

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

CASE No. EXP/447/ICANN/64

HOTREC, HOTELS, RESTAURANTS & CAFES IN EUROPE

(BELGIUM)

vs/

BOOKING.COM B.V

(THE NETHERLANDS)

(Consolidated with case No. EXP/385/ICANN/2

HOTEL CONSUMER PROTECTION COALITION (USA) 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). HOTREC, Hotels, Restaurants & Cafés

in Europe (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:

HOTREC, HOTELS, RESTAURANTS & CAFÉS IN EUROPE
Attn: Mr. Kent Nyström, President
Contact Information Redacted

1.7 The Objector is represented by:

Ms. Nathalie Dreyfus
DREYFUS & ASSOCIÉS
78 avenue Raymond Poincaré
75116 Paris, France
Email: contact@dreyfus.fr

1.8 The Applicant’s contact details are as follows:

BOOKING.COM B.V.
Attn: Mr. Jaap van den Broek, Corporate Counsel
Contact Information Redacted

1.9 The Applicant is represented by:

Mr. Alfred Meijboom
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1051 LH Amsterdam, The Netherlands
Email: Alfred.Meijboom@kvdl.nl
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1.10 The Expert in these proceedings is:

Ms. Jennifer Kirby
KIRBY
68 rue du Faubourg Saint-Honoré
75008 Paris, France
Email: jennifer.kirby@kirbyarbitration.com

1.11 The contact details for the Centre are:

Ms. Hannah Tümpel
ICC INTERNATIONAL CENTRE FOR EXPERTISE
33-43 avenue du Président Wilson
750016 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 13 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 4 April 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/385/ICANN/2 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 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.
- 2.7 On 1 July 2013, the Objector sought a stay of these proceedings.
- 2.8 On 9 July 2013, the Applicant opposed any stay of these proceedings.
- 2.9 On 22 July 2013, the Objector sought leave to file an additional submission in reaction to the Applicant's Response.
- 2.10 On 25 July 2013, the Applicant opposed the Objector's request to file an additional submission.
- 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/385/ICANN/2, 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 the Objector to file an additional submission pursuant to article 17(a) of the Procedure.
- 2.14 The Objector filed its additional submission on 20 August 2013 ("Additional Submission").
- 2.15 On 27 August 2013, the Applicant filed its response to the Additional Submission ("Additional Response").
- 2.16 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 email dated 4 September 2013, the Objector did the same.

- 2.17 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 constituted when the expert is 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).
- 2.18 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.
- 2.19 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

- 5.1 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.

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

- 5.2 Having said this, the Objector has submitted several exhibits in French, German and Portuguese without providing an English translation. *See, e.g.*, Objection, Appendices 14(A), 14(B), 16(A)-16(F), 18(A)-18(D), 22, 28(A), 40(A), 40(B). The Applicant has raised no objection in this regard. Article 15 of the Rules provides, among other things, that where a party proceeds with the expertise proceedings without objecting to a failure to comply with any provision of the Rules, any direction given by the Centre or the expert, or any requirement related to the conduct of the expertise proceedings, that party shall be deemed to have waived its right to object. In all events, however, none of these documents was material to the Expert's determination.
- 5.3 The Objector also submitted in French a copy of its statutes as they are published in the Official Belgium Bulletin. *See id.*, Appendix 8. While the Objector did not produce a translation of this document per se, it did also submit a copy of its statutes in English. *See id.*, Appendix 7. Again, the Applicant has raised no objection in this regard. *See* Rules, article 15.

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, it is a non-profit international association that brings together 44 national associations representing the interests of the hospitality industry in 27 European countries. Objection § 1; the Objector’s profile, Objection, Appendix 5; the Objector’s list of members, Objection, Appendix 6. Some of these national associations – such as Groupement National des Chaînes Hôtelières – in turn have members (such as Accor) that are among the world’s leading hotel chains and operate in many parts of the world, including Africa, Asia, Europe, Latin America, the Middle East and North America. Objection § 2.5; Accor 2011 Annual Report (operating over 4 400 hotels in 92 countries), Objection, Appendices 14(C)-14(D).
- 8.7 The Objector notes that Europe is the largest tourist destination in the world, with a global market share of over 50%. In 2011, three European countries – France, Italy and Spain – were among the top-five tourist destinations. Objection § 2. The Objector represents the interests of European hotels, restaurants, cafes and similar establishments in the European decision-making process before the European Commission, the Council of Ministers and the European Parliament. *Id.* § 2.2. Since 2007, it has also developed various tools to assist hotel operators across Europe, including the European Hospitality Quality scheme, the Hotelstars Union (a harmonized European hotel classification system), a methodology for improving fire safety in hotels, and benchmarks for fair practices in online distribution. *Id.* § 2.3; information from the Objector’s website on the Hotelstars Union, Objection, Appendix 11; press releases dated 10 February 2010 on the Objector’s guidelines for fire safety in European hotels, Objection, Appendix 12; position paper dated 27 April 2012 on the Objector’s benchmarks of fair practices in online distribution, Objection, Appendix 13. The Objector is also an Affiliated Member of the United Nations World Tourism Organisation (“UNWTO”) and collaborates closely with the International Hotel & Restaurant Association (“IH&RA”), the only international association recognized by the United Nations as representative of the global hotel industry. Objection § 2.2; list of UNWTO Affiliated Members dated 11 March 2013, Objection, Appendix 10(A).
- 8.8 The Objector states that it has been based in Brussels since 1991 and became a non-profit international association in 1994. The Objector is a recognized association listed in the European Transparency Register. It has statutes establishing its governing rules, principles

and procedures. The latest iteration of these was adopted in 2011. The General Assembly is the Objector’s highest decision-making body and brings together representatives of all member associations. The General Assembly elects nine members to an Executive Committee, which is chaired by the President and oversees management of the association. The Objector’s Secretariat, which is led by the Chief Executive Officer, manages the association and its activities on a day-to-day basis. Objection §§ 1, 2.1; the Objector’s statutes adopted 28 October 2011, Objection, Appendix 7; the Objector’s listing dated 10 March 2013 in the European Transparency Register, Objection, Appendix 9.

- 8.9 The Objector considers it axiomatic that the “Hotel Community” – which the Objector defines as the “set of all hotels that meet the definition of ISO 18513:2003” (Objection at 5; International Organization for Standardization 18513:2003 § 2.2.1, Objection, Appendix 3)² – is “strongly associated” with the gTLD “.HOTELS”. *See* Objection §§ 5-5.3.
- 8.10 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 6) – 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.
- 8.11 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 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.
- 8.12 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

² *See also* Objection § 3.1 (explaining that the Hotel Community “includes hotel operators as such, individual hotels, boutique hotels, hotel chains including owned and leased, franchised or managed hotels, and hotel networks or entities that represent the interests of hotels”).

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.

- 8.13 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.*
- 8.14 Based on the record in this case, I find that the Objector is an “established institution”. The Objector was established in 1991 – more than two decades before the gTLD application process opened for user registration and application submission in January 2012. *See* Guidebook, Module 1 at 1-2. The Objector necessarily enjoys global recognition within the hospitality industry through its membership in UNWTO and by virtue of the international character of its members, who are national associations that represent the interests of the hospitality industry in 27 European countries and, in turn, have as members hotel operators who have thousands of hotels around the globe.
- 8.15 I also find that the Objector has an “ongoing relationship with a clearly delineated community” – namely, the Hotel Community. As noted above (§ 8.9), the Objector has defined the Hotel Community as the “set of all hotels that meet the definition of ISO 18513:2003”. There is no dispute that it is possible to define such a group and label it the Hotel Community. The issue is whether the Hotel Community, thus defined, constitutes a “clearly delineated community” with which the Objector has an “ongoing relationship” for purposes of section 3.2.2.4 of Module 3 of the Guidebook.
- 8.16 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.

- 8.17 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.
- 8.18 In considering these factors, the Objector makes reference to the principles, recommendations and implementation guidelines established by the ICANN Generic Names Support Organization (“GNSO”), which were used as the basis for the new gTLD program. Objection § 3; *see also* Additional Submission at 2. Implementation Guideline P concerns Community Objections and explains that the term “community” should be “interpreted broadly and will include, for example, an economic sector”. Summary of GNSO Principles, Recommendations & Implementation Guidelines, IG P, Objection, Appendix 4; GNSO Final Report dated 8 August 2007, Part A, Objection, Appendix 15.
- 8.19 The Applicant disputes that the GNSO implementation guidelines “can be used to determine the appropriate test set by ICANN” because neither the Guidebook nor the Procedure call for them to be applied in these proceedings. Response at 5. In these circumstances, the Applicant states that I “need to decide on the appropriate tests in line with parties’ reasonable expectations pursuant to the Guidebook and Procedure.” *Id.* The Guidebook, however, gives me broad discretion in this regard by suggesting a number of non-exclusive factors I could take into consideration in determining whether the community at issue can be considered “clearly delineated”. Guidebook, Module 3 § 3.5.4. And the Procedure expressly provides that, in addition to the standards set out in section 3.5.4 of Module 3 of the Guidebook, I may also refer to and base my findings upon the statements and documents submitted and any rules or principles that I determine to be applicable. Procedure, article 20(b). Under these circumstances, I consider it within my discretion to take the GNSO implementation guidelines into account as part of my analysis.

- 8.20 With this approach in mind, I find that the Hotel Community, as defined by the Objector (*see supra* ¶ 8.9), 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 it brings together dozens of national associations that represent the interests of the hospitality industry, including hotel operators, in Europe. The Objector also represents the interests of hotel operators before European bodies and participates in the UNWTO, in addition to spearheading a variety of practical initiatives in Europe for the benefit of the Hotel Community.
- 8.21 That the Hotel Community is “strongly associated” with the gTLD “.HOTELS” cannot be gainsaid. 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.
- 8.22 I accordingly find that the Objector has standing to bring the Objection at issue here.
- 8.23 The Applicant resists this conclusion and contends that the Objector does not have standing because the Objection is *ultra vires*, as the Objector’s statutes do not permit it to make the Objection. Specifically, the Applicant notes that the Objector is a Belgian association and that its statutes do not provide that part of its purpose is objecting to applications. In light of this, the Applicant contends that Belgian law does not permit the Objector to file the Objection and that a legal action filed by the Objector would be inadmissible. Moreover, under Belgian law, the directors of the Objector could be held personally liable to the Objector itself or third parties for violating provisions related to the purpose of the association. Response ¶¶ 1.1-1.5; *see also* Additional Response at 1-3; legal opinion dated 23 May 2013 of Stefaan Cnudde, Response, Annex 2. I disagree.

- 8.24 The opinion of Mr. Cnudde, on which the Applicant relies, does not address the issue of the Objector's standing in these proceedings at all. It rather addresses (1) how a Belgian court would consider legal proceedings filed by the Objector and (2) the potential of the Objector's directors to be held liable for having the Objector act *ultra vires* – neither of which is at issue in these proceedings under the Procedure and the Rules. I accordingly consider these arguments inapposite with respect to the issue of whether or not the Objector has standing. This is reason enough to reject them. I also note, however, that Mr. Cnudde's opinion appears to be in tension with the Objector's statutes. *See* Objection, Appendix 7 (contemplating the possibility that the Objector may act as a plaintiff in legal proceedings); *see also* legal opinion dated 22 July 2013 of Philippe Simonart, Additional Submission, Annex 1.
- 8.25 The Applicant also contends that the Objector does not have standing because the Objector's community is not strongly associated with the applied-for gTLD. Response ¶¶ 2.1-2.5. Specifically, the Applicant submits that the Objector's community is what the Applicant calls the "Limited Hotel Operator Community", which it defines as consisting of hotel operators in 27 European countries. *Id.* ¶ 2.2. The Applicant contends that this Limited Hotel Operator Community is not "strongly associated" with the gTLD ".HOTELS", which the Applicant contends is instead strongly associated with something it calls the "Global Hotel Community", which it says the Objector does not represent. *Id.* ¶ 2.3; *see also* Additional Response at 3-4. I cannot follow the Applicant here.
- 8.26 The issue I need to consider in the context of standing is whether the Objector has "an ongoing relationship with a clearly delineated community" that is "strongly associated" with the new gTLD ".HOTELS". For the reasons noted above (¶¶ 8.20-8.21), I consider that the Objector has established that it does. In addition, it is not clear to me on what basis the Applicant considers it can redefine the community the Objector considers to be at issue. The Applicant's position appears to be based on the idea that the Objector cannot represent the interests of a community beyond its membership. The issue here, however, is not whether the Objector *represents* the community at issue, but whether it has an "ongoing relationship" with that community. And in all events, associations frequently have relationships with, and

represent the interests of, communities far larger than their membership. I accordingly do not see any basis for the Applicant's position.³

Merits

- 8.27 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.
- 8.28 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* ¶¶ 8.20-8.21. 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.
- 8.29 The Objector contends that the Hotel Community's opposition to the Application is “substantial”. In this regard, the Objector notes that a number of associations has expressed opposition to the Application, including the Objector,⁴ IH&RA, the German Hotel Association, and the Hotel Consumer Protection Coalition (“HCPC”), whose members operate tens of thousands of hotels in about 100 countries around the world. Objection § 4.2; comments dated 26 September 2012 of IH&RA, Objection, Appendix 24(A) (misabeled Appendix 26); comments dated 26 September 2012 of the German Hotel Association, Objection, Appendix 24(B); comments dated 11 August 2012 of HCPC,

³ I note that the Applicant brings this argument back in several variations when opposing the merits of the Objection. *See, e.g.*, Response ¶¶ 3.1-3.4, 4.1, 5.1, 9.1-9.6. For the reasons explained above, I do not find this line of argument persuasive in any of its iterations.

⁴ The Objector has also submitted letters from 24 of its members expressing individual support for the Objection. *See* Objection, Appendices 32(A)-32(X).

Objection, Appendix 24(C). Several large hotel groups have also individually published negative comments, including Accor, Hilton, InterContinental and Wyndham. Objection § 4.2; comments dated 25 September 2012 of Accor, Objection, Appendix 24(E); comments dated 26 September 2012 by Hilton Worldwide, Inc., Objection, Appendix 24(F); comments dated 11 August 2012 of InterContinental Hotels Group, Objection, Appendix 24(G); comments dated 10 August 2012 of Wyndham Worldwide Corporation, Objection, Appendix 24(H).

8.30 In addition, UNWTO, IH&RA and a variety of associations from different countries have submitted letters formally supporting the Objection. Objection § 4.2; letters dated 12 March 2013 from UNWTO, four Brazilian hospitality associations, French Hospitality in Europe, Fédération Nationale du Tourism of Morocco, and three Australian hospitality associations, Objection, Appendices 25, 28(B), 29(A), 29(C), 30(C), 30(D), 30(E); letters dated 11 March 2013 from the American Hotel & Lodging Association, the Austrian Hotel Association and HCPC, Objection, Appendices 27, 29(B), 31; letter dated 10 March 2013 from Hotel Association Nepal, Objection, Appendix 30(A); letter dated 4 March 2013 from IH&RA, Objection, Appendix 26.

8.31 In light of the above, the Objector contends that it has established that the Hotel Community's opposition to the Application is "substantial". For the reasons set forth below, I agree.

8.32 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 defense 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.

8.33 Through the Objector, the Application is opposed by associations representing the hospitality industry, including hotel operators, in 27 European countries. In addition, UNWTO, IH&RA and associations supporting hotel operators in Australia, Brazil, Morocco, Nepal, and the United States formally support the Objection. The Objection is

also formally supported by HCPC, whose members are among the largest hotel operators in the world. The stature and weight of the entities expressing opposition to the Application cannot be overstated. And together, these entities represent the interests of a broad range of Hotel Community members doing business around the globe in Africa, Asia, Europe, Latin America, the Middle East and North America. In light of this, I consider the Hotel Community's opposition to the Application to be "substantial".

- 8.34 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 ¶¶ 6.1-6.4. 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 (¶ 8.33) sufficient to establish the Hotel Community's "substantial" opposition to the Application.
- 8.35 The Applicant likewise contends that the Objector has failed to put on sufficient evidence of the historical defense of the Hotel Community in other contexts and the costs it has incurred in expressing opposition. *Id.* ¶¶ 7.1-8.2. 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. 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.* ¶ 5.2. This, however, I likewise have not relied on in reaching my decision.
- 8.36 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 intellectual property infringements, and the second with concerns flowing from the Applicant's intention to prevent members of the Hotel Community from registering domain names in ".HOTELS".

- 8.37 With respect to the Objector's first concern, the Objector considers that, if the gTLD ".HOTELS" is delegated to anyone, it would lead to an increase in cybersquatting and the "Hotel Community would have to face tremendous legal costs to remove the infringing domains", while the "advertising revenues from the infringing domain names would simply be stolen from legitimate advertisers causing substantial costs of redress." Objection § 6.3.5; *see also* U.S. Anti-Cybersquatting Consumer Protection Act, Objection, Appendix 48.
- 8.38 Turning to the Application in particular, the Objector contends that the Applicant intends to use ".HOTELS" to "register domain names infringing trademark rights to market its own services." Objection § 6.3.2. Specifically, the Objector contends that the Applicant intends to register descriptive, geographical and branded domain names that refer to the actual day-to-day business activities of the Applicant and its affiliates, subsidiaries and partners. *Id.* § 6.3.1. In doing so, the Objector contends that the Applicant intends to "ignor[e] the rights of third parties". *Id.* 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 § 6.3.2.
- 8.39 According to the Objector, this means that the "Applicant is attempting to justify free riding, unfair competition or brandjacking by playing the UDRP/URS procedure and diverting the system established to protect rights owners." Objection § 6.3.2. Moreover, "[w]ith the registration of branded domain names," the Objector foresees that the "Applicant will also control the communication and the image associated with the targeted hotels and may either dumb down a hotel's image with a standardized presentation or worse, completely ruin the marketing of hotel owners by not respecting their approach or image." *Id.* § 6.3.6. The Objector also foresees that the Applicant might operate domain names in a way that disrupts an alleged consensus the Hotel Community has reached with respect to mass communication online. *Id.* § 6.3.7.

8.40 With respect to the Objector's second concern, the Objector contends that the Application would harm the Hotel Community because the Applicant proposes to operate ".HOTELS" as what is known as a "single registrant TLD". *Id.* §§ 6.1.1-6.1.2. This is explained in section 18(c) of the Application, which 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). Single registrant TLDs are also sometimes referred to as "closed" gTLDs.

8.41 The Objector states that, if the Applicant were allowed to operate ".HOTELS" as a closed gTLD, hotels that are not affiliated with the Applicant would be unable to register domain names in ".HOTELS". According to the Objector, this means that the "Applicant, a single stakeholder would control and prevent others from registering domain names within a string representing their own economic sector, thus leading to a monopoly." Objection § 6.1.2. According to the Objector, such a monopoly would harm consumers and violate the competition laws in the United States and Europe. *Id.* §§ 6.1.2, 6.3.4; *see also* Sherman Antitrust Act, Objection, Appendix 42; Treaty on the Functioning of the European Union, articles 101-102, Objection, Appendix 43.

8.42 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. Objection § 6.1.3. The Objector further contends that the Hotel Community depends heavily on the domain name system (the "DNS"), as so many consumers now make their travel arrangements online. *Id.* § 6.2; The 2012 Traveler, Google, August 2012, Objection, Appendix 46; Internet Travel Hotel Booking Statistics (research date 23 September 2012), statisticbrain.com, Objection, Appendix 47; Roland Schegg & Michael Fux, The Power of Internet Distribution Systems, March 2012, Objection, Appendix 49. If

the Applicant operates “.HOTELS” as proposed, the Objector contends it “will be positioned to gain advantage in direct navigation and online search to the detriment of the Hotel Community” (Objection § 6.2), as “Internet users will be automatically redirected to a limited choice of hotels in accordance with the Applicant’s interests, and so may be deceived” (*id.* § 6.3.3). In this regard, the Objector states that, as “there is little doubt that Search Engine Optimization (SEO) mechanisms will favor meaningful TLDs, the operation by the Applicant of the TLD HOTELS would exclude *de facto* domains not in the TLD HOTELS namespace from the first results of search engines [. . .] with dramatic economic consequences for the Hotel Community members”. *Id.* § 6.4.

- 8.43 The Objector further contends that, even if the Applicant one day decided to operate “.HOTELS” as an open gTLD, it would not act “in the consumer interests” as a “neutral party”, but rather link registration of domain names in “.HOTELS” to the Applicant’s services. *Id.* § 6.3.8. In this regard, the Objector makes reference to part of the Application which states as follows:

The Applicant may make the .hotels top-level domain available to qualifying domain name registrants at an acceptable cost to them, to be determined if and when the Applicant would decide at its own discretion to allow third parties to register domain names, and – as the case may be – bundle such domain name registrations with additional added-value products and services generally offered by [the Applicant] in the course of its ordinary business activities, like operating the so-called “Bookit button”, which is a tool that can be integrated in websites, and whereby customers can make direct hotel reservations through [the Applicant’s] secure online transaction systems”.

Response, Annex 1 § 18(c); *see* Objection § 6.3.8. According to the Objector, such a “registration policy would increase user confusion and be detrimental to non-eligible members” because the Applicant considers “.HOTELS” a “marketing tool for maximizing its benefit”. Objection § 6.3.8.

- 8.44 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.
- 8.45 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.

8.46 With respect to the Objector's first concern about potential intellectual property infringements, a preliminary remark. To the extent the Objector has concerns that the creation of ".HOTELS" will increase cybersquatting no matter who has the gTLD, I consider this a concern that relates to ICANN's new gTLD program in general, rather than the Application in particular, and that the Community Objection is not the avenue to address such a concern. Turning to the concerns the Objector has raised with respect to the Application specifically, I can find no evidence in the record that suggests that the Applicant considers it can infringe the intellectual property rights of third parties or has any intention of doing so. 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.

8.47 Moreover, the quotation from the Application that the Objector sets forth to support its allegations (*supra* ¶ 8.38) 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).

8.48 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. In this regard, I note that the Objector itself has pointed out that, since it filed its Objection, Specification 11 of the draft New gTLD Registry Agreement has been revised. See Objector’s email dated 9 August 2013. 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. As the Objector has noted, these provisions cast considerable doubt on whether the Applicant would be able to operate “.HOTELS” as a closed gTLD, as it has proposed. *See* Objector’s email dated 9 August 2013. 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 the alleged detriment the Objector foresees.

- 8.49 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. Rather, the Objector’s submissions set forth a series of speculative allegations with no evidence to support a finding that any material detriment to the Hotel Community will likely come to pass. This is insufficient to meet the Objector’s burden of proof on this issue.
- 8.50 Specifically, the Objector contends that the Applicant’s operation of “.HOTELS” as a closed gTLD would harm consumers and be a monopoly in violation of US and European competition laws. But the Objector does not even explain, much less prove why this is the case. And its focus on harm to consumers misses the heart of the issue, which is whether the Application creates a likelihood of material detriment to a significant portion of the Hotel Community. The Objector similarly contends that the Applicant’s operation of “.HOTELS” as a closed gTLD will result in online consumers being redirected to a limited choice of hotels in line with the Applicant’s interests that will be favored by SEO mechanisms. Again, however, the Objector provides no evidence to support this alleged dystopian future. Finally, the Objector contends that, even if the Applicant operated “.HOTELS” as an open gTLD, it would do so in a way that was not in keeping with consumer interests, would increase user confusion and would be detrimental to those the Applicant nevertheless still decided to exclude. Again, this allegation is speculative and finds no evidentiary support in the text of the Application or otherwise. And it again places the focus on alleged potential harm to consumers, rather than likely detriment to the Hotel Community.
- 8.51 In closing, I note that the lack of evidence to support the Objector’s allegations of material detriment is striking, particularly in light of the gravity of its allegations and the volume of its submissions. The Objector submitted well over 100 exhibits in this case. Of these, it refers to only nine in its section on material detriment. And of these nine, most are not

documentary evidence. Rather, they are legal exhibits – the Sherman Antitrust Act, the Treaty on the Functioning of the European Union, the Latham Trademark Act, EU Directive 2008/95/EC, the Anti-Cybersquatting Consumer Protection Act. Objection, Appendices 42-45, 48. The only four pieces of documentary evidence on which the Objector relies to support its allegations with respect to material detriment are (1) the Application itself, (2) a study Google commissioned on the role travel plays in the lives of Americans, (3) internet travel hotel booking statistics on statisticbrain.com, and (4) the results of an online survey on hotel distribution in Germany, Austria and Switzerland. Response, Annex 1; Objection, Appendices 46, 47, 49. These materials are insufficient to substantiate the allegations the Objector makes.

8.52 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

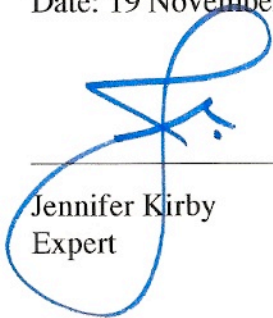
9.1 Pursuant to article 14(e) of the Procedure, upon the termination of the proceedings, after I have rendered my determination, the Centre shall refund to the prevailing party its advance payment of costs. *See also* Procedure, article 21(d).

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