

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

CASE No. EXP/458/ICANN/75

TD AMERITRADE

(USA)

vs/

IG GROUP HOLDINGS PLC

(UK)

This document is an original 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.

ICC Case Reference: EXP/458/ICANN/75

TD AMERITRADE (USA) / IG GROUP HOLDINGS PLC (UK)

EXPERT DETERMINATION

TABLE OF CONTENTS

LIST OF ABBREVIATIONS	2
I. PARTIES, REPRESENTATIVES AND EXPERTS	3
A. THE OBJECTOR	3
B. THE APPLICANT	3
C. THE OBJECTOR'S REPRESENTATIVE	3
D. THE APPLICANT'S REPRESENTATIVE	3
E. THE EXPERT PANEL	4
II. PROCEDURE	4
A. OBJECTION GROUND	4
B. CONSOLIDATION OF OBJECTIONS	5
C. DATES OF EXPERTS' APPOINTMENT	6
D. APPLICABLE RULES	6
E. LANGUAGE	6
F. PLACE	6
G. ELECTRONIC SUBMISSIONS ONLY	6
H. SUMMARY OF PROCEDURAL STEPS	6
I. TIME FRAME	8
III. FACTS	8
A. THE DISPUTE	8
B. GENERAL BACKGROUND	9
IV. SUMMARY OF PARTIES' POSITIONS	14
A. INTRODUCTION	14
B. AMERITRADE'S OBJECTION	14
C. IG GROUP'S RESPONSE	17
V. FINDINGS	18
A. STANDING	18
B. APPLICABLE TEST	18
C. OBJECTOR'S REQUEST TO STAY THE PROCEEDINGS	20
D. QUICK LOOK PROCEDURE	21
a) <i>Framework for the Quick Look Assessment</i>	21
b) <i>Quick Look Assessment by the Expert Panel</i>	22
E. SUBSTANTIVE ASSESSMENT	23
a) <i>The Objector's preliminary arguments</i>	23
b) <i>The .broker string would have an anti-consumer effect</i>	24
c) <i>Competition will suffer if .broker is allowed to proceed</i>	24
F. CONCLUSION	26
VI. COSTS	26
VII. DECISION	27

LIST OF ABBREVIATIONS

ASCII	- American Standard Code for Information Interchange
CEDAW	- Convention on the Elimination of All Forms of Discrimination Against Women
EC	- European Communities
EEC	- European Economic Community
EUR	- Euro
GAC	- Governmental Advisory Committee
GNSO	- Generics Name Supporting Organisation
gTLD	- Generic Top Level Domain
ICANN	- Internet Corporation for Assigned Names and Numbers
ICC	- International Chamber of Commerce
ICCPR	- International Covenant on Civil and Political Rights
IDN	- Internationalised Domain Names
LPIO	- Limited Public Interest Objection
NCUC	- Non-Commercial Users Constituency
NGPC	- New gTLD Program Committee
TLD	- Top Level Domain
TRIPS	- Trade-Related Aspects of Intellectual Property
UDHR	- Universal Declaration of Human Rights
WIPO	- World Intellectual Property Organisation
WTO	- World Trade Organisation

I. PARTIES, REPRESENTATIVES AND EXPERTS

A. THE OBJECTOR

1. The Objector in this proceeding (the ‘Objector’ or ‘Ameritrade’) is:

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B. THE APPLICANT

2. The Applicant in this proceeding (the ‘Applicant’ or ‘IG Group’) is:

IG GROUP HOLDINGS PLC
Ms. Sharon Harris
Cannon Bridge House
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Email: Sharon.harris@iggroup.com

C. THE OBJECTOR’S REPRESENTATIVE

3. The Objector’s representative in this proceeding is:

INFORMATION LAW GROUP
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Chicago, IL 60606
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D. THE APPLICANT’S REPRESENTATIVE

4. The Applicant is represented internally. Its contact person in this proceeding is:

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E. THE EXPERT PANEL

5. The members of the Expert Panel in this proceeding are the following persons:

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II. PROCEDURE

A. OBJECTION GROUND

6. The Objection in this proceeding (the 'Objection') is filed by the Objector against the application ID 1-1332-82635 for the string .broker (the

‘Application’), made by the Applicant. The Objection ground invoked by the Objector is a Limited Public Interest Objection (LPIO) under Section 3.2.1 of the gTLD Applicant Guidebook, Version 2012-06-04 (the ‘Guidebook’). As provided in Section 3.2.3 of the Guidebook, the Objection was filed with the International Centre of Expertise of the International Chamber of Commerce (the ‘Centre’) (Article 2 and 3 of the New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook).

B. CONSOLIDATION OF OBJECTIONS

7. In its Objection Ameritrade has requested for the sake of efficiency and consistency to consolidate the objections filed against IG Group’s Application with reference to Article 12 of the Attachment to Module 3 of New gTLD Dispute Resolution Procedure (the ‘Procedure’) of the Internet Corporation for Assigned Names and Numbers (ICANN), more particularly Ameritrade’s Objection and that of Charles Schwab & Co., Inc.
8. On 12 April 2013, the Centre informed the Parties that it was considering the eventual consolidation of the proceedings in the present matter with case reference EXP/458/ICANN/75 with the proceedings in case reference EXP/469/ICANN/86, initiated on the basis of a Limited Public Interest Objection against the same .broker string, filed with the Centre by Charles Schwab & Co., Inc., and invited the Parties to file their comments in relation to such eventual consolidation. No comments were made by the Parties on this issue.
9. On 22 April 2013, the Centre informed the Parties that it had decided to consolidate the proceedings in the present case with the proceedings in case reference EXP/469/ICANN/86, and the new reference number of the consolidated proceedings was case reference EXP/458/ICANN/75 (c. EXP/469/ICANN/86).
10. Following the non-payment by Charles Schwab & Co., Inc. of the amount of the Costs fixed by the Centre as due by this Party within the seven day deadline for payment fixed by the Centre in its letter to the Parties dated 16 July 2013, on 7 August 2013 the Centre decided to dismiss its Objection and to terminate the proceedings in case reference EXP/469/ICANN/86 on the grounds of Article 14(d)(i) of the Procedure. Following the termination of the proceeding in that case, the proceeding in the present case is no longer consolidated with other proceedings, and the reference number of this proceeding is case reference EXP/458/ICANN/75.

C. DATES OF EXPERTS' APPOINTMENT

11. By letter dated 28 June 2013, the Centre informed the Parties that pursuant to Article 13 of the Procedure, Article 9(5)(d) of the Rules, and Article 3(3) of Appendix I to the Rules, the Chairman of the Standing Committee of the Centre had appointed the members of the Expert Panel in this matter on 21 June 2013. Prof. Van Dam was appointed as the Chair of the Expert Panel and Prof. Kleinheisterkamp and Mr. Alexiev were appointed as co-experts of the Expert Panel.

D. APPLICABLE RULES

12. The Expert Panel has considered this case on the basis of the following rules: Rules for Expertise of the ICC ('Rules'), supplemented by the ICC Practice Note on the Administration of Cases ('ICC Practice Note'), under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ('Procedure') of the gTLD Applicant Guidebook ('Guidebook').

E. LANGUAGE

13. All submissions and proceedings were in English (Article 5(a) of the Procedure). No other language was used for supporting evidence.

F. PLACE

14. The place of the proceedings was Paris, France (Article 4(d) of the Procedure).

G. ELECTRONIC SUBMISSIONS ONLY

15. All communications by the parties, the Expert Panel and the Centre were submitted electronically (Article 6(a) of the Procedure).

H. SUMMARY OF PROCEDURAL STEPS

16. Ameritrade submitted its Objection to the Centre on 13 March 2013.
17. On 3 April 2013, IG Group submitted to the Centre certain comments on the Objection, and requested the Centre to review its administrative compliance.

18. On 4 April 2013, the Centre informed the Parties that it had conducted the administrative review of the Objection (Article 9 of the Procedure), and that the Objection was in compliance with Articles 5 – 8 of the Procedure and with the Rules. Accordingly, the Objection was registered for processing (Article 9(b) of the Procedure).
19. On 12 April 2013, ICANN published its Dispute Announcement pursuant to Article 10(a) of the Procedure in relation to the present proceeding.
20. On 22 April 2013, the Centre informed the Parties that it had decided to consolidate the proceedings in the present case with the proceedings in case reference EXP/469/ICANN/86, and invited IG Group to file its Responses in the two consolidated proceedings as separate Responses to each specific Objection within 30 days (Article 11(b) of the Procedure).
21. On 22 May 2013, IG Group filed its Responses in the two consolidated proceedings with the Centre.
22. On 20 June 2013, Ameritrade submitted to the Centre a supplemental submission. The Centre acknowledged the receipt of this supplemental submission on June 26, 2013 and informed the parties that once appointed the Expert Panel will contact them to discuss further proceedings and the additional submissions. Following the transfer of the file to the Expert Panel none of the Parties requested to file additional submissions.
23. On 28 June 2013, the Centre informed the Parties that the Responses filed by IG Group were in compliance with the Procedure and the Rules (Article 11 of the Procedure). By the same letter, the Centre informed the Parties of the appointment of the Expert Panel and estimated total Costs for this matter and invited the Parties to pay the advance of Costs within 10 days of the receipt of the letter in accordance with Article 14(b) of the Procedure.
24. On 2 July 2013, Ameritrade submitted a request to the Centre for the stay of the proceedings in the case pending further direction from ICANN on the issue of whether, or under what conditions, closed registries will be permitted for generic strings. Ameritrade referred to the current dialogue between the ICANN Board New gTLD Program Committee ('NGPC') and the ICANN's Governmental Advisory Committee ('GAC') on the issue of closed generic strings.
25. On 5 July 2013, Ameritrade repeated its request to the Centre to stay the proceedings.
26. On 5 July 2013, the Centre invited IG Group to comment on the request for stay of the proceedings, and informed the Parties that the deadlines for payment of the Costs were stayed until further notice.

27. On 8 July 2013, IG Group submitted a communication to the Centre, by which it objected to the request for stay of the proceedings.
28. With a letter dated 11 July 2013, Ameritrade requested the NGPC to instruct the Centre to stay the proceedings until the NGPC has completed its dialogue with the GAC on the issue of closed generic strings.
29. On 16 July 2013, the Centre informed the Parties that it was not in a position to stay the proceedings. With the same letter, the Centre confirmed the advance payments by Ameritrade and IG Group of the estimated Costs fixed by the Centre. The Centre also invited Charles Schwab & Co., Inc. to make the advance payment within a seven day time limit under Article 14(b) of the Procedure.
30. Charles Schwab & Co., Inc. did not make the advance payment within the seven day time limit fixed by the Centre under Article 14(b) of the Procedure. Following the non-payment by Charles Schwab & Co., Inc. of this amount, the Centre decided to dismiss the Objection and to terminate the proceedings in case reference EXP/469/ICANN/86.
31. On 7 August 2013, the Centre confirmed the full constitution of the Expert Panel and transferred the file to the Experts. No hearing was held.

I. TIME FRAME

32. The Expert Determination was submitted to the Centre for scrutiny within the 45 day time-limit in accordance with Article 21(a) and (b) of the Procedure. No extension had to be granted by the Centre.

III. FACTS

A. THE DISPUTE

33. On 13 June 2012, IG Group submitted the Application to register the string 'broker,' to operate as a restricted registry. In its Application, IG Group states that it is a world-leading broker in financial derivatives, with a market capital value of £1.7 billion as of October 2011 (Section 18(a)). IG Group seeks to operate the .broker gTLD as a restricted registry and plans to provide an authoritative Internet space where information, services and resources regarding online trading in financial derivatives via IG Group, as a broker, will be closely controlled by IG Group (Section 18(a)).

34. On 13 March 2013, Ameritrade filed an Objection against the Application by IG Group mentioned above to register the string 'broker'. The objection ground was Limited Public Interest Objection.

B. GENERAL BACKGROUND

35. In 2005, ICANN's policy development body, the Generics Name Supporting Organisation (GNSO)¹ started developing principles and recommendations on the introduction of New Generic Top Level Domain names (gTLD). In its Final Report in 2007, GNSO stated, among others, the following principle C:

*The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.*²

36. In its Recommendation #6, GNSO postulated:

Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.

*Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).*³

37. This recommendation was adopted against the dissent of one of ICANN's constituencies, the Non-Commercial Users Constituency (NCUC), who believed that the exclusion of strings by reference to 'morality and public order' would violate ICANN's mission as these terms were too vague and impossible to apply in a transnational setting owing to their domestic connotations; moreover they would allow experts deciding on objections to registration to prevent registration of strings, the refusal of which would

¹ Article X.1 ICANN Bylaws: <http://www.icann.org/en/about/governance/bylaws/bylaws-28feb06-en.htm#X>.

² Principle C; http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc43798015.

³ *Ibid*, Recommendation 6.

violate the USA constitutional prohibition of censoring and thus render ICANN's decision illegal and give rise to a significant risk of litigation.⁴

38. The first paragraph of the GNSO recommendation was adopted in October 2008 as one of the four objections accepted against applications for new gTLD registrations in ICANN's first draft *Guidebook*, but leaving the question of standing requirements open for further study.⁵ The other three recognized objections are: potential string confusion; violation of existing legal rights; and opposition from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.
39. In the 5th version of November 2010, ICANN Board New gTLD Program Committee (NGPC) proposed to change the 'morality and public order objection' to a 'Limited Public Interest Objection', subject to consultation of the community. It was decided not to limit the standing of objectors for this ground to filter out abusive or vexatious objections through a special 'quick look procedure'. This change was then permanently incorporated into the *Guidebook* and constitutes since then the LPIO ground on which also the objection in the present case is based:

***Limited Public Interest Objection** – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.⁶*

40. In the public consultations held by ICANN, some contributors had raised early on concerns about the New gTLD procedure potentially affecting consumer concerns and competition.⁷ These concerns, however, do not seem to have caused any change in the policy or the procedure concerning New gTLD until ICANN's Governmental Advisory Committee (GAC) in April 2013 raised these issues in the context of the debate on 'closed gTLD'

⁴ http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc48210873.

⁵ Point 3.1.1 and 3.1.2.3 <http://archive.icann.org/en/topics/new-gtlds/dispute-resolution-23oct08-en.pdf>

⁶ gTLD Applicant *Guidebook* Version 2012-06-04, Module 3, Point 3.2.1, see also Point 3.2.2.3 for the 'quick look' procedure and Point 3.5.3 for the explanations on the LPIO ground.

⁷ See, e.g., in ICANN's 'Analysis of Public Comment of the New gTLD Application *Guidebook* Version 2' (31 May 2009) p. 24; <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>.

***Competition concerns.** The gTLD seems like a step towards creating a monopolistic situation where the registrars will effectively eliminate any market opportunity for domain registrants. Opening the door to this type of exploitation by a few corporations seems like a step in the wrong direction. Pat (12 April 2009).*

***Consumer protection.** It is important that appropriate mechanisms are in place through all stages of the application process to ensure the protection of consumer interests. J.A. Andersen, Director General, Ministry of Science Technology and Innovation, National IT and Telecom Agency, Denmark (2 Mar. 2009).*

strings and provided its Safeguard Advice on New gTLD, in which it advised the ICANN Board, *inter alia*:

1. Restricted Access

As an exception to the general rule that the gTLD domain name space is operated in an open manner registration may be restricted, in particular for strings mentioned under category 1 above. In these cases, the registration restrictions should be appropriate for the types of risks associated with the TLD. The registry operator should administer access in these kinds of registries in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage.

2. Exclusive Access

For strings representing generic terms, exclusive registry access should serve a public interest goal. In the current round, the GAC has identified the following non-exhaustive list of strings that it considers to be generic terms, where the applicant is currently proposing to provide exclusive registry access[: among 60 other strings]... .broker...⁸

41. This GAC safeguard advice came in the aftermath of a number of GAC Early Warnings,⁹ which raised consumer and competition issues regarding the exclusive use of common generic strings that relate to a broader and partially also regulated market sectors.¹⁰ One of these Early Warnings was issued by the Australian Government regarding the Applicant's Application for the restrictive use of the string '.broker'.¹¹
42. In reaction to the GAC safeguard advice of 11 April 2013, the ICANN Board NGPC, after a public consultation,¹² adopted a resolution on 25 June 2013 to implement the GAC advice as follows:

Resolved (2013.06.25.NG04), the NGPC adopts the "Proposed PIC Spec Implementation of GAC Category 2 Safeguards" (20 June 2013), attached as Annex I to this Resolution, to accept and implement the GAC's Category 2

⁸ GAC Communiqué – Beijing 11 April 2013, <http://www.icann.org/en/news/correspondence/gac-to-board-11apr13-en.pdf>, Annex I – 'Category 2: Restricted Registration Policy'; see also VI.1.b.

⁹ See Guidebook 1.1.2.4 and 1.1.2.7.

¹⁰ Already on 17 October 2012, GAC had explained in its Toronto Communiqué: 'In the interest of sharing information with the Community, and in advance of individual GAC members issuing any early warnings on specific applications, the GAC notes that individual GAC members are considering a range of specific issues including: Consumer protection; Strings that are linked to regulated market sectors, such as the financial, health and charity sectors; Competition issues; ...'; https://gacweb.icann.org/download/attachments/27132070/FINAL_Toronto_Communique_20121017.pdf.

¹¹ <https://gacweb.icann.org/download/attachments/27131927/Broker-AU-82635.pdf>.

¹² <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>.

Safeguard Advice for applicants not seeking to impose exclusive registry access.

Resolved (2013.06.25.NG05), the NGPC directs staff to make appropriate changes to the final draft of the New gTLD Registry Agreement, as presented in Annex I attached to this Resolution, to implement the GAC's Category 2 Safeguard Advice for applicants not seeking to impose exclusive registry access.

Resolved (2013.06.25.NG06), the NGPC directs staff to defer moving forward with the contracting process for applicants seeking to impose exclusive registry access for "generic strings" to a single person or entity and/or that person's or entity's Affiliates (as defined in Section 2.9(c) of the Registry Agreement), pending a dialogue with the GAC.¹³

43. On the basis of these resolutions, the final draft of the New gTLD Registry Agreement now includes the following specification as set out in Annex I to the NGPC Resolutions of 25 June 2013:

***Specification 11 -
Public Interest Commitments (for Category 2 Safeguard Advice)***

1. 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.

2. 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" (as defined in Section 2.9(c) of the Registry Agreement). "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 of others.¹⁴

44. It is worth noting that since the submission of the final draft of this Expert Determination for scrutiny by the ICC Centre for Expertise, further developments have also taken place, which confirm the Panel's understanding and references to which shall be included in this Expert Determination for the sake of completeness.

¹³ Resolutions 2013.06.25.NG04 – 2013.06.25.NG06 (emphasis added);

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.c>.

¹⁴ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-i-agenda-2c-25jun13-en.pdf>.

45. On 28 September 2013, the NGPC, after considering the applicant responses¹⁵ to the GAC Beijing advice, adopted the following resolution:¹⁶

Resolved (2013.09.28.NG02), the NGPC adopts the "Remaining Items from Beijing and Durban GAC Advice: Updates and Actions" (28 September 2013), attached as Annex 1 [PDF, 94 KB] to this Resolution, in response to remaining items of GAC advice in the Beijing Communiqué and the Durban Communiqué as presented in the scorecard.

Point 10 of Annex 1¹⁷ to this resolution includes the following decision:

The NGPC further directs staff to prepare an analysis and proposal for how to implement the Category 2 Safeguard Advice for applicants who do intend to impose exclusive registry access for generic strings.

46. On 16 November 2013 the NGPC again discussed the open items from the GAC Beijing and Durban Communiqués, including the Category 2 Safeguard Advice, and the further actions to be taken by its staff in this regard:¹⁸

The Committee also received an update on the progress to date to address the Category 2 Safeguard Advice in the GAC's Beijing Communiqué. Staff noted that it would contact the applicants who confirmed their intent to operate as an exclusive access registry. Staff will ask those applicants to provide an explanation for how their exclusive access registry serves a public interest goal. The Committee recommended imposing a deadline for receiving responses from the applicants so that the Committee could provide the responses to the GAC for possible consideration before the Singapore meeting.

¹⁵ <http://newgtlds.icann.org/en/applicants/gac-advice/beijing46>

¹⁶ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-28sep13-en.htm>

¹⁷ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf>

¹⁸ See Section 2(a) of the Preliminary Report for this meeting, available at <http://www.icann.org/en/groups/board/documents/prelim-report-new-gtld-16nov13-en.htm>

IV. SUMMARY OF PARTIES' POSITIONS

A. INTRODUCTION

47. On 13 March 2013, Ameritrade filed a Limited Public Interest Objection against IG Group's Application, arguing that the applied-for gTLD string is contrary to general principles of international law of public order as reflected in the relevant international and domestic instruments of law and therefore falls within one of the categories identified in Section 3.5.3 of the Guidebook as a ground for a limited rights objection. It argues that allowing registration of the .broker gTLD string would be contrary to principles of international law because it would cause harm to consumer interest and to competition.

B. AMERITRADE'S OBJECTION

48. Ameritrade's Objection consists of preliminary remarks and two main concerns. In its preliminary remarks (pages 6-7 of the Objection), Ameritrade argues that 'broker' is a common, generic term that is also specifically defined by law and closely related to the highly regulated financial industry. It is defined in the USA in the Securities and Exchange Act, in the European Union in Directive 2006/73/EC of 10 August 2006, and in the United Kingdom the Financial Service Authority imposes additional regulations and requirements on brokers.

49. Ameritrade also points out that the significant opposition that has been expressed regarding applied-for generic domains in various industries reflects the contention surrounding closed generic gTLDs and that ICANN has specifically sought public comments on the issue. It also refers to the Early Warning issued on 20 November 2012 by the Governmental Advisory Committee through the Department of Broadband, Communications and the Digital Economy, on behalf of the Australian Government. The Early Warning held that the IG Group 'is proposing to exclude any other entities, including potential competitors, from using the [.broker] TLD,' which is 'a common generic term relating to a market sector.' The Australian government had communicated that restricting 'common generic strings for the exclusive use of a single entity could have unintended consequences, including a negative effect on competition.' In addition, public comments raising public interest concerns have also been filed in response to the .broker Application.

50. Ameritrade's main concerns are twofold. First, it argues that registration of .broker would have an anti-consumer effect (pages 7-8 of the Objection). Exclusive control of the .broker domain by a single broker entity in the

global financial industry would harm the public by having a negative effect on consumers and on competition. In this context, Ameritrade refers to what it calls significant opposition that has been expressed regarding applied-for generic domains in various industries which according to it reflects the contention surrounding closed generic gTLDs. Ameritrade also argues that IG Group's motivation for the Application is to restrict consumers' options in the brokerage services space and that it is to foster and further strengthen its reputation as a pioneer broker offering secure online trading in financial derivatives.

51. In this respect, Ameritrade also argues that the public interest is particularly at risk in the case of generic terms that are regulated by statute or other legal authority, such as by the USA and the European Union. It considers that various jurisdictions regulate and define the term 'broker', particularly in the financial industry, including who may use the term 'broker' and offer financial and investment services using the term. These laws do not place any limits on the number of brokers who may offer their services to the consuming public, let alone name IG Group as an exclusive broker.
52. Ameritrade furthermore argues that by confining the availability of information, services, and other resources under the .broker gTLD to the registry provided by IG Group, the consuming public loses the benefits to be gained from diverse perspectives. The concept of brokerage services is not exclusive to the Applicant, but the association of this concept through the use of the gTLD is likely to create the impression in the minds of the consumers that the IG Group's perspective, resources, materials, and features are synonymous with 'broker' and 'brokerage services', and would also suggest to the public that IG Group has some sort of unique, preferred, or even government-sponsored role with respect to brokerage services. It would also be misleading because the term 'broker' is defined and regulated by the USA government, the European Union, and other jurisdictions. According to Ameritrade it is a disservice to consumers to suggest that one service provider, among many, defines and controls a genus of specialized financial services contemplated by the government. The Objector considers the potential impact of a new gTLD string to be much greater than the risks that may arise in the context of individual domain names such as .com, because a new gTLD requires ICANN approval and substantial resources, both for the application and for the operation of the gTLD. Thus, the public interest concerns must weigh more heavily than they do for individual domain names.
53. Ameritrade's second argument is that competition will suffer if .broker is allowed to proceed (pages 8-9 of the Objection). It considers that an exclusive right on IG Group's part to operate a domain registry using this generic term would give it an unfair competitive advantage, because the

exclusive right to .broker would be tantamount to granting IG Group a monopoly over a term that belongs to the general public.

54. In this respect Ameritrade refers to international law and the laws of various jurisdictions resisting the granting of exclusive rights in generic terms. More particularly it refers to the Madrid Agreement and Protocol, Article 6*quinquies* Paris Convention, Article 3 Council Regulation (EEC) No. 2081/92, and USA case law. Allowing IG Group to control a gTLD comprised of 'broker' would be the equivalent of granting trademark protection when there should be none. Allowing such a term's exclusive use by any one entity – whether as a trademark or as a gTLD – would infringe upon an important collective and society-wide ownership. The gTLD would grant IG Group, a single business, the exclusive use of a generic word and render that exclusivity enforceable on the Internet while unenforceable anywhere else. It would also allow the IG Group to circumvent trademark law by arguing that the string has acquired secondary meaning warranting trademark protection and further harming competitors and consumers.
55. IG Group's operation of the .broker gTLD would effectively give it a monopoly over the generic term 'broker' in a specified online context, contrary to international law. Granting such a monopoly also prevents others in the same industry from accessing or using the domain. Accordingly, IG Group would be positioned to gain an unfair advantage in direct navigation, online search, and search optimization. Permitting use of the generic string with exclusive rights as a closed string in connection with the very products being provided would cause the individual consumer to suffer from loss of choice and from biased content delivery. Principles of international law do not permit such an anti-competitive operation. According to the Objector, the same objections apply if IG Group would operate .broker as an open registry: it could unilaterally impose the terms of access to and use of the domain, and it would be able to set unfair or abusive pricing terms for its competitors. Under widely-accepted international principles of competition and the international and domestic laws identified above (among others), IG Group should not be allowed to have essentially discretionary ability to control its competitors.
56. Finally, Ameritrade refers to ICANN's Core Value number 6, providing that ICANN is to foster the introduction and promotion of 'competition in the registration of domain names where practicable and beneficial in the public interest.' According to Ameritrade, restricting the use of generic terms, such as 'broker', for the gain of any one business at the cost of competition, and against the interests of consumers is harmful to the public interest.
57. Ameritrade concludes by requesting that the Expert Panel determines that IG Group's Application is contrary to general principles of international law for public order and, therefore, should be rejected entirely.

C. IG GROUP'S RESPONSE

58. IG Group first sets out its view on the historic development of the Limited Public Interest Objection, the test of which can now be found in Section 3.5.3 of the Guidebook. From this, the IG Group draws two conclusions.
59. First, the string itself is the target of the enquiry, not any consideration regarding the Applicant, its business plan or how it proposes to operate the string. The string itself may be objected to if it breaches the generally accepted norms against morality and public order. This ground was created to prevent strings that were inherently immoral, obscene or were incitements to breach public order. According to IG Group, nothing in the context of the Application turns the common commercial term 'broker' into a string likely to breach international norms of morality or public order.
60. Second, IG Group argues that a Limited Public Interest Objection must be based on specific principles of international law and relevant instruments. It concludes that the Objector fails to plead any generally understood norm of international law dealing with, or relevant to morality and public order. Where the Objector argues that allowing this string is in breach of trademark laws, the Applicant maintains that this is dealt with by a separate 'Legal Rights Objection', which has its own standing requirements, standards, forum and rules. According to IG Group the Objector has no standing to bring a Legal Rights Objection as it has no protectable rights in the term 'broker' which is inherently generic and unable to be protected under trademark laws. IG Group also argues that the Objector does not describe the international principle or points to relevant instruments of international law with respect to 'anti-competitive effects'.
61. IG Group also argues that ICANN's mission is not limited to providing more domain name registration opportunities at the second level but also to provide new and innovative opportunities which a new gTLD registry does. A .broker TLD will create additional services and opportunities for the purchasing public. Existing services are unaffected by the approval of the Application for .broker and it adds to consumer choice.
62. IG Group considers the ICANN debate over closed generics and GAC Early Warnings to be irrelevant in relation to the Objection. According to IG Group a closed generic registry has always been permissible under the Guidebook and the Early Warning is of no procedural effect, neither did it raise an issue relevant to a morality and public order objection.
63. IG Group also argues that the Objector is wrong in arguing that all brokers should have access to the .broker TLD by stating that not all brokers have

access to broker.com, .net, .org, or any other TLD. In exactly the same way the ICANN programme allowed a first-come first-served applicant the opportunity to choose a generic name that suited it. Brokers missing out have lost out in a competition, which, according to IG Group, is a very different result than .broker being ‘anti-competitive’.

64. The Applicant also refutes the Objectors argument that consumers will make wrong assumptions when seeing a .broker domain name as there is no standard assumption a consumer could make and the Applicant will educate the public as to what the new TLD means. Neither does the Applicant consider that the risks of confusion are different between broker.com and .broker.
65. IG Group also refutes that it will obtain trademark rights by its registration as a gTLD because the term broker has a generic character, particularly when being used in the context of broking services for which it is descriptive. It also states that Objector’s suggestion that a gTLD registration could confer a monopoly on ‘broker’ is fanciful.
66. The Applicant concludes that none of the issues raised by the Objector are relevant to such as objection, consisting of complaints on other grounds, with no evidence to support them, being merely the allegations of a competitor and that the Objection should be dismissed.

V. FINDINGS

A. STANDING

67. Section 3.2.2 of the Guidebook does not provide limitations as to who may file a Limited Public Interest Objection. On the contrary, Section 3.2.2.3 holds that ‘anyone’ may file a Limited Public Interest Objection. Therefore, the Expert Panel concludes that the Objector has standing.

B. APPLICABLE TEST

68. Section 3.5.3 of the Guidebook holds that an Expert Panel hearing a Limited Public Interest Objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order. The section provides a non-exhaustive list of instruments (international conventions, declarations and covenants) containing such general principles. It also holds that national laws not based on principles of international law are not a valid ground for a Limited Public Interest Objection.

69. The section notes that under the mentioned general principles, everyone has the right to freedom of expression, but that the exercise of this right carries with it special duties and responsibilities and that, accordingly, certain limited restrictions may apply.
70. Section 3.5.3 provides that the grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order are:
- *incitement to or promotion of violent lawless action;*
 - *incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;*
 - *incitement to or promotion of child pornography or other sexual abuse of children; or*
 - *a determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.*
71. Finally, Section 3.5.3 requires the Expert Panel to conduct its analysis on the basis of the applied-for gTLD string itself. If need be it may, however, use the intended purpose of the TLD as stated in the Application as additional context. For the purpose of its decision in this case, the Expert Panel interprets the latter as including the effects of the use of the applied-for gTLD string .broker. In its response (s. 21) the Applicant has taken a similar approach by arguing ‘that nothing in the context of the Application turns the commercial term “broker” into a string likely to breach international norms of morality or public order.’
72. The Expert Panel concludes from Section 3.5.3 that for a Limited Public Interest Objection to be accepted, it must show that the gTLD string is (a) contrary to general principles of international law for morality and public order, such as can be found in the list of international conventions, or (b) incitement to or promotion of specifically described unlawful conduct, or (c) contrary to specific principles of international law as reflected in relevant international instruments of law. The Expert Panel considers these categories not necessarily to be mutually exclusive in the sense that they may partially overlap.
73. The Expert Panel also considers that the Limited Public Interest Objection of Section 3.5.3 must also be understood in the light of the discussion on closed gTLDs and thus especially in function of the ICANN NGPC Decisions 2013.06.25.NG04-06, 2013.09.28.NG02, and its decisions taken on 16 November 2013, and the on-going dialogue between NGPC and GAC (above section 3.2). These decisions and the dialogue show that, within the overall procedure for new gTLD registrations, the issues relating to the non-

exclusive or exclusive use of generic strings (including consumer and competition issues) will be taken care of by ICANN in line with a publicly discussed and co-ordinated policy.

C. OBJECTOR'S REQUEST TO STAY THE PROCEEDINGS

74. On 3 July 2013, the Objector requested the Centre to stay the Objection proceedings. It referred to Resolution 2013.06.25.NG06 adopted by the ICANN Board New gTLD Program Committee ('NGPC'), directing ICANN staff to defer moving forward with the contracting process for applicants seeking exclusive registry access for generic strings, pending a dialogue with the Governmental Advisory Committee on this issue. Although the Resolution does not specifically state what effect it has on pending objection proceedings, the Objector assumes that the Resolution should have the same effect on gTLD dispute resolution service providers as it does on ICANN staff. The Objector believes that it is in the interest of judicial efficiency that objection proceedings be stayed pending further direction from ICANN.
75. On 8 July 2013, the Applicant responded by pointing out that the deliberation by ICANN of the GAC advice and concerns regarding closed generic strings are a matter of policy for ICANN and not a ground for raising a Limited Public Interest Objection. It argues that if ICANN were to change its policy and restrict the grounds upon which applicants can apply for closed generic strings, this would require amending the applications to be compliant. Any such change in ICANN policy would not support or defeat a Limited Public Interest Objection. If ICANN does not amend its policy, the Application would proceed without amendment. In either situation, the requirements for a Limited Public Interest Objection have not been met.
76. On 16 July 2013, the Centre in its capacity as Dispute Resolution Service Provider has informed the parties that ICANN has informed ICC that at this stage it has not yet taken a final decision in relation to the next steps of the applications for Exclusive Registry Access for Generic Strings. The Centre held that it cannot stay the proceedings pursuant to the Procedure or the Rules since the parties have not reached an agreement in this matter. The Centre invited the parties to discuss this question with the Expert Panel.
77. The Expert Panel has taken notice of the Objector's above-mentioned request to stay the proceedings, the Applicant's response and the Centre's decision. The Expert Panel in particular noted that the Objector argues that Resolution 2013.06.25.NG06, directing ICANN staff to defer moving forward with the contracting process pending a dialogue with the Governmental Advisory Committee (GAC) should have the same effect on gTLD dispute resolution service providers.

78. The Expert Panel considered that the Resolution and the dialogue may indeed impact closed generic string applications including the .broker Application. The relevant point for staying this procedure is, however, whether and if so how, the Resolution and the dialogue as well as the expected further direction from ICANN will specifically impact decisions of Expert Panels with respect to the Limited Public Interest Objection as set out in Section 3.5.3 of the Guidebook.

79. The Expert Panel does not see any reasons why this would be the case. As made clear by Resolutions 2013.06.25.NG05 and NG06, 2013.09.28.NG02, and the NGPC decisions taken on 16 November 2013, the question of how to address the issues relating to closed generic string applications are to be resolved by NGPC itself at the stage of deciding on the contracting and its modalities, not at the prior stage of resolving disputes resulting from objections by third parties. There is no indication that any policy decision resulting from the dialogue between NGPC and GAC would ultimately concern the Limited Public Interest Objection that is the basis for the present procedure. The Expert Panel therefore considered that there is no need for further discussion on whether to stay these proceedings, and shall accordingly proceed to render its Expert Determination in this matter.

D. QUICK LOOK PROCEDURE

a) *Framework for the Quick Look Assessment*

80. Section 3.2.2.3 of the Guidebook requires the Expert Panel to first conduct a Quick Look Procedure by assessing whether the Limited Public Interest Objection falls within one of the categories that have been defined in Section 3.5.3 (see above, paragraphs 68-73). If the Limited Public Interest Objection does not fall within one of these categories it would be manifestly unfounded. Even if the objection is framed to fall within one of these categories, other facts may clearly show that the objection is abusive and hence manifestly unfounded.

81. The Expert Panel notes that the scope of the Quick Look Procedure is to identify and eliminate frivolous and/or abusive objections. This scope is directly linked to the inclusive standing base, implying that anyone may file a Limited Public Interest Objection. For this reason Objectors are subject to a Quick Look Procedure.

82. The Expert Panel will therefore first establish (a) whether the Objection falls within one of the categories of Section 3.5.3. If the answer is in the affirmative, the Expert Panel will consider whether the Objection nonetheless constitutes (b) an abuse of the right to object or (c) can be deemed to be frivolous. When answering these questions the Expert Panel

will take into account the scope of the Quick Look Procedure as described above.

b) Quick Look Assessment by the Expert Panel

83. The Expert Panel observes that the Objector has framed its Objection in the wording of Section 3.5.3. It therefore invokes one of the applicable categories and the Expert Panel concludes that the Objection is not for this reason manifestly unfounded.
84. As to the question whether the Objection is nonetheless abusive, the Expert Panel first notes that the examples given in the Guidebook (multiple objections filed by the same or related parties against a single applicant or an objection that attacks the applicant, rather than the applied-for string) are clearly not at stake in this case. The Expert Panel also observes that the Objection is presented in a learned and consistent manner and that no part of it gives an indication that the Objector would be abusing its right to object or that the Objection has abusive character in any other sense. The Expert Panel concludes that the Objection does not constitute an abuse of the right to object.
85. The Applicant has argued that the Objection is frivolous and abusive and ‘an undisguised objection on trademark and unspecified competition law grounds’. In this respect, the Expert Panel once again observes that the Objection is presented in a consistent manner and presents a number of colourable legal arguments with reference to a variety of legal instruments. Moreover, the Objection raises concerns about the use of generic strings, which are part of a broader discussion. At the time of submitting its Objection, the Objector was not and could not be aware of the recent developments with respect to ICANN’s policies as set out above in paragraphs 35-46. The Expert Panel is of the opinion that the question whether the Objection is well-founded is not to be answered in the Quick Look Procedure but at the substantive stage (paragraphs 87-106 below). The Expert Panel concludes that the Objection is neither manifestly unfounded on this ground.
86. As to the Quick Look Procedure, the Expert Panel concludes that the Objection is not manifestly unfounded on any of the grounds provided by Section 3.2.2.3.

E. SUBSTANTIVE ASSESSMENT

87. The Objector has filed the Objection on the ground that allowing registration of the .broker gTLD string would be contrary to principles of international law because it would cause harm to consumer interest and to competition.

a) *The Objector's preliminary arguments*

88. The preliminary arguments of the Objector are found on pages 6-7 of the Objection and summarised in paragraphs 48 and 49 above. In essence, the argument put forward by the Objector is that the term broker is subject to national and supranational legislation. The Applicant (s. 32) argues that these regulations are not as extensive as the Objector alleges and that the Objection ignores the many uses of 'broker' that are unregulated, such as 'pawn broker', 'stamp broker', 'marriage broker' and 'power broker'.

89. Firstly, the Expert Panel observes that the Applicant is a broker in financial derivatives and intends to use the .broker string in precisely that capacity. Its argument that there are many uses of 'broker' that are unregulated is therefore not relevant.

90. The Expert Panel also observes that the Objector only refers to national and supranational legislation. As mentioned above (paragraph 68), Section 3.5.3 of the Guidebook states that national laws not based on principles of international law are not a valid ground for a Limited Public Interest Objection. The Expert Panel considers that the legal instruments to which the Objector refers are not based on principles of international law for morality and public order. Neither is the Objector's argument linked to any of the other grounds mentioned in Section 3.5.3. The Expert Panel concludes that this argument of the Objector must be rejected.

91. As to the Objector's argument regarding the discussion on gTLD applications for generic terms, the Expert Panel considers that the issues raised by the Objector refer to the broader context of the application procedures for gTLD strings and that this discussion has not yet been concluded. As the Expert Panel pointed out above (paragraphs 35-46), this discussion has progressed since the submission of the Objection, particularly by the adoption of ICANN NGPC Resolutions 2013.06.25.NG04-06, 2013.09.28.NG02, and the NGPC decisions taken on 16 November 2013, indicating that a solution for the issues of competition law and consumer protection is to be found at the final contracting stage and that this will happen through the open fair access clause for non-exclusive registrations, while the possibility and the requirements for exclusive registry access to generic strings will be subject of a further dialogue with the GAC, taking into account how the exclusive access registries serve a public interest goal.

The Expert Panel appreciates that the issues put forward by the Objector may still be relevant for that discussion but considers that the Panel's task is limited to assessing whether the gTLD string .broker is contrary to general or specific principles of international law for morality and public order. Against this background, the Expert Panel observes that no general or specific principle of international law for morality and public order or any of the other grounds mentioned in Section 3.5.3 assists the Objector's argument. The second argument put forward by the Objector therefore also needs to be rejected.

b) The .broker string would have an anti-consumer effect

92. The arguments of the Objector on this issue are found on pages 7-8 of the Objection and summarised in paragraphs 50-52 above. The gist of the Objector's argument here is that allowing the .broker string to be operated by the IG Group would harm consumer interests.

93. The Expert Panel considers that the Objector's arguments on this issue may be relevant in the broader context of the application procedures for gTLD strings but it also reiterates that the Expert Panel's task is limited to assessing whether the gTLD string .broker is contrary to general or specific principles of international law for morality and public order.

94. The Expert Panel notes that the Objector in very general terms refers to rules of national and supranational law and only in the context of the use of the word 'broker'. The Expert Panel fails to see how these laws are based on a general or specific principle of international law for morality and public order, as required by Section 3.5.3. Neither can the objection be couched in the terms of the other grounds mentioned in Section 3.5.3. Therefore, the Panel has decided to reject this argument.

c) Competition will suffer if .broker is allowed to proceed

95. The arguments of the Objector on this issue are found on pages 8-9 of the Objection and are summarised in paragraphs 53-56 above. The gist of the Objector's second argument is that allowing the .broker string to be operated by the Applicant would harm competition.

96. The Expert Panel considers that the Objector's arguments on this issue may also be relevant in the broader context of the application procedures for gTLD strings but it reiterates that the Expert Panel's task is limited to assessing whether the gTLD string .broker is contrary to general or specific principles of international law for morality and public order.

97. Before assessing this argument, the Expert Panel notes that the Applicant argues (s. 15) that competition laws do not apply. For this purpose, it quotes p. 10 of the Explanatory Memorandum published by ICANN in May 2009:¹⁹

The competition (antitrust) laws of certain countries operate to limit freedom of expression (e.g., the denigration of a third party's product or service). In light of the lack of uniformity in this area and taking into consideration the protection of third party rights available through legal rights objections, it does not appear necessary or desirable to include such a category in the standards applied to morality and public order objections.

98. Unlike the Applicant, the Expert Panel does not interpret this statement as generally excluding anti-competitive effects as a ground for the Limited Public Interest Objection. The statement refers to competition law rules limiting the freedom of expression and therefore only insofar these rules can be considered to be excluded from the Limited Public Interest Objection grounds. The Expert Panel concludes that an objection can still be based on other competition law concerns, provided these amount to the string being contrary to general or specific principles of international law for morality and public order.
99. According to the Objector, under the Madrid Agreement and Protocol, if a term is generic, this constitutes an absolute ground for refusing international registration of a trademark. The Objector also refers to Article 6*quinquies* of the Paris Convention (presumably the Objector means the Paris Convention for the Protection of Industrial Property), holding that trademarks may not be 'devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods.' Finally, the Objector refers to European Union and USA regulations holding similar provisions.
100. In this respect, the Applicant argues (s. 25) that breach of trademark laws is dealt with by a separate Legal Rights Objection, which has its own standing requirements, standards, forum and rules but it also rightly argues that the Objector would have no standing to bring such an Objection. The Expert Panel understands, however, that the aim of the Objector's Limited Public Interest Objection is not to invoke the protection trademark rights but to raise issues of a broader character.
101. The Applicant also argues (s. 19), that the WIPO (trademark) treaties were excluded from the final version. The Expert Panel notes that the list of treaties in the final version of Section 3.5.3 indeed does not mention any of

¹⁹ <http://archive.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf> (last accessed on 30 August 2013).

the WIPO administered intellectual property treaties or the TRIPS Agreement. However, the Panel also considers that neither Section 3.5.3 nor any other part of the Guidebook excludes those treaties from being applied. On the contrary, Section 3.5.3 explicitly notes that the treaties are included to serve as examples, rather than an exhaustive list. On this basis, the Expert Panel concludes that such treaties could still carry an objection that the string is contrary to general or specific principles of international law for morality and public order.

102. The Expert Panel understands that the Objector's broader argument is that where a generic term like 'broker' would not qualify for international registration as a trademark because it would be an impediment to competition this would also go for generic terms for gTLD strings such as .broker. Therefore, the gist of the Objector's argument is not about trademarks but about impediment to competition.
103. In this respect, the Expert Panel notes that throughout the legal systems, competition law issues are considered and valued in various ways. Insofar as the Objector invokes certain trademark protection treaties and laws, the Expert Panel considers that these instruments may be based on competition law considerations but that their provisions as such do not provide evidence of an underlying principle of international law for morality and public order.
104. The Expert Panel concludes that this argument of the Objection is ultimately not sustained by any general or specific principle of international law for morality and public order, as required by Section 3.5.3. The argument put forward by the Objector is therefore rejected.

F. CONCLUSION

105. The Expert Panel concludes that the Limited Public Interest Objection submitted by Ameritrade against the .broker gTLD string is unfounded and that it should therefore be rejected.

VI. COSTS

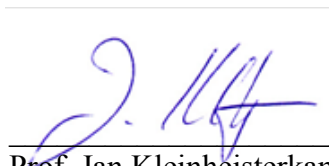
106. The Expert Panel decides that IG Group, as the prevailing Party in this procedure, is entitled to the refund by the ICC of its advance payment of costs paid pursuant to Article 14(e) of the Procedure.

VII. DECISION

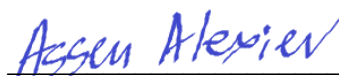
107. The Expert Panel unanimously decides that the Limited Public Interest Objection brought by the Objector TD AMERITRADE against the Applicant IG GROUP HOLDINGS PLC's Application for the gTLD string '.broker' is rejected and that the Applicant prevails in this dispute.
108. The advance payment of Costs made by the Applicant shall be refunded by the Centre in accordance with Article 14(e) of the Procedure.

Date: 11 December 2013

Signatures:



Prof. Jan Kleinheisterkamp,
Co-expert of the Expert Panel



Mr. Assen Alexiev,
Co-expert of the Expert Panel



Prof. Cees van Dam,
Chair of the Expert Panel