 200
Atlanta, GA 30342, USA
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1.8 The Applicant’s contact details are as follows:

BOOKING.COM B.V.
Attn: Mr. Jaap van den Broek, Corporate Counsel
Herengracht 597
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Email: jaap.vandenbroek@booking.com

1.9 The Applicant is represented by:

Mr. Alfred Meijboom
Mr. Joran Spauwen
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1051 LH Amsterdam, The Netherlands
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1.10 The Expert in these proceedings is:

Ms. Jennifer Kirby
KIRBY
68 rue du Faubourg Saint-Honoré
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1.11 The contact details for the Centre are:

Ms. Hannah Tümpel
ICC INTERNATIONAL CENTRE FOR EXPERTISE
33-43 avenue du Président Wilson
75016 Paris, France
Email: expertise@iccwbo.org

2. PROCEEDINGS

2.1 Below is a summary of the main procedural steps in these proceedings.

2.2 On 12 March 2013, the Objector filed its Community Objection with the Centre (the “Objection”) pursuant to article 7 of the Procedure.

2.3 By letter dated 28 March 2013, the Centre notified the parties that it had conducted an administrative review of the Objection pursuant to article 9(a) of the Procedure and had found the Objection in compliance with articles 5 through 8 of the Procedure. The Centre accordingly registered the Objection for processing in accordance with article 9(b) of the Procedure.

2.4 By letter dated 25 April 2013, and with the agreement of all parties, the Centre informed the parties that it had decided to consolidate this case with case EXP/447/ICANN/64 pursuant to article 12 of the Procedure.

2.5 On 24 May 2013, the Applicant submitted its response to the Objection (the “Response”) pursuant to article 11 of the Procedure. By letter dated 30 May 2013, the Centre confirmed to the parties that the Response was in accordance with the Procedure and the Rules.

2.6 On 14 June 2013, in reaction to the Applicant’s Response, the Objector submitted an additional submission dated 12 June 2013 (“Additional Submission”).

- 2.7 On 19 June 2013, the Applicant objected to the Objector's filing its Additional Submission.
- 2.8 On 24 June 2013, the Chairman of the Standing Committee appointed Ms. Kirby as the Expert in the consolidated proceedings pursuant to article 13 of the Procedure, article 9(5) of the Rules and article 3(3) of Appendix I to the Rules.
- 2.9 On 2 July 2013, the Objector requested a stay of these proceedings.
- 2.10 On 9 July 2013, the Applicant opposed the requested stay.
- 2.11 On 6 August 2013, the Centre confirmed the full constitution of the Expert Panel and transferred the file to the Expert. The Centre clarified that, despite the consolidation of this case with case EXP/447/ICANN/64, the Expert was to render a separate determination for each case.
- 2.12 By letter dated 13 August 2013, the Expert denied the Objector's request for a stay of these proceedings. The reasons for the Expert's decision are set forth in her letter and are incorporated here by reference.
- 2.13 Also on 13 August 2013, by way of the same letter, the Expert decided to allow in the Objector's Additional Submission pursuant to article 17(a) of the Procedure.
- 2.14 On 27 August 2013, the Applicant filed its response to the Additional Submission ("Additional Response").
- 2.15 By two emails dated 3 September 2013, the Applicant confirmed that it had no objection to the way these proceedings were conducted and agreed that it had been treated with equality and has been given a reasonable opportunity to present its position. By two emails dated 2 and 3 September 2013, the Objector did the same.
- 2.16 Article 21(a) of the Procedure, provides that the Centre and the expert shall make reasonable efforts to ensure that the expert renders her decision within 45 days of the "constitution of the Panel".¹ The Centre considers that the Panel is fully constituted when the expert is

¹ All quotations in this determination are set forth "as is". Any grammatical or typographical errors are in the original documents.

appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the expert. In this case, the Panel was constituted on 6 August 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that her determination was rendered no later than 20 September 2013. Procedure, articles 6(e), 6(f).

2.17 Pursuant to article 21(b) of the Procedure, the Expert submitted her determination in draft form to the Centre for scrutiny as to form before it was signed.

2.18 Further to paragraph 6 of the ICC Practice Note, the parties waived the requirements for the expert mission as set out in article 12(1) of the Rules.

3. POTENTIAL RELIEF

Article 21(d) of the Procedure provides that the remedies available to an applicant or an objector in these proceedings are limited to the success or dismissal of the objection and the refund by the Centre to the prevailing party of its advance payment of costs pursuant to article 14(e) of the Procedure and any relevant provisions of the Rules.

4. PLACE OF THE PROCEEDINGS

Pursuant to article 4(d) of the Procedure, the place of the proceedings is the location of the DRSP – i.e., the Centre – which is located in Paris, France.

5. LANGUAGE OF THE PROCEEDINGS

English is the language of the proceedings pursuant to article 5(a) of the Procedure. All submissions in these proceedings have been made in English.

6. COMMUNICATIONS

Pursuant to article 6(a) of the Procedure, all communications by the parties, the Expert and the Centre in these proceedings were submitted electronically.

7. STANDARDS AND BURDEN OF PROOF

- 7.1 In determining an objection, the expert shall apply the standards that have been defined by ICANN. Procedure, article 20(a). In this regard, section 3.5 of Module 3 of the Guidebook sets forth “Dispute Resolution Principles (Standards)” for each of the four types of objection that can be raised under the Procedure. The standards applicable to Community Objections are set forth in section 3.5.4 of Module 3 of the Guidebook. In addition, the expert may refer to and base her findings upon the statements and documents submitted and any rules or principles that she determines to be applicable. *Id.*, article 20(b).
- 7.2 The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards. *Id.*, article 20(c).

8. REASONING AND DECISION

- 8.1 This determination is made pursuant to article 21 of the Procedure. Further to paragraph 8 of the ICC Practice Note, the parties are deemed to have agreed that this determination shall be binding upon the parties, as permitted by article 12(3) of the Rules.
- 8.2 Although I have considered all of the allegations, evidence and arguments the parties have submitted to me, I refer in my determination only to those I consider relevant to my reasoning and decisions.

Two-Step Approach

- 8.3 To have its Objection considered, the Objector must have standing. As the first step in making my determination, I accordingly must review the Objection and decide whether the Objector has standing to object. Guidebook, Module 3 § 3.2.2.
- 8.4 To have standing to raise its Community Objection, the Objector must prove that (1) it is an “established institution” and (2) it has an “ongoing relationship with a clearly delineated community”. *Id.* § 3.2.2.4. And the community named by the Objector must be a community “strongly associated” with the new gTLD that is the subject of the Application. *Id.*

8.5 If I find that the Objector has standing, my second step is to determine the merits of the Objection in light of the standards set out in section 3.5.4 of Module 3 of the Guidebook applicable to Community Objections. Further to those standards, I am to apply a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, for a Community Objection to be successful, an objector must prove that (1) the community invoked by the objector is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association between the community invoked and the applied-for gTLD”; and (4) the application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

Standing

8.6 The Objector contends that it has standing to object to the Application for the new gTLD “.HOTELS”. According to the Objector, its members include the world’s leading hotel companies – namely, Accor, Choice Hotels International (“Choice”), Hilton Worldwide (“Hilton”), Hyatt, Intercontinental Hotels Group (“IHG”), Marriott, Starwood Hotels and Resorts (“Starwood”) and Wyndham Hotel Group (“WHG”). By number of rooms, IHG, Marriott, Hilton, WHG, Accor, Choice and Starwood are the top seven hotel companies in the world, and Hyatt is the thirteenth. *See* Special Report: Hotels 325, *Hotels Magazine*, July/August 2012, Objection, Annex 1 at 2. Together, the Objector’s members provide more than 31,000 hotels offering more than four million hotel rooms in approximately 100 counties around the globe. Objection at 4; profiles of the Objector’s members, Objection, Annex 9. Their hotel brands – e.g., Sofitel, ibis, Comfort Inn, Waldorf Astoria Hotels & Resorts, Hilton Hotels & Resorts, Park Hyatt, InterContinental Hotels & Resorts, Holiday Inn Hotels & Resorts, Ritz-Carlton, Marriott Hotels & Resorts, Le Meridien, Westin, Sheraton, St. Regis, W – are among the most well-known and well-established in the world. Objection at 4-5.

8.7 The Objection is also formally supported by the American Hotel & Lodging Association (“AH&LA”), the only national association representing all sectors and stakeholders in the lodging industry in the United States with over 8,700 properties in membership with over 1.3 million rooms (*see* letter dated 4 March 2013 from AH&LA, Objection, Annex 5), and

HOTREC, the umbrella association of the hospitality sector in Europe, which brings together 44 national associations representing the interests of the hospitality industry in 27 European countries (*see* letter dated 6 March 2013 from HOTREC, Objection, Annex 6).

- 8.8 The Objector states it was established in 2006 – before the establishment of the new gTLD application process – to address “industry-wide problems arising from e-commerce practices that harm or mislead consumers, and in turn damage the reputation of coalition member companies, their brands and the hospitality industry as a whole.” Objection at 4; declaration dated 12 June 2013 of Andrew Kauffman, Additional Submission, Annex B. The Objector’s activities focus on researching and resolving unfair and misleading online practices and marketing-related activities. Objection at 4. The Objector also educates consumers about such practices and how to protect themselves and works with governmental authorities and others to reduce harmful e-commerce related activities. *Id.* Although most of its work is done outside the public arena and has been unrelated to the domain name system (the “DNS”), the Objector has publicly commented on ICANN issues on several occasions. *See, e.g.*, letter dated 22 June 2006 from the Objector to ICANN (regarding the purpose of Whois and the Whois contacts), Objection, Annex 2; letter dated 12 January 2007 from the Objector to ICANN (regarding the Preliminary Task Force Report on Whois Services), Objection, Annex 3.
- 8.9 In light of the above, the Objector considers that it is (1) an “established institution” with (2) an “ongoing relationship with a clearly delineated community” – namely, the “hotel community” (Objection at 5)² – that is “strongly associated” with the new gTLD “.HOTELS” that is the subject of the Application, and that it therefore has standing to bring its Objection. For the reasons explained below, I agree.
- 8.10 Section 3.2.2.4 of Module 3 of the Guidebook sets forth a series of non-exclusive factors I may consider in determining whether the Objector is an “established institution”. These non-exclusive factors are (1) the level of global recognition of the institution; (2) the length

² In its Response, the Applicant attempts to redefine the community at issue as the “Limited Hotel Community”, which it defines as the Objector’s members. *See, e.g.*, Response ¶¶ 3.2-3.4; *see also* Additional Response at 5. It is not clear to me, however, on what basis the Applicant considers it can redefine the community the Objector considers to be at issue. Moreover, the Applicant’s position appears to be based on the idea that the Objector cannot represent the interests of a community beyond its membership. As associations frequently represent the interests of communities far larger than their membership, I do not see any basis for the Applicant’s position.

of time the institution has been in existence; and (3) public historical evidence of the institution's existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. In all events, however, the institution must not have been established solely in conjunction with the gTLD application process.

- 8.11 That same section also sets forth a series of non-exclusive factors that I may consider in determining whether the Objector has an “ongoing relationship with a clearly delineated community”. These non-exclusive factors are (1) the presence of mechanisms for participation in activities, membership and leadership; (2) an institutional purpose related to the benefit of the associated community; (3) the performance of regular activities that benefit the associated community; and (4) the level of formal boundaries around the community.
- 8.12 In determining whether the Objector has standing, I am to “perform a balancing of the factors listed above, as well as other relevant information”. Guidebook, Module 3 at 3-8. It is not expected that the Objector must satisfy each and every factor considered in order to satisfy the standing requirements. *Id.*
- 8.13 Based on the record in this case, I find that the Objector is an “established institution”. The Objector was established in 2006³ and was not created in conjunction with the gTLD application process, which opened for user registration and application submission in January 2012. *See* Guidebook, Module 1 at 1-2. Although the Objector does not have a high public profile, it necessarily enjoys global recognition within the hotel community by virtue of the international character of its members, who operate hotels in over 100 countries in Africa, Asia, Australia, Europe, North America and South America. That both AH&LA and HOTREC – which together represent the hospitality industry in 28 countries in Europe and North America – have formally supported its Objection, also reflects the global recognition the Objector enjoys in the hotel community.⁴

³ The Applicant contends that the Objector has failed to prove that it was in fact established in 2006. Response ¶ 1.3; *see also* Additional Response at 3. I disagree and consider the declaration of Mr. Kauffman (Additional Submission, Annex B) sufficient evidence on this score.

⁴ The Applicant considers that the Objector has failed to prove that it has received a “level of global recognition” and that the Objector has in fact conceded that it is not widely known. Response ¶ 1.4. In making this statement, the Applicant appears to read “global

- 8.14 I also find that the Objector has an “ongoing relationship with a clearly delineated community” – namely, the hotel community. Though it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what constitutes a “clearly delineated community”. When evaluating the merits of an objection, the Guidebook suggests that I could balance a number of factors to determine whether the community at issue can be considered “clearly delineated”. These factors include (1) the level of public recognition of the group as a community at a local or global level; (2) the level of formal boundaries around the community and what persons or entities are considered to form the community; (3) the length of time the community has been in existence; (4) the global distribution of the community; and (5) the number of people or entities that make up the community. *Id.* § 3.5.4.
- 8.15 The Guidebook does not suggest any factors I could consider when considering what constitutes a “clearly delineated community” for purposes of standing. But there is nothing in the Guidebook that suggests that the words “clearly delineated community” should be given any different meaning when evaluating standing than they are given when evaluating the merits of an objection. In light of this, I consider that the five factors listed above may be helpful to my analysis of whether the hotel community is a “clearly delineated community” for purposes of assessing whether the Objector has standing.
- 8.16 In considering these factors, the Objector has suggested that I take into consideration the views of the Independent Objector (the “IO”) on what constitutes a “clearly delineated community”. *See* Objection at 5; comments of the IO regarding the application for “.WTF”, Objection, Annex 7. For its part, the Applicant has not objected to my doing so, nor taken issue with the views the IO has expressed. Under these circumstances, I consider it appropriate to take the IO’s views into account for purposes of this case.

recognition” to mean global recognition *by the general public*. I do not see any basis to read “global recognition” this way. For purposes of evaluating an objector’s standing to bring a Community Objection, the more pertinent issue would seem to be whether the objector has received a level of global recognition within the community whose interests it purports to serve.

- 8.17 The IO has noted that the “notion of ‘community’ is wide and broad” and can include a community of interests.⁵ *Id.* at 5. It is a group of individuals who have something in common or who “share common values, interests or goals (i.e. the health, legal, internet or ICANN community).” *Id.* “[W]hat matters is that the community invoked can be clearly delineated, enjoys a certain level of public recognition and encompasses a certain number of people and/or entities.” *Id.*
- 8.18 With this approach in mind, I find that the hotel community – like the legal community or the health community – is a “clearly delineated community” composed of people and entities operating hotels. It is common knowledge that this community has many thousands of members around the world and has existed for centuries. The Objector necessarily has an ongoing relationship with the hotel community because its current members include the seven largest hotel companies in the world with tens of thousands of hotels across the globe. And the Objector’s work related to unfair and misleading online practices and marketing-related activities is designed to help protect consumers and the reputation of its members, their brands and the hospitality industry as a whole. That the hotel community is “strongly associated” with the gTLD “.HOTELS” cannot be gainsaid.⁶
- 8.19 I accordingly find that the Objector has standing to bring the Objection at issue here.
- 8.20 The Applicant resists this conclusion on the grounds that the Objector is not an “established institution” and therefore cannot have standing. Response ¶¶ 1.1-1.9. The Applicant’s primary argument in this regard is that the Objector cannot have standing because it does not

⁵ The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who uses the global Internet. The IO may, among other things, file Community Objections against “highly objectionable” gTLD applications to which no Community Objection has otherwise been filed. The IO is granted standing to file Community Objections, notwithstanding the regular standing requirements for such objections. Guidebook, Module 3 § 3.2.5.

⁶ Although it is an element an objector must prove to establish standing (Guidebook, Module 3 § 3.2.2.4) and to prevail on the merits of its objection (*id.* § 3.5.4), the Guidebook does not define what it means for a community to be “strongly associated” with the applied-for gTLD. When evaluating the merits of an objection, the Guidebook suggests several factors I could balance to determine whether there is such a “strong association”. These include (1) statements contained in the application; (2) other public statements by the applicant; and (3) associations by the public. *Id.* § 3.5.4. While these factors could also be potentially helpful in the context of evaluating the term “strongly associated” for purposes of standing, I do not consider a factor-by-factor analysis necessary on the facts presented here, where the applied-for gTLD effectively names the community at issue.

exist as a “legal entity and has no right to be a party in legal proceedings, including these objection procedure”. *Id.* ¶ 1.2; *see also* Additional Response at 2; Bing.com printout dated 1 May 2013, Response, Annex 2; HTTP Request and Response Header, Response, Annex 4; letter dated 21 May 2013 from Hawkins Parnell Thackston & Young to Kennedy Van der Laan, Response, Annex 5. I disagree.

- 8.21 As detailed above (¶ 8.10), Module 3 of the Guidebook sets forth a non-exclusive list of factors that I may consider when evaluating whether the Objector is an “established institution”. None of these factors suggest that an objector may only be an “established institution” if it is a legal entity that can be a party to “legal proceedings”, and I see no reason to import such a requirement here. In this regard, I note that the Applicant has not explained on what basis this expertise procedure under the Procedure and the Rules should be considered “legal proceedings” and I am not aware of any. Moreover, on a practical level, the Applicant’s argument that the Objector must have legal personality might have more appeal if these proceedings could result in a decision directing the Objector to do or refrain from doing something. As noted above (¶ 3), however, they cannot. The remedies available to the Applicant or the Objector under the Procedure are limited to the success or dismissal of the Objection and to the refund by the Centre to the prevailing party of its advance payment of costs. In these circumstances, I see no reason to limit standing to objectors who are legal entities as the Applicant proposes.
- 8.22 The Applicant also contends that the Objector does not have standing because it does not have “an ongoing relationship with a clearly delineated community” that is “strongly associated” with the new gTLD that is the subject of the Application (i.e., “.HOTELS”). *See* Response ¶¶ 2.1-2.2, §§ 4-8, 10; Additional Response at 4. For the reasons noted above (¶ 8.18), I disagree. I also note that the Applicant’s arguments in this regard appear principally to be responding to arguments raised in the Objection (at 5-8), where the Objector conflates itself with the hotel community – arguments I have not adopted in reaching my conclusion that the Objector has standing. Indeed, the Objector conflates itself with the hotel community at numerous points throughout its Objection, a matter I return to when discussing the merits of the Objection below. *See infra* ¶ 8.45.

Merits

- 8.23 Having found that the Objector has standing, I must now turn to the merits of its Objection. As noted above (¶ 8.5), with respect to Community Objections, the Guidebook sets forth a four-part test for determining whether there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD may be targeted. Specifically, to succeed, the Objector must prove that (1) the community it invokes – the hotel community – is a “clearly delineated community”; (2) community opposition to the application is “substantial”; (3) there is a “strong association” between the hotel community and the gTLD “.HOTELS”; and (4) the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community.
- 8.24 In the context of deciding standing, I have already found that the hotel community is a “clearly delineated community” and that there is a “strong association” between the hotel community and the gTLD “.HOTELS”. *See supra* ¶ 8.18. It therefore remains for me to determine whether the hotel community’s opposition to the Application is “substantial” and whether the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community.
- 8.25 The Objector contends, among other things, that the hotel community’s opposition to the Application is “substantial” by virtue of the fact that its members – who provide tens of thousands of hotels offering millions of hotel rooms in approximately 100 countries around the globe – oppose the Application. Objection at 8. In addition, as noted above (¶ 8.7), both HOTREC and AH&LA have filed letters formally supporting the Objection, and other travel-related companies have likewise filed comments against the Application. *Id.* at 8-9; new gTLDs application comments dated August/September 2012 (raising concerns about the Application), Objection, Annex 12.
- 8.26 In light of the above, the Objector contends that the hotel community’s opposition to the Application is “substantial”. For the reasons set forth below, I agree.
- 8.27 Section 3.5.4 of Module 3 of the Guidebook suggests that I “could balance a number of factors to determine whether there is substantial opposition” by the hotel community to the

Application. These factors include (1) the number of expressions of opposition relative to the composition of the community; (2) the representative nature of the entities expressing opposition; (3) the level of recognized stature or weight among sources of opposition; (4) the historical defence of the community in other contexts; and (5) the costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

- 8.28 Through the Objector, the Application is opposed by seven of the world’s top-ten hotel operators. The stature and weight of the Objector’s members in the hotel community cannot be overstated. In addition, both HOTREC (which brings together 44 national associations representing the interests of the hospitality industry, including hotels, in 27 European countries) and AH&LA (which represents both individual hotel property members and hotel companies in the US) formally support the Objection. Together, these entities represent the interests of a broad range of hotel community members doing business in about 100 countries around the globe. In light of this, I consider the hotel community’s opposition to the Application to be “substantial”.
- 8.29 The Applicant opposes this conclusion on the grounds that the Objector has failed to quantify the number of expressions of opposition relative to the composition of the community. In light of this, the Applicant notes that it is impossible to compare the number of expressions of opposition to the total number of entities within the community and assess what proportion of the community they represent. Response ¶¶ 9.1, 9.5, 9.6; Additional Response at 5. While the Guidebook suggests that such numbers could be a factor in my analysis, it does not require that they be, and I consider the facts discussed above (¶ 8.28) sufficient to establish the hotel community’s “substantial” opposition to the Application.
- 8.30 The Applicant likewise contends that the Objector has failed to put on sufficient evidence of the historical defence of the hotel community in other contexts and the costs it has incurred in expressing opposition. *Id.* ¶ 9.2. While the Guidebook likewise lists these as factors that could be relevant to assessing whether community opposition is “substantial”, in the context of this case, I do not find them so, as the facts discussed above (¶ 8.28) are sufficient to establish the hotel community’s “substantial” opposition to the Application. The Objector’s alleged failure to put on sufficient evidence with respect to these factors is accordingly immaterial to my decision. The Applicant also objects to the Objector’s reliance on opposition to the Application from entities that are not part of the hotel community. *Id.*

¶ 9.3. This, however, I have not relied on in reaching my decision. The Applicant also contends that the Objector has failed to put on evidence that each of its individual members objects to the Application. *Id.* ¶ 9.4. As the Objector speaks on behalf of its members, I see no basis to require such evidence. I note, however, that some of its members have in fact directly expressed opposition to the Application in their own names. *See* Objection, Annex 12; Additional Submission at 3-4.

- 8.31 This brings me to the last element the Objector must prove to succeed on its Objection – namely, that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community. Broadly speaking, the Objector contends that it does for two reasons. The first has to do with concerns over cybersquatting and similar intellectual property infringements, and the second with concerns that members of the hotel community would not be able to register domain names in “.HOTELS”.
- 8.32 With respect to the Objector’s first concern, the Objector contends that “ICANN’s gTLD program and its expansion of the number of gTLDs will likely exacerbate the problems that its members have been fighting online for many years, including cybersquatting.” Objection at 9; World Intellectual Property Organization (“WIPO”) statistics dated 18 February 2013 on areas of complaint activity, Objection, Annex 10; WIPO statistics dated 27 February 2013 on decided cases, Objection, Annex 11; WIPO Administrative Panel Decision, Case No. D2009-1661, *Inter-Continental Hotels Corp. v. Kirchhof*, Objection, Annex 15.
- 8.33 The Objector understands ICANN’s commitment to expand the number of gTLDs, however, and does not object to all applications. Should ICANN decide to approve any of the ten “.HOTEL” or similar gTLD applications that have been filed, the Objector would prefer the application for “.HOTEL” that has been filed by HOTEL Top-Level-Domain SARL (“HTLDS”) because the application proposes to operate “.HOTEL” as a “closed registry limited only to [. . .] the ‘hotel community’”. Objection at 10. The Objector states that HTLDS has assured it that (1) “hotel community” is defined to exclude “‘any entity other than a hotel, hotel chain, or organization or association that is not formed or controlled by individual hotels or hotel chains’”; (2) HTLDS staff will respond immediately to reports of infringement and immediately suspend clear violations, including typosquatting and cybersquatting; and (3) HTLDS will reach out to the Objector’s members to more fully protect their trademarks. *Id.*; *see also* new gTLDs comments dated 11 August 2012 (where

the Objector conditionally supports the application of HTLDS), Objection, Annex 4; GAC Early Warning dated 20 November 2012 from France (proposing that “.HOTELS” and similar strings be reserved to hotel businesses), Objection, Annex 20; letter dated March 2012 from International Hotel & Restaurant Association to ICANN (endorsing the application of HTLDS), Objection, Annex 21; letter dated 20 March 2012 from AH&LA to ICANN (same), Objection, Annex 22.

- 8.34 The Objector contends that, by contrast, the Applicant has taken the “preposterous position” that it “would have the right to engage in cybersquatting on the long-standing and famous hotel brands owned by Objector’s members.” Objection at 12. In support of this contention, the Objector quotes from a section of the Application that states as follows:

[The Applicant] shall claim to have a legitimate interest in these domain names, as they are merely descriptive of the activities, products or services of [the Applicant]. So even if one or more of these domain names would be protected by a registered trademark, held by a third party, it is likely that a claim under the Uniform Dispute Resolution Policy or Uniform Rapid Suspension policy will fail.

Application, Response, Annex 1 § 18(c); *see* Objection at 12.

- 8.35 With respect to the Objector’s second concern, the Objector contends that the Applicant’s Application would harm the hotel community because the Applicant proposes to operate “.HOTELS” as a “single registrant TLD”. *Id.* at 10. In this regard, the Objector points to a section of the Application that states in pertinent part as follows:

At least during the initial months or even years following the delegation of the .hotels gTLD to [the Applicant], this extension is likely going to be a so-called “single registrant TLD” [. . .]. [A] “single registrant TLD” is a TLD where (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use, and (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator.

Therefore, parties who are not [the Applicant] or – insofar and the extent [the Applicant] deems appropriate – an Affiliate within the meaning of the Registry Operator Agreement will not be entitled to register domain names in the .hotels gTLD.

Response, Annex 1 § 18(c); *see* Objection at 10.

- 8.36 While single registrant TLDs may be appropriate in the case of a “dot-brand” (e.g., “.GUCCI”), the Objector contends that they are inappropriate in the case of generic words – such as “hotels” – because they would make the gTLD “unavailable for the community it should serve, to the community’s detriment.” *Id.* at 10. In other words, if the Applicant were allowed to operate “.HOTELS” as proposed, the Objector and its members would be unable to register domain names such as “sofitel.hotels” or “hyatt.hotels” or “marriott.hotels” and would therefore “be unable to conduct business in the one gTLD that is most directly related and beneficial to its business.” *Id.* at 10-11. *See also* Objection, Annex 12 (raising concerns about the Applicant’s proposal to operate “.HOTELS” as a closed gTLD); GAC Early Warnings dated 20 November 2012 from Australia and Germany (same), Objection, Annex 20. It is for this reason that such “closed” gTLDs have received critical comment. *See* letter dated 31 January 2013 from Microsoft to ICANN (raising concerns with respect to closed gTLDs), Objection, Annex 16; letter dated 15 February 2013 from Retail Council of Canada to ICANN (same), Objection, Annex 18; letter dated 25 September 2012 from Kathryn Kleiman to ICANN (same), Objection, Annex 19.
- 8.37 The Objector contends that the Applicant’s proposal to operate “.HOTELS” as a closed gTLD shows that it does not intend to act in accordance with the interests of the hotel community, but rather only in accordance with its own interests. Objection at 13. The Objector considers that such a situation would damage the reputation of the hotel community. *Id.* at 12. Specifically, the Objector alleges that the Applicant’s operation of “.HOTELS” would “directly damage Objector and its members by excluding them from the most appropriate gTLD for their community, forcing Objector and its members to incur significant additional expenses to properly inform the public about its official Internet presences.” *Id.* The Objector contends that this is especially so as the hotel community depends heavily on the DNS, as so many consumers now make their travel arrangements online. *Id.* at 13; *U.S. Consumer Online Travel Spending Surpasses \$100 Billion for First Time in 2012*, 20 February 2012, comScore.com, Objection, Annex 23; *The Evolution of Online Travel (Infographic)*, 28 February 2012, hotelmarketing.com, Objection, Annex 24; *Top 10 Hospitality Industry Trends for 2012*, 22 December 2011, hotelmarketing.com, Objection, Annex 25.
- 8.38 In light of the above, the Objector considers that it has proven that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community. For the reasons set out below, I disagree.

- 8.39 Section 3.5.4 of Module 3 of the Guidebook suggests that I could use several non-exclusive factors in determining whether the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the hotel community. These non-exclusive factors are (1) the nature and extent of damage to the reputation of the hotel community that would result from the Applicant's operation of the gTLD ".HOTELS"; (2) evidence that the Applicant is not acting or does not intend to act in accordance with the interests of the hotel community or users more widely, including evidence that the Applicant has not proposed or does not intend to institute effective security protection for user interests; (3) interference with the core activities of the hotel community that would result from the Applicant's operation of the gTLD ".HOTELS"; (4) dependence of the hotel community on the DNS for its core activities; (5) the nature and extent of concrete or economic damage to the hotel community that would result from the Applicant's operation of the gTLD ".HOTELS"; and (6) the level of certainty that the alleged detrimental outcomes would occur. In all events, an allegation of detriment that consists only of an applicant being delegated the gTLD instead of an objector will not be sufficient for a finding of material detriment.
- 8.40 With respect to the Objector's first concern about cybersquatting and the like, there is no evidence in the record that suggests that the Applicant considers it can engage in cybersquatting at all, much less cybersquatting that would infringe the trademarks of the Objector's members. On the contrary, section 29 of the Application (Response, Annex 1) sets forth the Applicant's commitment to the protection of intellectual property rights and how it intends to implement the mandatory rights protection mechanisms contained in the Guidebook and detailed in Specification 7 of the draft New gTLD Registry Agreement – mechanisms that are specifically designed to combat cybersquatting, among other infringements.
- 8.41 Moreover, the quotation from the Application that the Objector sets forth to support its cybersquatting allegation (*supra* ¶ 8.34) is taken out of context and does not support the Objector's position. In fact, taken in context, the quotation is further evidence of the steps the Applicant would take to minimize the potential for trademark disputes with third parties regarding domain names registered in the ".HOTELS" gTLD:

[E]ven if only [the Applicant] will be entitled to register domain names, this does not exclude the hypothesis that disputes may arise with one or more third parties as regards domain names that are registered in the .hotels gTLD.

In order to avoid these risks, [the Applicant] intends to implement the following policies and processes:

First, the domain names to be registered by [the Applicant] could relate to the following:

- * registered trademarks of [the Applicant];*
- * names of affiliates and/or hotel partners of [the Applicant];*
- * names of departments within [the Applicant], and its subsidiaries;*
- * etc.*

Furthermore, [the Applicant] envisages registering a fair number of generic words that are directly or indirectly related to the day-to-day business activities and operations of [the Applicant] and its Affiliates.

Prior to effectively registering such domain names in the .hotels gTLD, [the Applicant] will require its legal department to review the list of these domain names on a regular basis in order to satisfy itself that they will not infringe the rights of third parties.

In any case, [the Applicant] shall claim to have a legitimate interest in these domain names, as they are merely descriptive of the activities, products or services of [the Applicant]. So even if one or more of these domain names would be protected by a registered trademark, held by a third party, it is likely that a claim under the Uniform Dispute Resolution Policy or Uniform Rapid Suspension policy will fail.

Response, Annex 1 § 18(c).

- 8.42 The Objector has similarly failed to prove any likely material detriment to the hotel community flowing from the Applicant’s proposal to operate “.HOTELS” as a closed gTLD. As a preliminary matter, I note that, in trying to prove material detriment, the Objector has contended that the “.HOTEL” application filed by HTLDS is preferable to other applications for identical or similar gTLDs – including the Application at issue here for “.HOTELS” – because the former will better serve the interests of the hotel community. *See supra* ¶ 8.33. A Community Objection, however, is not the avenue for determining the relative merits of different gTLD applications, and nothing in the four-part test set out in section 3.5.4 of Module 3 of the Guidebook suggests that it is. The alleged relative merits of other gTLD applications are accordingly not material to my determination of the Objection at issue here.

8.43 More importantly, since the Objector filed its Objection, Specification 11 of the draft New gTLD Registry Agreement has been revised. Specifically, paragraphs 3(c) and 3(d) of that Specification now provide in pertinent part as follows:

- (c) *Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.*
- (d) *Registry Operator of a “Generic String” TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person’s or entity’s “Affiliates” [. . .]. “Generic String” means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those others.*

Draft New gTLD Registry Agreement dated 2 July 2013. These provisions cast considerable doubt on whether the Applicant would be able to operate “.HOTELS” as a closed gTLD, as it has proposed. It is accordingly far from certain that the Applicant would be able to exclude members of the hotel community from registering domain names in “.HOTELS” and cause them the alleged detriment the Objector foresees.

8.44 In addition, the Objector has failed to prove any material detriment the hotel community would likely suffer in the (unlikely) event the Applicant were permitted to operate “.HOTELS” as a closed gTLD. The most the Objector has done in this regard is to allege that, if the Objector and its members cannot register domain names in “.HOTELS”, this will force the “Objector and its members to incur significant additional expenses to properly inform the public about its official Internet presences.” Objection at 12. This is insufficient to meet the Objector’s burden of proof on this issue.

8.45 In this regard, it is unclear to me why the Objector contends that the Applicant’s operating “.HOTELS” as a closed gTLD would likely cause material detriment to itself. To make out its Objection, the Objector must prove that the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community, not to itself. And while the Objector serves the interests of the hotel community, it is not synonymous with that community and does not operate any hotels. It is therefore not clear why it would want to register a domain name in “.HOTELS” or how its inability to do so would cause it additional expense. I also note that, although the Objector registered the domain name “hotelconsumerprotectioncoalition.org” in 2006 (*see* Whois

output dated 6 June 2013, Additional Submission, Annex A), the Objector does not seem to use it. Moreover, users trying to access that domain name bounce to “ihg.com” – the website for IHG. *See* Response, Annex 4. In these circumstances, the Objector’s alleged desire to “properly inform the public about its official Internet presences” is far from clear.

8.46 The Objector has similarly failed to prove that the Applicant’s operating “.HOTELS” as a closed gTLD would likely cause material detriment to its members. Again, the issue is whether the Application creates a “likelihood of material detriment to the rights or legitimate interests of a significant portion” of the hotel community. However, even assuming that the Objector’s members themselves constitute a “significant portion” of the hotel community, the Objector has not even explained (much less proven) how their inability to register domain names in “.HOTELS” would cause them to incur additional expense with respect to their Internet presences. The absence of any evidence in this regard is striking, particularly as it would seem that, if anything, the opposite is true: the Objector’s members would incur additional expense if they were to expand their Internet presences by registering domain names in “.HOTELS”.

8.47 Having said this, I agree with the Objector that the Applicant’s proposal to operate “.HOTELS” as a closed gTLD indicates that it intends to act in accordance with its own interests, not those of the hotel community. But the Objector’s members and other members of the hotel community already have many avenues through the DNS to have a presence on the Internet – avenues the Objector’s members and many others in the hotel community already exploit. So while the Objector’s members and others in the hotel community might want to register domain names in “.HOTELS” if it is delegated, it is not clear what the marginal benefit of doing this would be worth to them, if anything.⁷ The Objector has simply put on no evidence of the nature or extent of any concrete or economic damage to the hotel community that would result from the Applicant’s operating “.HOTELS” as a closed gTLD.

8.48 The Objector has similarly failed to offer any evidence to support its conclusory allegation that the Applicant’s operating “.HOTELS” as a closed gTLD would damage the reputation of the hotel industry. Nor has it alleged what the nature and extent of that purported damage

⁷ In this regard, I note that the fact that the Objector would prefer that ICANN not have a new gTLD program suggests that it does not see much benefit to the hotel community in being able to register domain names in new gTLDs. *See* Objection at 9-10.

would be. Similarly, the Objector has also not alleged that the Applicant's operating ".HOTELS" as a closed gTLD would interfere with the core activities of the hotel community, even though the hotel community is increasingly dependent on the DNS.

8.49 For these reasons, I find the Objector has failed to prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the hotel community.

9. COSTS

9.1 Pursuant to article 14(e) of the Procedure, upon the termination of the proceedings, after I have rendered my determination, the Centre shall refund to the prevailing party its advance payment of costs. *See also* Procedure, article 21(d).

9.2 As I have decided to dismiss the Objection, the Applicant is the prevailing party in these proceedings. The Centre shall accordingly refund to the Applicant its advance payment of costs.

10. DETERMINATION

- 10.1 For the reasons set out above, the Expert makes the following determination:
- 10.2 The Objection is dismissed and the Applicant accordingly prevails;
- 10.3 The Centre shall refund to the Applicant its advance payment of costs.

Date: 19 November 2013



Jennifer Kirby
Expert