

**REFERENCE MATERIALS TO NEW gTLD PROGRAM COMMITTEE  
SUBMISSION 2014.06.06.2a**

**TITLE:** **Reconsideration Requests Regarding .WINE and .VIN**

**Summary Background**

While the full background can be found in the documentation attached to this Reference Materials, Reconsideration Requests 14-13, 14-14, 14-15, 14-16, 14-17, 14-18, 14-19, 14-20, 14-21, 14-22, 14-24, 14-25, and 14-26 (the “Requests”), filed by nine entities, which include representatives of the European Commission, the United Kingdom Government, the French Government, the Spanish Government, various GI Organizations,<sup>1</sup> the Italian Government, the Portuguese Government, the Luxembourg Government, and the Swiss Government,<sup>2</sup> (collectively the “Requesters”), ask the Board (or here the NGPC) to reconsider of one or more of the NGPC Resolutions 2014.03.22.NG01, 2014.04.04.NG01, 2014.04.04.NG02, 2014.04.04.NG03, and 2014.04.04.NG04 (collectively the “Resolutions”), which relate to the applications for .WINE and .VIN.

The BGC considered the Requests at its 14 May 2014 meeting and concluded that that the Requesters have not stated proper grounds for reconsideration. As detailed in the Recommendation and the documents attached to this Reference Materials, the BGC concluded there is no indication that the Board’s actions in adopting the Resolutions

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<sup>1</sup> The National Appellation of Origin Wines and Brandy Producers (“CNAOC”), the Comité Interprofessionnel du Vin de Champagne (“CIVC”), the European Federation of Origin Wines (“EFOW”), the Bureau National Interprofessionnel du Cognac (“BNIC”), and the Conseil Interprofessionnel du Vin de Bordeaux (“CIVB”) shall be collectively referred to herein as the “GI Organizations.”

<sup>2</sup> The Requesters separately filed the following thirteen Reconsideration Requests: European Commission (Request 14-13), United Kingdom Government (Request 14-14), French Government (Requests 14-15 and 14-25), Spanish Government (Requests 14-16 and 14-17), GI Organizations (Requests 14-18 and 14-24), Italian Government (Requests 14-19 and 14-26), Portuguese Government (Request 14-20), Luxembourg Government (Request 14-21), and Swiss Government (Request 14-22). The BGC may consolidate the consideration of reconsideration requests “if the issues stated within are sufficiently similar.” (Reconsideration Request Form, Terms and Conditions; Bylaws, Art. IV, § 2.8.) Because the Requests involve the same general Board action or inaction and raise sufficiently similar issues, the Requests will be addressed in the same proceeding.

support reconsideration. The BGC recommended to the NGPC that the Requests be denied without further consideration

### **Document/Background Links**

The following attachments are relevant to the BGC's recommendation regarding the Requests.

Attachment A are the thirteen Reconsideration Requests combined.

Attachment B is the [Attachments to Request 14-16](#), submitted on 8 April 2014.

Attachment C is the [Attachments to Request 14-17](#), submitted on 8 April 2014.

Attachment D is the [Attachments to Request 14-18](#), submitted on 8 April 2014.

Attachment E is the [Attachments to Request 14-24](#), submitted on 18 April 2014.

Attachment F is the [BGC's Recommendation on Reconsideration Requests 14-13, 14-14, 14-15, 14-16, 14-17, 14-18, 14-19, 14-20, 14-21, 14-22, 14-24, 14-25, and 14-26](#), issued on 14 May 2014.

Submitted by:	Amy A. Stathos
Position:	Deputy General Counsel
Date Noted:	28 May 2014
Email:	amy.stathos@icann.org

# Attachment A

# **REQUEST 14-13**

## Reconsideration Request Form

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### 1. Requester Information

**Name:** Robert Madelin (Director General European Commission, DG CONNECT)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

### 2. Request for Reconsideration of (check one only)

Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered

This request is submitted against **Resolution 2014.03.22.NG01** since the NGPC did not consider it to be superseded by Resolutions 2014.04.04 NG01-2014.04.04 NG04. The undersigned considers that once Resolution 2014.03.22.NG01 is duly reconsidered, Resolutions 2014.04.04 NG01-2014.04.04 NG04 should be declared null and void, since they depart from the mistaken conclusions drawn in Resolution 2014.03.22.NG01.

The undersigned seeks that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, due to the Resolution conclusion that that "*the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such conclusion was drawn given the following Rationale 2014.03.22.NG01: "*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*". The effect of the NGPC's action concerning the Governmental Advisory Committee advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs, and renders useless any on-going negotiations among the parties

It should be noted that the aforementioned the GAC Register of Advice identified as 2013-09-09-wine and vin, which constitutes the basis for this Resolution, **is the result of a breach of GAC Operating Procedure number 47 (OP47)**. The GAC Consensus given in Beijing (not to delegate the strings pending negotiations between the parties) was **overruled inappropriately when the GAC Chair advised the Board to proceed**

**with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached, as clearly indicated in OP47.** Accordingly, the statement that "*The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*" is not a consensus view of the GAC as per the aforementioned Operating Principle, it does not convey the full range of views in the GAC, and does only represent a mere interpretation and opinion of the GAC Chair. As such, due to the procedural mistake, it should not be taken by the NGPC or the ICANN Board as a basis for any of its Resolutions.

In addition, reconsideration is requested on the grounds that the cited Resolution is not based on the relevant materials and communications addressed by European Commission and other stakeholders to the ICANN Board via ICANN's correspondence site, and on the grounds that, to the contrary, the Resolution is based on a piece of **flawed legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN**, provided by a selected expert to the ICANN's Board NGPC.

As per the legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the breach of **three** sections of the **Bylaws**.

a) **Bylaws Article XI-A, Section 1 subsection 3 which states:**

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice**". (emphasis added).

In this regard, the GAC can request "**at any time**" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, **will consult with the GAC regarding the appropriate source** from which to seek such advice including "**definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

b) **Bylaws Article XI-A, Section 1 subsection 6 which states:**

"6. *Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board*". (emphasis added)

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN is still trying to define appropriate safeguards for the protection of the public policy interest in the new gTLD Program. Despite the argument that the new gTLD policy development finalized in 2007, several policy changes had still taken place since 2007. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" received prior to "any" decision by the Board.

**c) By-law XI.A Section 5 which states:**

That the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its responsibilities", without specific reference to implementation or policy-development process.

In any event, and despite the fact that the case in hand is **clearly a matter of public policy relevance**, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least **the Board failed to clarify on which basis it was seeking such advice, and would need to include on its next Rationale due explanations as regards the reasons why**

- a) the protection of new gTLDs is not a matter of public policy;**
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and**
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.**

Unfortunately, to date none of the .WINE and .VIN applicants have unequivocally included in their applications appropriate safeguards for the protection of Geographical Indications (GI's). Therefore, if according to the Resolution 2014.03.22.NG01, these applications were to proceed through the normal evaluation process, **then there would be significant concern that the safeguards which are necessary for a sound and acceptable functioning of the TLDs would not be guaranteed.**

The text of the Resolution reads as follows:

*"Main Agenda:*

*a. Outstanding GAC Advice*

*Whereas, on 11 September 2013, the Governmental Advisory Committee (GAC) issued advice to the ICANN Board that it had finalized its consideration of the strings .WINE and .VIN.*

*Whereas, the GAC advised the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, in the Buenos Aires Communiqué, the GAC noted that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on*

*its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

*Whereas, the NGPC commissioned an [analysis \[PDF, 772 KB\]](#) of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN, which the NGPC considered as part of its deliberations on the GAC's advice.*

*Whereas, the Bylaws (Article XI, Section 2.1) require the ICANN Board to address advice put to the Board by the GAC.*

*Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012 to exercise the ICANN Board's authority for any and all issues that may arise relating to the new gTLD Program.*

*Resolved (2014.03.22.NG01), the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Rationale for Resolution 2014.03.22.NG01*

*The NGPC's action today, addressing the open item of GAC advice concerning .WINE and .VIN, is part of the ICANN Board's role to address advice put to the Board by the Governmental Advisory Committee (GAC). Article XI, Section 2.1 of the ICANN Bylaws <http://www.icann.org/en/about/governance/bylaws#XI> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning .WINE and .VIN. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.*

*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC "has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process." The effect of the NGPC's action concerning the GAC advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs.*

*As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant responses are provided at: <http://newgtlds.icann.org/en/applicants/gac-advice/>. The NGPC has considered the applicant responses in formulating its response to the item of GAC advice being addressed today.*

*Additionally, on 28 September 2013, the NGPC noted that it stood ready to hear from GAC members as to the nature of the differences in views expressed in the advice while*



*the NGPC analyzed the GAC's advice. Several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed, with some individual governments expressing concerns that additional safeguards should be imposed before the strings are delegated, while others recommended that no additional safeguards should be imposed on the strings.*

*In response to the GAC's suggestion in the Buenos Aires Communiqué, the NGPC commissioned an analysis of the legally complex and politically sensitive background on this matter in the context of the GAC advice in order to consider the appropriate next steps of delegating .WINE and .VIN. The expert analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions.*

*As part of its deliberations, the NGPC reviewed the following materials and documents:*

*GAC Beijing Communiqué:*

*[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130718.pdf?version=1&modificationDate=1375787122000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB]*

*GAC Durban Communiqué:*

*[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 104 KB]*

*GAC Buenos Aires Communiqué:*

*[https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB]*

*Letter from H. Dryden to S. Crocker dated 11 September 2013 re: .vin and .wine:*

*[https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board\\_20130909.pdf?version=1&modificationDate=1379026679000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board_20130909.pdf?version=1&modificationDate=1379026679000&api=v2) [PDF, 63 KB]*

*Applicant responses to GAC advice:*

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

*Applicant Guidebook, Module 3:*

*<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]*

*There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. As part of ICANN's organizational administrative function, ICANN posted the Buenos Aires GAC advice and officially notified applicants of the advice on 11 December 2013. The Durban Communiqué and the Beijing Communiqué were posted on 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1".*

#### **4. Date of action/inaction**

The ICANN Board New gTLD Program Committee (NGPC) Resolved on 22.03.2014. Even though the URL <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22.03.2014 has the date for Resolution 22.03.2014 it was only published on **25.03.2014**. The latter date was shown for some days on that very URL as the date of publication of the resolution and its rationale, **but it has now changed**.

#### **5. On what date did you become aware of the action or that action would not be taken?**

The undersigned and the European Commission representatives to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communique drafting session. It should be highlighted that Governmental Advisory Committee was not informed of the existence of this Resolution during the specific session between the GAC and the NGPC that took place on 25.03.2014 (**the date of online publication of the Resolution challenged**).

#### **6. Describe how you believe you are materially affected by the action or inaction:**

A considerable number of GAC Members including the European Commission, representing the interest of the European Union as a whole, have serious concerns with the Resolution 2014.03.22.NG01 as well as its Rationale and the process that has been followed to arrive at this Resolution.

Despite having a GAC liaison member on the NGPC, the GAC was not aware until 26 March of this decision or its mistaken rationale. Had it been the case, the GAC could have corrected any misunderstandings and thus pre-empted the NGPC's resolution.

It is also worth noting that the NGPC resolved on the grounds of false information as it is our understanding, as reported by ICANN's CEO, that members of the NGPC were informed that the negotiations between applicants and wine rightholders had come to a satisfactory ending, which was not the case.

The Resolution, its Rationale and the procedural breaches connected to such Resolution and Rationale materially affect the Requestors for the following reasons:

##### 1) Grounds for the Resolution

###### (a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

However, such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 09.09.2013 without it being circulated to GAC members.

Principle 47 of the GAC Operating Principles provides that "*[t]he GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.*"

Principle 47 of the GAC Operating Principles refers to the concept of "consensus" as per the practice of the United Nations. In this respect, consensus is understood as follows: "*the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions "without a vote", "by consensus" and "by general agreement" are, in the practice of the United Nations, synonymous and therefore interchangeable.*"

The statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC.

Given the lack of consensus and the fact that the letter of 09.09.2013 did not convey the full range of views expressed by the GAC members, the Requesters conclude that such letter was sent to the ICANN Board in breach of the GAC Operating Principles and can't therefore be taken as a basis for any Resolution.

Practically speaking, the fact that the GAC has actually not reached any consensus in this matter cannot have the effect of having the strings proceed through the normal evaluation process without further consideration. To the contrary, the lack of consensus means that this matter requires further consideration.

(b) an apparent lack of liaison

(i) in relation to the alleged consensus

The GAC Chair, as a non-voting liaison member of the NGPC, should surely have brought the lack of consensus and background to the attention of the NGPC more fully, or the NGPC should have enquired about this knowing the seriousness of the issue for a number of governments, and surely provided background to the letter of 11 September 2013 with the claim therein that the GAC has advised the ICANN Board that there was no GAC consensus advice on additional safeguards for the .WINE and .VIN TLDs, and the GAC "*has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*". Indeed such claim is disingenuous at best as it was clear, and is still clear, if the subsequent

correspondence from the European Commission, available at <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en> and <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>, is considered, that there was no consensus within the GAC that additional safeguards were not necessary, nor was there consensus to proceed through the normal evaluation process. (ii) in relation to the status of the negotiations between the interested parties.

Some NGPC members have stated that they were under the impression that the negotiations with the applicants were concluded or almost concluded when this was not the case when the Resolution was passed. Such statement is based upon misinformation and, as such, in itself undermines the ongoing negotiations in that there is then no incentive for the applicants to finalise the negotiations or resolve the outstanding points.

In that regard, it should be noted that the subsequent Resolution issued by the NGPC on 04.04.2014 does grant additional time, namely 60 days, for the interested parties to negotiate. However, this Resolution provides that, "*[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting*". This seems to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, once again, the applicants would be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once such deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to one of its applicants. Such context is far from being favourable to negotiations in good faith and to the pursuit of a balanced agreement.

(c) Jérôme Passa's legal opinion

The resolution challenged is also based on an opinion issued to the ICANN Board NGPC by a University Professor, Jérôme Passa, a piece of **flawed and misinterpreted legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN.**

As per such legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the **breach of at least three sections of the Bylaws.**

i) Bylaws Article XI-A, Section 1 subsection 3 which states:

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee**

regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice". (emphasis added).

In this regard, the GAC can request "at any time" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, "shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

ii) Bylaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board".* (emphasis added)

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN and the GAC is still trying to define appropriate safeguards for the protection of the public policy interest in wine-related new gTLDs. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" receive prior to any decision by the Board.

iii) Also By-law XI.A Section 5 clearly says that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its responsibilities", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its Rationale due explanations of the reasons why**

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

2) Failure to consider relevant comments and communications

The Resolution fails to refer to and to take into consideration comments and documentation provided by the relevant stakeholders to the ICANN Board, such as follow up letters sent by the European Commission to the ICANN Board and the NGPC

and letters sent by worldwide wine-related stakeholders. **This constitutes an additional breach of the ICANN Bylaws which promotes the notions of fairness, transparency and openness.**

3) Lack of information from the GAC Chair

The GAC Chair is a non-voting liaison on the NGPC. In this respect, Article VI, Section 9 of the ICANN Bylaws provides that "*non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization*".

The GAC Chair therefore had a duty to inform the GAC of the Resolution but the GAC Chair failed to do so. In addition, the GAC Chair should inform the GAC of its presence or absence at the meetings in which the NGPC considers, among its agenda points, issues pertaining to the public policy interests and pertaining to the work of the GAC.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The protection of GIs serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Consumers procuring wine on line via Internet could indeed be deceived into believing that they are buying a genuine EU product with specific qualities and characteristics of a product with geographic indication, when they are in fact they are buying an imitation. Further the rights of holders of geographic indication would be impaired. Therefore, the adverse impact of the Resolution could be considerable.

If the applications for .WINE and .VIN proceed through the normal evaluation process, as per the Resolution's conclusion, the direct consequence would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there is an important number of small wine producers which play a crucial role for the sustainability of their communities and regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the Requesters fear that the potential for abuse would considerably increase in online spaces where no specific protection would be granted to GIs. If wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse

and fraudulent activities. The global scope of the .WINE and .VIN TLDs and a lack of clear rules and safeguards can indeed only amplify these problems including as follows:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited products may be facilitated;
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs and this is certainly not the result expected by the applicants to these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Europe and also across the globe but also is an incredible missed opportunity to create a secure and safe space in the DNS which is supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The Requesters therefore call for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

## **8. Detail of Board or Staff Action – Required Information**

**This request relates to a Board Action, namely the adoption of a Resolution which is due to: a) material information not considered by the Board and b) based upon inaccurate, false or misleading materials (and information) presented to the Board and which formed the basis for the Resolution to be reconsidered.**

1) The Board has not considered certain material information. Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union (currently posted under ICANN's correspondence and which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al->

19mar14-en

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>

Such correspondence would, or at least should, have had an important impact on any Resolution issues, with respect to the delegation of the .WINE and .VIN extensions.

2) The ICANN Board NGPC has also based its Resolution upon inaccurate, false and misleading materials (and information), and which formed the basis for the Board action being challenged.

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013. However:

(i) such letter was sent to the ICANN Board without being circulated to GAC members first.

(ii) as explained in section 6. above, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the*



*applications for .WINE and .VIN should proceed through the normal evaluation process"* is not a consensus view of the GAC.

This letter, which is one of the grounds of the Resolution, is therefore clearly misleading.

(b) the failure to give the GAC an opportunity to comment on the materials used by the NGPC and the failure to clarify with the GAC the appropriate source from which the advice should be sought including the definition of the scope and process.

In first place, it should be clarified that the matter in hand it is a matter of public policy and not merely a matter of implementation. Additionally, the undersigned understands that the By-laws remain the main source of procedural rules for ICANN, and that in any case they prevail over the By-laws as it will be shown below.

- Bylaws Article XI-A, Section 1 subsection 3 states that the GAC can request "**at any time**" to board to seek advice in matters of public policy, and that the Board "**shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.
- Bylaws Article XI-A, Section 1 subsection 6 states that the GAC has the opportunity to comment upon "**any external advice**" received by the Board and prior to "**any decision**". In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation" matters, while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, the GAC (and subsequently ICANN) is still trying to define appropriate safeguards for the protection of the public policy interest.
- By-law XI.A Section 5 clearly indicates that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its **responsibilities**", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its rationale due explanations to clarify why:**

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

(c) the content of the legal opinion issued by Mr Passa

Concerning the legal opinion provided by Mr Passa, the undersigned would like to remind of the content of the European Commission's comments concerning both the procedural aspects relating to such opinion and its content (available at <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>). In particular the European Commission questions the transparency of such legal opinion given that the process of appointing Mr Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr Passa's external expert legal advice is sufficiently thought through and pertinent and whether Mr Passa has considered the politically sensitive background of this matter when issuing his advice. For example, the undersigned notes that Mr Passa only refers to the application filed by one of the applicants, namely the Donuts company. It is therefore suggested that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is however worthwhile noting that Mr Passa clearly states in his opinion that, if ICANN *"had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD."*

This would certainly appear to be a key point in the advice provided by Mr Passa, and this point is completely ignored by the NGPC not being mentioned at all in the Rationale for the Resolution. The Rationale seeks to justify the Resolution by quoting from another part of the expert expert analysis saying that there is no rule of law or general principle which obliges ICANN to reject the applications. The Requesters agree with this point but respectfully submits that this is not the point to consider. The point is, exactly as Mr Passa states, that if the registry for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr Passa is of the opinion that ICANN should reject the application.

**In terms of the form of the legal report provided to the NGPC and the conditions surrounding its authorship and its submission:**

The undersigned seeks clarification of the following issues:

- Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary

documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

- Taking into account that the Buenos Aires GAC Communique requested the Board to "*seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings*" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?
- Taking into account that the expert report is not dated, can the NGPC confirm the date in which the report was drafted? Can the NGPC confirm that the report seems to have been delivered on 22.03.2014 as indicated in ICANN's website <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en> and that as such, the NGPC resolved on the matter on the very same day that the report was delivered being that the reason why the NGPC did not consult the GAC?

Pending clarification of the aforementioned matters through a response of the current reconsideration, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

**In terms of substance of the legal report provided to the NGPC**, the undersigned would like to make reference to the letter sent by the European Commission to the ICANN Board on 02.04.2014 (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), and seek clarification of why the content indicated in the following sections has not been taken into account in any NGPC Resolution, notably for what concerns the obligation for the Registry/Registrar of the .WINE and .VIN gTLDs to implement protective measures:

- In point 1, § 6, the author indicates that "*It then becomes the registrar of these third-party domain names, and as such, draws up its own naming conventions, laying down the conditions under which third parties can reserve these domain names*". This confirms our views that ICANN is not the best placed party to adjudicate on the matter and that the implementation of safeguards should be left to the concerned parties (applicants and rightholders)
- In Point 10, § 1 the author indicates that "*ICANN had serious reasons for believing that the registry of the new gTLD ".wine" or ".vin" would assign domain names to third parties without taking account the protection of wine-related geographic indications, i.e.: without taking precautions designed to prevent infringements of these geographical indications in its relations with its*

*contracting parties, that it would then be able to reject the application for the new gTLD" and "based on a simple precautionary measure designed to prevent what are deemed to be sufficiently serious risks of an infringement of the geographical indication" as set forth in Point 10, § 2, . The application of this precautionary measure appears hence justified due to the lack of commitment of the applicants to the on-going negotiations.*

- In point 2, § 1, the author rightfully acknowledges yet that "*reservation of a new gTLD may infringe prior third-party rights or, more generally, interests*".
- The author notes in Point 5, iii) that "*a party reserving a domain name does not necessarily have the right to use the geographical indication in question for wines of for products or another type which it sells on the website identified under the domain name in question*", therefore recognizing the existence of a high risk of third-party rights misuse and misappropriation.
- It is also worth noting that the author, in Point 9, § 2 explicitly mentions that "*If, however, he [understood as the "registrant"] also sells, on his website, products which do not benefit from this geographical indication, it is likely that such sales may constitute an infringement of the geographical indication*". The matter, indeed, as indicated in Point 9, § 2, would require a case by case analysis by reference to a given geographical indication "*which would allow to identify the international, regional –notably European- or national rules governing it and which are therefore applicable*".
- Moreover, as already requested by European and other GAC members, in Point 11, § 1 the author concurs with our opinion and expressed that "*Naturally, pursuant to the rules laid down by ICANN, the registry agreement – an agreement concluded between ICANN and the owner of the new gTLD – may inform this owner of the need to ensure that its co-contracting parties respect third-party rights and, in particular, geographic indications*".
- Furthermore, Point 11, § 2, also in full accordance to the views of the European Commission and other interested governments and parties, confirms that "*if this agreement did not make express provision for it, no fault could be attributed to ICANN for it is the registry of the new gTLD in its capacity as a professional to automatically take precautions designed to avoid domain name users, its partners, from infringing third party rights*". It is for that reason that applicants have been continuously encouraged since the ICANN Beijing meeting in mid-2012 to come to an agreeable solution with wine rightholders to ensure that adequate safeguards are provided in the delegation of the ".wine" and ".vin" gTLDs.

## **9. What are you asking ICANN to do now?**

The undersigned, on behalf of the European Union, respectfully request from ICANN to:

- a) reverse its Resolution 2014.03.22NG01 considering the aforementioned information and comments; and further declare null and void Resolutions 2014.04.04 NG01-2014.04.04 NG04
- b) While reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed across this document and notably in Section 8.
- c) Provide explanations as regards:
  - a. How ICANN's Board NGPC resolutions are affected when they are based upon GAC advice given in breach of GAC Operating Principles.
  - b. Explanation of "policy vs. implementation" as regards the application of the By-laws for what concerns expert advice, and notably the By-laws breached by Resolution 2014.03.22.NG01 an taking into account the arguments listed under Sections 2, 6 and 8 of the current reconsideration request.
  - c. Explanation of cases in which the Applicant Guidebook may prevail of the general ICANN By-laws.
  - d. Explanation of the questions raised by the undersigned in Section 8.c) and of how the relevant sections included in the expert legal advice provided by Jerome Passa and which favor the protection of GIs have been taken into account and will be taken into account.
- d) Grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline. In this regard, the undersigned notes that in previous negotiations under pressure due to a tight deadline (30 days after the Durban GAC Communique) those negotiations were rendered useless as applicants had the incentive to wait until the GAC as a whole or the Board resolved on the matter.
- e) Evaluate the negative effects for the Domain Name Security, Resilience and Stability produced by the NGPC Resolution challenged, taking into account that European Union and its Member States would have to seek blocking measures in order to safeguard the protection of EU Regulation in the field of Geographical Indications, as well as in the field of consumer protection and competition.
- f) Have the full ICANN Board reconsidering the matter, according to the External Expert advice rules set forth under ICANN By-laws.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

In addition to the elements noted in Section 6 of this Reconsideration Request, it is clear that the Resolution breached the ICANN Bylaws. The conclusion of the Resolution,

which is based on such violation, is highly detrimental to the interests of the wine and spirit industry. Indeed, the Resolution concluded that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*". In the EU the overwhelming majority of wines produced are covered by geographical indications ("**GIs**"). Therefore, the risk of applications for second-level domain names as part of the .WINE and .VIN TLDs, that would constitute a misuse, evocation or otherwise undue appropriation of a vested right related to an EU GI for wines is considerable. Proceeding through the normal evaluation process without additional safeguards would negate the EU wine and spirit industry's ability to protect its GIs against such misuse, evocation or undue appropriation. In addition, this would prevent the applicants and interested parties to continue their negotiations with a view to reach an agreement on the matter.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards, while the applicants and interested parties seeking GI protection have not had adequate time in order to reach proper agreement, would therefore seriously undermine the protection granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs also serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine EU product with specific qualities and characteristics, when they are in fact getting an imitation. Therefore, the adverse impact of the Resolution could be considerable.

Failure to follow the specific policies described above results in further contradiction of ICANN policies ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability. Indeed, the Requester has spent a considerable amount of time and efforts into trying to reach an agreement with the applicants to try to obtain that safeguards be implemented before the .WINE and .VIN strings are delegated and the Resolution would unfairly prevent it from reaching an agreement in this respect.

The worldwide sales value of EU GIs is estimated at € 54.3 billion in 2010, at wholesale stage. Of these total sales, EU GIs regarding wines actually account for 56 %, (€ 30.4 billion), regarding agricultural products and foodstuffs for 29 % (€ 15.8 billion), and regarding spirit drinks for 15 % (€ 8.1 billion). These sales were made in: the country of production (60 %), EU countries (20 %), outside the EU (20 %).

The main export destinations are the US (30 % of total exports), Switzerland and Singapore (7 % each), Canada, China, Japan and Hong-Kong (6 % each). The total value of EU GIs exported outside the EU is estimated at € 11.5 billion. This represents 15 % of the total EU food and drinks exports. Of these total GI exports (in value), wines account for 47 %, spirits for 44 %, agricultural products and foodstuffs for 10 %.

Products benefiting from a GI clearly enjoy a value premium, i.e.: the premium that a GI can expect from the market, compared to similar non-GI products.

In average, the whole value premium rate in the EU 27 for GI products was estimated at 2.23, which means that GI products were sold 2.23 times as high as the same quantity of

non-GI products. A comparison of the average value premium rates between schemes shows that GI wines and spirits received far higher prices than their related standard products (2,75), compared to spirits (2.57) and agricultural products and foodstuffs (1,55).

The link below refers to comprehensive data in that respect:

[http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report\\_en.pdf](http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report_en.pdf)

It stems from the above that EU GIs for wines represent an utterly high asset, whose reputation and considerable value are undisputed. Accordingly, their protection against misuse, evocation or otherwise undue appropriation is of the utmost importance.

In order to ensure such protection:

At international level, Article 23 of the Trips Agreement requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated, even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.

Within the EU, the European Commission is bound, pursuant to Article 17 of the Treaty on European Union, to *"promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. (...)*

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see Article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against :

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the

laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that *"The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Regulation (EU) No 607/2009, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that *"In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue."*

It stems from the above that both the European Commission and its Member States are bound to take the appropriate measures in order to tackle any misuse of protected GIs. In the present circumstances, considering on one hand the worldwide coverage of internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

The undersigned represents the European Commission and is put forwards on behalf of European citizens and consumers in the defense of the public policy interests that concerns them in the case in hand, and to ensure the rule of law in the European Union.

The European Commission plays a representative role by ensuring the representation of the European Union in third countries and in many international organizations, among others ICANN.

In the EU and its Member States food labeling, the common organization of the market and agricultural products as well as designations of origin and geographical indications are governed by several sets of EU secondary legislation (regulations and directives).

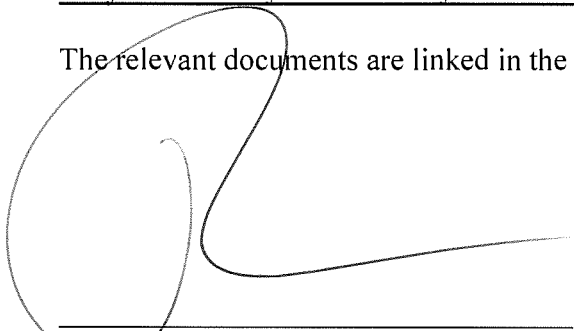


The European Commission as is the guardian of the Treaties and of all the EU's legislation. One of the Commission's main tasks is to ensure the proper application of the provisions of the Treaties and of secondary legislation. The ICANN Resolution 2014.03.22.NG01 leads to the attribution of the .wine and .vin TLDs to applicants who are not rightful holders of geographical indications. Without prior agreement of proper safeguards to between applicants and rightholders, this resolution likely to lead to a systematic breach of EU legislation in the field of food labelling and geographical indications within the EU market, and would infringe TRIPS provisions governing the trade of products with geographical indication. In such circumstances the EU Commission has a legal standing to submit this present Reconsideration Request in order to prevent systematic breaches of EU law and to up-hold the EU legal order.

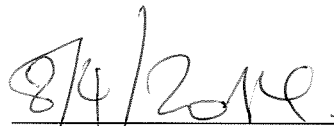
The European Commission as well as law enforcement agencies in the EU Member States in the field of consumer protection, competition and intellectual property rights will incur enforcement costs, in amounts differing depending on their consituitional and legal settings, when persecuting breaches of EU and the EU Member States' law, caused by applicants being attributed by ICANN and allowed to use the .VIN and .WINE TLDs without prior agreement reached with GI rightholders. Rightholders would incur their legal advice and enforcement costs.

**Do you have any documents you want to provide to ICANN?**

The relevant documents are linked in the text of the Reconsideration Request.



Signature



Date

# **REQUEST 14-14**



Your Ref:  
Our Ref:  
7 April 2014

## Reconsideration Request Form

Version of 11 April 2013

### 1. Requester Information

**Name:** Mark Carvell, Department for Culture, Media and Sport. United Kingdom  
Government representative on the GAC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

### 2. Request for Reconsideration of (check one only):

**Board action/inaction**

**Staff action/inaction**

### 3. Description of specific action you are seeking to have reconsidered.

The UK Government requests that Resolution 2014.03.22.NG01 of the ICANN Board New gTLD Program Committee (NGPC) be suspended and reconsidered on procedural grounds for the following reasons:

- i) the Governmental Advisory Committee (GAC) has not had the opportunity to comment upon the external advice received prior to the decision by the Board as required under Bylaws Art. XI-A, Section 1 subsection 6.

- ii) The GAC was unaware of the NGPC resolution at the time of its passing and it should have been informed in accordance with Bylaw Art. VI Section 9. This amounts to a second failure of due process.
- iii) We are also not assured that the NGPC has taken into account all recent communications in this matter from global wine stakeholders (including from north and Latin America as well as Europe) and from the European Commission and that there is a serious risk therefore that the resolution is flawed.
- iv) We understand that discussions between the applicants and wine rights holders in respect of GIs have not yet been concluded and therefore the NGPC decision and action must be considered premature.

Furthermore, the Buenos Aires GAC Communique referred to requiring a clear understanding of the legally complex and politically sensitive background to this matter in order to consider the appropriate next steps in the process of delegating the two strings. A detailed review by the GAC of the external advice provided to the NGPC would assist the GAC in that objective.

Accordingly the UK Government does not support the NGPC's proposed course of action that the new gTLD applications for .wine and .vin should now continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs.

**4. Date of action/inaction:**

With immediate effect.

**5. On what date did you become aware of the action or that action would not be taken?**

26 March 2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The NGPC decision and proposed action have not taken into account the position of a significant number of GAC members from Europe, including the United Kingdom, and Latin America which is that the .wine and .vin applications should not proceed through ICANN's evaluation processes until additional safeguards are established with the agreement of the registry operators for the protection of geographical indications (GIs). There is no GAC consensus that the applications should proceed without such safeguards.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The European Commission stated in its letter of 3 February 2014 that "*the EU, its Member States, Switzerland and Norway still believe that ... general safeguards are not sufficient*".

Without a comprehensive agreement on GI safeguards being in place, the UK Government believes that there is a serious risk that the interests of consumers worldwide and of individual wine producers and traders will be materially harmed primarily through further widespread abuse of GIs at the second level under these two domains.

**8. Detail of Board or Staff Action – Required Information**

**In the following section, the undersigned aims to provide the necessary details to prove that:**

The United Kingdom Government has supported all the actions taken by the European Commission with regard to resolving the issue of GI safeguards and for GIs, including the following correspondence posted on the ICANN website:

<http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>

<http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>

<http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

**9. What are you asking ICANN to do now?**

i.) The United Kingdom Government requests firstly that the NGPC suspend and reconsider its decision and proposed course of action, pending its consideration of points i) – iv) under part 3 of this request.

ii.) the .wine and .vin applicants and interested parties should be allowed additional time to reach agreement on GI safeguards before a decision is taken by ICANN to proceed with evaluation of these applications.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As a member of the GAC, the United Kingdom Government has a duty to ensure that the public policy interests are taken fully into account in all ICANN decisions. This public interest mandate includes consumer protection, protecting legal rights, preventing fraud,

combatting criminality and protecting the legitimate interests of business stakeholders including entrepreneurs, investors, and innovators.

The United Kingdom Government is also mindful of its international obligations and commitments in respect of tackling misuse of GIs:

- Article 23 of the Trips Agreement requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated.
- Article 17 of the Treaty on European Union includes provision to "*promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. (...)*".
- Article 92 of Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers. Article 103 indicates that a GI shall be protected against:

(a) *any direct or indirect commercial use of that protected name:*

(i) *by comparable products not complying with the product specification of the protected name; or*

(ii) *in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

(b) *any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

(c) *any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;*

(d) *any other practice liable to mislead the consumer as to the true origin of the product."*

- Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

(a) *be such as could mislead the purchaser to a material degree, particularly:*

(i) *as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Article 19 (2) of Regulation (EU) No 607/2009, which focuses in particular on GIs in the wine sector, requires that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue.*"

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

No

**Do you have any documents you want to provide to ICANN?**

Not at this time.

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Mark Carvell

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7 April 2014

Signature

Date



# **REQUEST 14-15**

## Reconsideration Request Form

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### 1. Requester Information

**Name: Pierre Sellal, Secretary general, French Ministry of Foreign Affairs and International Development , on behalf of the French Government**

**Address:**

Contact Information Redacted

Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

### 2. Request for Reconsideration of (check one only):

**Board action/inaction**

**Staff action/inaction**

### 3. Description of specific action you are seeking to have reconsidered.

The undersigned requests that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, as it resolved that *"the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his*

*designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process".*

The resolution is posted in the ICANN website under

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm>

This request is submitted in case resolution 2014.03.22.NG01 is not deemed superseded by resolutions 2014.04.04 NG01-2014.04.04 NG04.

**4. Date of action/inaction:**

The ICANN Board New gTLD Program Committee (NGPC) took its decision on 22.03.2014. Even though the URL <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22<sup>nd</sup> March 2014 as the date Resolution 2014.03.22.NG01 was published, the date 25<sup>th</sup> March 2014 was shown for some days on that very URL as the date of publication of the resolution and its rationale.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned and the French GAC representative to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communique drafting session. It should be highlighted that Governmental Advisory Committee was not

informed of the existence of this Resolution during the meeting with representatives of the NGPC on the 22<sup>nd</sup> March 2014 or at specific session between the GAC and the Board that took place on 25.03.2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The French Government is mandated by our Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.03.22.NG01.

This Resolution lets the evaluation procedure of applications to .wine and .vin to proceed without demanding adequate safeguards to avoid the risks of consumer deception as to the true origin of the wines sold through e-commerce sites lodged under .wine and .vin TLDs. European GAC members have repeatedly declared that Category 0 Safeguard GAC Advice (Beijing Communiqué), specifically, safeguards 5 and 6, are not enough since there is no mention to geographic indications (GIs) and “applicable law” is a vague term that does not afford sufficient protection to GIs in all jurisdictions.

Whereas GIs are a token for quality wines worldwide, consumers, both within and outside Europe, may be led to think that they buy true Champagne, Bordeaux, Cognac or whatever other GI protected wine when purchasing from champagne.wine, bordeaux.wine, cognac.vin, chassagne-montrachet.wine or

macon.vin.

Cybersquatting and all sorts of GIs abuse have occurred in the domain name space as WIPO Standing Committee on the Law on Trademarks, Industrial Designs and Geographical Indications has proved in document SCT/10/6 dated April 3<sup>rd</sup>, 2003 on “Internet domain names and Geographical Indications” (see paragraphs 225 and 226 as well as its annexes).

The power these TLDs may have as a locus to find wines on the web increases the risk of deceiving acts happening. In an effort to protect vulnerable consumers, French law prohibits such acts. The French Consumer code makes any kind of deceiving acts misleading consumers unlawful in its article L. 121-1, which emanates from article 44 of the Royer Act of 27 December 1973.

In addition to the general consumer protection concerns expressed above, the French legislation has the same registration requirements as a Protected Designation of Origin in the European Regulation 510/2006. However, the notion of “particular qualities” of agricultural products is more precise in the French law. The specifications of the products take into account not only the geographical origin and tradition, which serve as the differentiation base of typical regional and specific organoleptic characteristics where the technology is not capable of being reproduced. To sum up, the *Law on the Protection of Appellations of Origin*<sup>1</sup> not only controls the geographical origin, but also the quality of the products. Geographical names, therefore, traditionally served not only as a statement of

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<sup>1</sup> Loi 93-949 du 26 juillet 1993, Journal Officiel, 27 July 1993.

origin, but also as a guarantee of quality and the maintenance of certain characteristics that must be taken into account.

These provisions, together with the relevant European Regulations, are the basis of the French legislation on geographical indications. We invite the Board Governance Committee to refer to the letter sent by the Commission on 29<sup>th</sup> July 2013 to GAC members to have a complete picture of the international and European legislation on the matter.

It must be added that the French Government must promote the development of all economic sectors, in particular, agriculture. In that regard, French wine exports have been experiencing a stagnation in quantity but a reinforcement in selling price. French wine exports were 7.600 million euros worth in 2012, compared to 1.021.897 euros US wines reached the same year (see International Trade Policy Wine Institute's letter to ICANN at <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en.pdf>). France remains as the first largest wine exporting country in 2012, while the US occupied the sixth position, with a total turnover of 1.077 million euros. French, Italian and Spanish wine products accounted for 56,4% of global output and 59% of export value. If we add to that group German and Portuguese exports, they make up a 63,9% share of all exports whereas the six new exporting countries (Australia, New Zealand, Chile, US, South Africa and Argentina) topped at 28,7% in 2011. United Kingdom, US and Germany are the main destination markets for our quality winess.

The French wine production represents 15 % of the total agricultural production (in value). Vines are traditionally set up in zones with a weak agronomical potential. PDO and PGI represent ¾ of this production.

7. **Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

As reflected in section 6, consumers and right holders are the stakeholders affected by resolution 2014.03.22.NG01. The protection of their legitimate rights has a public value as demonstrated above. The French Government represents that public interest and as such, it is also entitled to assert this reconsideration request.

8. **Detail of Board or Staff Action – Required Information**

**In the following section, the undersigned aims to provide the necessary details to prove that:**

A) **The Board has not considered certain material information.**

Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union

which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other organisations and wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>



- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>
- Letter 8: <http://www.icann.org/en/news/correspondence/baptista-to-crocker-15nov13-en>

They all point out at harm that can be caused to consumer interests and wine right holders if delegation is done without proper safeguards. However, applicants are worried about the «commercial viability of theTLDs» if more safeguards are applied (see, for instance, June Station LLC comment to the Buenos Aires Communiqué).

ICANN has a duty to serve public interest (article I.Section 2.6 of the ICANN Bylaws and points 3 and 4 of the Affirmation of Commitments) and it should not slant towards the applicants' interests only because they are only a limited subset of stakeholders (point 4 of the Affirmation of Commitments).

B) The ICANN Board NGPC has also based its Resolution upon inaccurate and misleading materials.

## B.1 Misunderstanding about GAC consensus on ".vin" and ".wine":

The action that was approved by the NGPC on 22.03.2014 is allegedly based on GAC consensus, whereas in reality a significant number of GAC members were in consensus not to allow the .WINE and .VIN applications to proceed through evaluation until sufficient additional safeguards were in place. The reality is that the GAC as a whole could not reach consensus, what does not necessarily imply that the strings can proceed through the normal evaluation process without further consideration.

The letter from the GAC Chair to the Chair of the ICANN Board dated 09.09.2013 was sent without prior consultation of GAC members. As such, it represents a breach of GAC operating principle number 47. For it to have been given the weight that it deserves, the "opinion" conveyed by the GAC Chair should have been previously cleared with the GAC. The European Commission in its letter dated 03.02.2014 specifically covered this point and said "the EU, its Member States, Switzerland and Norway still believe that these general safeguards are not sufficient and that the Beijing Consensus was overruled inappropriately when the GAC Chair advised the Board to proceed with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached." More details of this EU position can be found on the two letters sent on behalf of the EU Commission to GAC members and GAC Chair quoted above.

The GAC Chair's statement that "The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed

through the normal evaluation process" is not a consensus view of the GAC as per the aforementioned Operating Principle, but a mere interpretation and opinion of the GAC Chair.

B.2 Insufficient analysis of the legally complex and politically sensitive background:

The Buenos Aires Communique specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings.

The GAC has not received the terms of reference of the consultation addressed to Mr. Jérôme Passa. We wish we have received it for full transparency and proper evaluation of the NGPC action. However, it can be inferred from page 2 of Mr. Passa's report that the questions made fell short of the analysis the GAC recommended to carry out. The politically sensitive background of this matter has not been considered at all by ICANN's request of advice and the resulting report (i.e. the various attempts at creating a multilateral system of notification and registration of geographical indications for wines according to article 23.4 of the TRIPS Agreement or at launching a UDRP for GIs in WIPO).

Moreover, it is debatable whether the external expert legal advice is sufficiently reasoned. In addition, the Rationale for Resolution is vague and does not make reference to the specific grounds on the basis of which the resolution is taken,

nor it addresses the specific arguments laid down in the legal advice received or makes reference to the panoply of letters and additional materials shared with the ICANN Board via formal correspondence.

### **B.3 Breach of ICANN Bylaws:**

Perhaps one of the most relevant arguments is that Article XI-A section 1 subsection 6 of the ICANN By-Laws requires that "the GAC - in addition to the supporting organisations or other advisory committees - shall have an opportunity to comment upon any external advice received prior to any decision by the Board". This important prerogative has not been respected.

### **Required Detailed Explanation:**

The undersigned wishes to elaborate on points B.2 and B.3 contained above. Point B.1 is sufficiently developed as set forth above.

### **B.2 detailed explanation:**

- On the process followed to seek expert external advice:

Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent

competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

Taking into account that the Buenos Aires GAC Communique requested the Board to "*seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings*" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?

Pending clarifications from the NGPC expressed on its reconsideration of the challenged Resolution, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

- On the scope of the consultation:

Although the Buenos Aires Communique seeks clarification of the legally complex and politically sensitive background and the next steps in order to delegate the two strings (please note that the GAC did not ask for the refusal to delegate the strings), Point 3, § 2 evidences that the author has only been "consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be bound: a) to assign the new gTLDs in question to the applicant, or, to the contrary, to refuse to assign them in order to protect prior rights as mentioned above." The question is by all means misleading and it was clear from the outset that ICANN is not legally bound by international law to automatically grant or reject an application. On the contrary, our understanding is that for all domain names for which an application was submitted, a series of legal safeguards should be put in place by ICANN or by the potential Registries in order to efficiently protect public and private rights and interests. These safeguards vary however depending inter alia on the nature of the domain names concerned, on the specific concerns expressed by the GAC and the objectors, on the applicable legislation.

The scope of the analysis is intentionally limited by ICANN as indicated in Point 3, § 6 since the author confirms that "Given the wording of ICANN's questions to the undersigned, this opinion will concentrate exclusively on the reasons why ICANN might be led to assign or refuse to assign the new gTLDs in question, in other words on the disputes which have arisen during the evaluation stage of the

applications. It will not examine as its main focus questions and disputes likely to arise in the subsequent stage, following assignment of these new gTLDs during which the second-level domains open in the gTLDs will be exploited". In this regard, the most essential question is left out of the analysis and therefore it does not provide the necessary insights for the NGPC to respond adequately to GAC's requests.

As a consequence, half of the report (until "Secondly") is useless. Of course, "vin" and "wine" are generic terms and are not protected by geographic indications or any other intellectual property right. So, ICANN is obviously legally unimpeded to grant those TLDs to whoever applies for them. But, that is not the question that has held up GAC advice for a year.

The NGPC has chosen to stick to this part of the report to accept "GAC advice" to proceed with the evaluation process without additional safeguards and does not reason on the concerns expressed by Governments and right holders or on the considerations expressed in other sections of Mr. Passa's report. Thus, Resolution 2014.03.22.NG01 is ill reasoned.

- On the author's opinion on the scope of GIs:

The second part of the report is severely wrong. He indicates that "a geographical indication does not enjoy absolute or automatic protection against

any use of an identical or similar name by a third party", and refers to Article 22 of the TRIPS agreement which allegedly provides for protection where an indication is used in a manner which misleads the public. He further indicates that there are other provisions (i.e.: the Lisbon Agreement of 1958 or the EU relevant legislation (EU) No 1308/2013 on wines) that allow for a more extensive protection that includes the concept of evocation.

However, not only Article 22 of the TRIPS agreement also broadly encompasses (see point 2.b) thereof) "any use which constitutes an act of unfair competition (...)" ; but in addition, Article 22 of the TRIPS agreement is an incorrect legal basis as far as wines are concerned. Actually, wines (and spirits) enjoy an additional explicit protection under Article 23 of the TRIPS agreement which is considered in international fora as including the aforementioned concept of evocation, and which does not require any "misleading test" to be performed. Concretely, should an operator use the term "JapanChampagne.vin" there would be a clear indication of the actual origin thereof, so at first sight no misleading of the consumer as to the geographical origin, and accordingly no infringement of Article 22 TRIPS; but there would be nonetheless a clear violation of the relevant Article 23.1 TRIPS which prohibits any inappropriate use of a geographical indication, including in translation and where the true origin of the product is indicated.

- On the need to lay down adequate safeguards:



The most rightful conclusion of the report has not been taken into account by the NGPC. Jérôme Passa concludes that if there are indications that GIs can be subject to abuse as second level domains, ICANN should take precautions to prevent damage from being done (points 10 and 11). Indeed, the NGPC should be aware of the long history of abuse of GIs under other generic TLDs. WIPO has conducted studies, like the one mentioned above, on the matter with a view to setting up a UDRP for GIs.

Nonetheless, it is not enough to force the Registry to remind registrants of third-party rights, as Jérôme Passa suggests. There should be an enforcement mechanism which until now remains the main stumbling block in this process. This mechanism can only be decided by ICANN.

### **B.3 detailed explanation:**

The NGPC is bound by the Bylaws. Article XI Section 2.1 of the Bylaws –which Resolution 2014.03.22.NG01 refer to- is not the only section the Board must comply with in the implementation of the new gTLD programme. The Applicant Guidebook is not self-contained as the rule governing the gTLD programme and does not override the Bylaws, which is the superior norm to abide by.

Article XI-A Section 1 is also relevant as it details the procedure ICANN must

follow to seek external expert advice. At least, two breaches have been committed in relation to the report commissioned to Mr. Passa:

- Article XI-A Section 1 3 b as to the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.
  
- Article XI-A Section 1 6 regarding the need to consult, among others, with the GAC on the analysis received before taking any action.

**9. What are you asking ICANN to do now?**

The undersigned respectfully request from ICANN to:

- a) reverse its Resolution 2014.03.22NG01 considering the aforementioned information and comments;
  
- b) while reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed in Section 8;
  
- c) grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

The grounds under which the French Government has standing to assert this Reconsideration Request are numerous. Below, we set out national and European regulations in the field of wines that support our request. International Treaties and EU bilateral agreements on the protection of GIs are not included. Please refer to letter from the EU Commission to GAC members on the 29<sup>th</sup> July 2013 for information.

France is the first country that developed the systematic legal protection of geographical indications. As soon as at the beginning of last century, the *Law of 1 August 1905*<sup>2</sup> made the French government responsible for the administrative recognition of appellations of origin and allowed imposition of fines on those who would mislead or even attempted to mislead the contracting party as to the origin of goods.

In 1990 the Law on Protection of Appellations of Origin of 1919 was amended substantially and has since been incorporated into the Consumer code (Code de la Consommation). Later on, the changes required by EC Regulation 510/2006

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<sup>2</sup> Journal Officiel, August 5, 1905.

on the protection of geographical indications and designations of origin for agricultural products and foodstuffs were incorporated to the French Law by the Law 94-2 of 3 January 1994 on the recognition of the quality of agricultural products and foodstuffs.

All the relevant Regulatory Framework of France can be found in the dedicated sections of the Consumer Code. Article L115-1 of the Consumer Code defines an appellation of origin as follows:

“... the name of a country, region or locality serving to designate a product originating therein the quality and characteristics of which are due to the geographical environment, including both natural and human factors”.

*An Appellation d'origine contrôlée* is defined by Articles L115-6 of the Consumer Code as:

*“... an appellation of origin in the agricultural products and foodstuffs sector, with a duly established reputation and an approval procedure defined by a decree passed on an INAO proposal setting out the relevant boundaries and requirements pertaining to production and approval.”*

The Ministry of Agriculture and Fisheries is the national authority responsible for overall quality policy in France and the INAO has now the responsibility to conduct the national examination of the appellations of origin and geographical indications for all products as provided in Regulation 510/2006.

- European legislation:

European Regulations are directly enforceable in each of EU Member States (article 288 of the Treaty on the functioning of the European Union).

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against:

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its*

*origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Commission Regulation (EU) No 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No. 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to*

*stop such unlawful use and to prevent any marketing or export of the products at issue."*

It stems from the above that both the European Commission and its Member States are bound to take the appropriate measures in order to tackle any misuse of protected GIs.

In the present circumstances, considering on one hand the worldwide coverage of Internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining

parties? Explain.

The undersigned represents the French Government and represents French citizens and undertakings in the defense of the public policy interests that concerns them in the case in hand.

**Do you have any documents you want to provide to ICANN?**

The relevant documents are linked in the text of the Reconsideration Request.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.



BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

7<sup>th</sup> April 2014

Signature

Date

A handwritten signature in black ink, consisting of a series of connected loops and curves, positioned over a horizontal line.

**Pierre SELLAL**

# **REQUEST 14-16**

## Reconsideration Request Form

### 1. Requester Information

**Name:** Víctor Calvo-Sotelo Ibáñez-Martín. Secretary of State for Telecommunications and Information Society (Ministry of Industry, Energy and Tourism of Spain)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

### 2. Request for Reconsideration of (check one only):

X Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered.

The undersigned requests that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, as it resolved that "*the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process*".

The resolution is posted in the ICANN website under

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm>

Resolution 2014.03.22.NG01 is not deemed superseded by resolutions 2014.04.04 NG01-2014.04.04 NG04.

**4. Date of action/inaction:**

The ICANN Board New gTLD Program Committee (NGPC) took its decision on 22.03.2014. Even though the URL <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22<sup>nd</sup> March 2014 as the date Resolution 2014.03.22.NG01 was published, the date 25<sup>th</sup> March 2014 was shown for some days on that very URL as the date of publication of the resolution and its rationale.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned and the Spanish GAC representative to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communique drafting session. It should be highlighted that Governmental Advisory Committee was not informed of the existence of this Resolution during the meeting with

representatives of the NGPC on the 22<sup>nd</sup> March 2014 or at specific session between the GAC and the Board that took place on 25.03.2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Spanish Government is mandated by our Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.03.22.NG01.

This Resolution lets the evaluation procedure of applications to .wine and .vin to proceed without demanding adequate safeguards to avoid the risks of consumer deception as to the true origin of the wines sold through e-commerce sites lodged under .wine and .vin TLDs. European GAC members have repeatedly declared that Category 0 Safeguard GAC Advice (Beijing Communiqué), specifically, safeguards 5 and 6, are not enough since there is no mention to geographic indications (GIs) and “applicable law” is a vague term that does not afford sufficient protection to GIs in all jurisdictions.

Whereas GIs are a token for quality wines worldwide, consumers, both within and outside Europe, may be led to think that they buy true Rioja, Penedés, Jerez, Ribera del Duero, Cava or whatever other GI protected wine when purchasing from vinosderioja.wine, bodegasriberadelduero.wine, riasbaixas.vin, truetxacoli.wine or tororedwines.vin.

Cybersquatting and all sorts of GIs abuse have occurred in the domain name space as WIPO Standing Committee on the Law on Trademarks, Industrial Designs and Geographical Indications has proved in document SCT/10/6 dated April 3<sup>rd</sup>, 2003 on “Internet domain names and Geographical Indications” (see paragraphs 225 and 226 as well as its annexes).

The power these TLDs may have as a locus to find wines on the web increases the risk of deceiving acts happening. According to the Spanish laws<sup>1</sup> on unfair competition and consumer protection, these acts are illegal (articles 5, 6 and 7 of Law 3/1991, of 10<sup>th</sup> January, on Unfair Competition and articles 19 and 20 of Royal Legislative Decree 1/2007, of 16<sup>th</sup> January, approving the Consolidated Text on the Law for the defense of consumer rights) and public authorities have a duty to counter them (article 51 of the Spanish Constitution).

As noted above, the Spanish Government must behave and defend the rule of law (articles 9, 97 and 103 of the Spanish Constitution). Our Law 3/1991, of 10<sup>th</sup> January, stipulates that certain acts of imitation and all reputation damaging acts are unlawful (articles 11 and 12). According to article 12, the use of a geographical indication identifying agricultural products for products not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like is regarded as an unfair commercial practice. This provision is inspired by article 23 of the TRIPS Agreement, which is also the source of article 18 of the Law

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<sup>1</sup> All Spanish laws and regulations can be founded at [www.boe.es](http://www.boe.es).

24/2003, of 10<sup>th</sup> July, of Vineyard and Wine.

These provisions, together with the relevant European Regulations, are the basis of the Spanish legislation on geographic indication. We invite the Board Governance Committee to refer to the letter sent by the Commission on 29<sup>th</sup> July 2013 to GAC members to have a complete picture of the international and European legislation on the matter.

The Spanish Government must promote the development of all economic sectors, in particular, agriculture, according to article 130 of the Spanish Constitution. Spain was the third wine producing country in the World in 2012 in accordance with the International Organisation of Vine and Wine (29,7 million hectoliters and 11,8% of the total output). US ranked 4<sup>th</sup> with a production of 20,5 million hectoliters. 14,9 million hectoliters of the 29,7 million hectoliters of wine produced in Spain in 2012 carried an appellation of origin or any other geographic indication.

Spanish wine exports have been experiencing a decrease in quantity but a rise in selling price and that's due to a growing share of GIs wine exports. Spanish wine exports were 2.499,3 million euros worth in 2012, compared to 1.021.897 euros US wines reached the same year (see International Trade Policy Wine Institute's letter to ICANN at <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en.pdf>). Spain remains as the third largest wine exporting country in 2012, after Italy and France while the US occupied the sixth position, with a total turnover of 1.077 million euros. French, Italian and Spanish wine products accounted for 56,4% of global output and 59% of export value. If we

add to that group German and Portuguese exports, they make up a 63,9% share of all exports whereas the six new exporting countries (Australia, New Zealand, Chile, US, South Africa and Argentina) topped at 28,7% in 2011.

Germany, United Kingdom, US and France are the main destination markets for our quality wines although Japan and China are becoming more and more important as export markets for Spanish wines.

There are approximately 4.000 wineries in Spain amounting to 0,73% of Spanish GDP. They are generally small enterprises made of family assets, with limited resources not only to litigate for their rights but to become aware of cybersquatters abusing their GI names.

The Spanish wine sector is, thus, one of the agricultural activities yielding more wealth to rural areas in Spain so it's vital for us to foster its sustainability and expansion.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

As reflected in section 6, consumers and right holders are the stakeholders affected by resolution 2014.03.22.NG01. The protection of their legitimate rights has a public value as demonstrated above. The Spanish Government represents that public interest and as such, it is also entitled to assert this reconsideration request.



## 8. Detail of Board or Staff Action – Required Information

In the following section, the undersigned aims to provide the necessary details to prove that:

### A) The Board has not considered certain material information.

Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>
- Letters sent by the European Commission to the GAC:
  - Letter sent by Linda Couregedo Steneberg to GAC members on 29th

July 2013.

- Letter sent by Linda Couregedo Steneberg to the GAC Chair on 19th September 2013.

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other organisations and wine-related stakeholders (including US-based wine rightholders). The following communications are and were also published under ICANN's correspondence site at the time NGPC adopted Resolution 2014.03.22, and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>

- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>
- Letter 8: <http://www.icann.org/en/news/correspondence/baptista-to-crocker-15nov13-en>

They all point out at harm that can be caused to consumer interests and wine right holders if delegation is done without proper safeguards. However, applicants are worried about the «commercial viability of theTLDs» if more safeguards are applied (see, for instance, June Station LLC comment to the Buenos Aires Communiqué).

ICANN has a duty to serve public interest (article I.Section 2.6 of the ICANN Bylaws and points 3 and 4 of the Affirmation of Commitments) and it should not slant towards the applicants' interests only because they are only a limited subset of stakeholders (point 4 of the Affirmation of Commitments).

B) The ICANN Board NGPC has also based its Resolution upon inaccurate and misleading materials.

B.1 Misunderstanding about GAC consensus on “.vin” and “.wine”:

The action that was approved by the NGPC on 22.03.2014 is allegedly based on GAC consensus, whereas in reality a significant number of GAC members were in consensus not to allow the .WINE and .VIN applications to proceed through evaluation until sufficient additional safeguards were in place. The reality is that the GAC as a whole could not reach consensus, what does not necessarily imply

that the strings can proceed through the normal evaluation process without further consideration.

The letter from the GAC Chair to the Chair of the ICANN Board dated 09.09.2013 was sent without prior consultation of GAC members. As such, it represents a breach of GAC operating principle number 47. For it to have been given the weight that it deserves, the "opinion" conveyed by the GAC Chair should have been previously cleared with the GAC. The European Commission in its letter dated 03.02.2014 specifically covered this point and said "the EU, its Member States, Switzerland and Norway still believe that these general safeguards are not sufficient and that the Beijing Consensus was overruled inappropriately when the GAC Chair advised the Board to proceed with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached." More details of this EU position can be found on the two letters sent on behalf of the EU Commission to GAC members and GAC Chair quoted above.

The GAC Chair's statement that "The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process" is not a consensus view of the GAC as per the aforementioned Operating Principle, but a mere interpretation and opinion of the GAC Chair.

B.2 Insufficient analysis of the legally complex and politically sensitive background:

The Buenos Aires Communique specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings.

The GAC has not received the terms of reference of the consultation addressed to Mr. Jérôme Passa. We wish we have received it for full transparency and proper evaluation of the NGPC action. However, it can be inferred from page 2 of Mr. Passa's report that the questions made fell short of the analysis the GAC recommended to carry out. The politically sensitive background of this matter has not been considered at all by ICANN's request of advice and the resulting report (i.e. the various attempts at creating a multilateral system of notification and registration of geographical indications for wines according to article 23.4 of the TRIPS Agreement or at launching a UDRP for GIs in WIPO).

Moreover, it is debatable whether the external expert legal advice is sufficiently reasoned. In addition, the Rationale for Resolution is vague and does not make reference to the specific grounds on the basis of which the resolution is taken, nor it addresses the specific arguments laid down in the legal advice received or makes reference to the panoply of letters and additional materials shared with the ICANN Board via formal correspondence.

### B.3 Breach of ICANN Bylaws:

Perhaps one of the most relevant arguments is that Article XI-A section 1 subsection 6 of the ICANN By-Laws requires that "the GAC - in addition to the

supporting organisations or other advisory committees - shall have an opportunity to comment upon any external advice received prior to any decision by the Board". This important prerogative has not been respected.

**Required Detailed Explanation:**

The undersigned wishes to elaborate on points B.2 and B.3 contained above. Point B.1 is sufficiently developed as set forth above.

**B.2 detailed explanation:**

- On the process followed to seek expert external advice:

Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

Taking into account that the Buenos Aires GAC Communique requested the Board to "*seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings*" can the NGPC clarify why this

question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?

Pending clarifications from the NGPC expressed on its reconsideration of the challenged Resolution, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

- On the scope of the consultation:

Although the Buenos Aires Communique seeks clarification of the legally complex and politically sensitive background and the next steps in order to delegate the two strings (please note that the GAC did not ask for the refusal to delegate the strings), Point 3, § 2 evidences that the author has only been "consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be bound: a) to assign the new gTLDs in question to the applicant, or, to the contrary, to refuse to assign them in order to protect prior rights as mentioned above." The question is by all means misleading

and it was clear from the outset that ICANN is not legally bound by international law to automatically grant or reject an application. On the contrary, our understanding is that for all domain names for which an application was submitted, a series of legal safeguards should be put in place by ICANN or by the potential Registries in order to efficiently protect public and private rights and interests. These safeguards vary however depending inter alia on the nature of the domain names concerned, on the specific concerns expressed by the GAC and the objectors, on the applicable legislation.

The scope of the analysis is intentionally limited by ICANN as indicated in Point 3, § 6 since the author confirms that "Given the wording of ICANN's questions to the undersigned, this opinion will concentrate exclusively on the reasons why ICANN might be led to assign or refuse to assign the new gTLDs in question, in other words on the disputes which have arisen during the evaluation stage of the applications. It will not examine as its main focus questions and disputes likely to arise in the subsequent stage, following assignment of these new gTLDs during which the second-level domains open in the gTLDs will be exploited". In this regard, the most essential question is left out of the analysis and therefore it does not provide the necessary insights for the NGPC to respond adequately to GAC's requests.

As a consequence, half of the report (until "Secondly") is useless. Of course, "vin" and "wine" are generic terms and are not protected by geographic indications or



any other intellectual property right. So, ICANN is obviously legally unimpeded to grant those TLDs to whoever applies for them. But, that is not the question that has held up GAC advice for a year.

The NGPC has chosen to stick to this part of the report to accept "GAC advice" to proceed with the evaluation process without additional safeguards and does not reason on the concerns expressed by Governments and right holders or on the considerations expressed in other sections of Mr. Passa's report. Thus, Resolution 2014.03.22.NG01 is ill reasoned.

- On the author's opinion on the scope of GIs:

The second part of the report is severely wrong. He indicates that "a geographical indication does not enjoy absolute or automatic protection against any use of an identical or similar name by a third party", and refers to Article 22 of the TRIPS agreement which allegedly provides for protection where an indication is used in a manner which misleads the public. He further indicates that there are other provisions (i.e.: the Lisbon Agreement of 1958 or the EU relevant legislation (EU) No 1308/2013 on wines) that allow for a more extensive protection that includes the concept of evocation.

However, not only Article 22 of the TRIPS agreement also broadly encompasses (see point 2.b) thereof) "any use which constitutes an act of unfair competition

(...)" ; but in addition, Article 22 of the TRIPS agreement is an incorrect legal basis as far as wines are concerned. Actually, wines (and spirits) enjoy an additional explicit protection under Article 23 of the TRIPS agreement which is considered in international fora as including the aforementioned concept of evocation, and which does not require any "misleading test" to be performed. Concretely, should an operator use the term "JapanChampagne.vin" there would be a clear indication of the actual origin thereof, so at first sight no misleading of the consumer as to the geographical origin, and accordingly no infringement of Article 22 TRIPS; but there would be nonetheless a clear violation of the relevant Article 23.1 TRIPS which prohibits any inappropriate use of a geographical indication, including in translation and where the true origin of the product is indicated.

The examples given in point 9 of the report to illustrative the limited protection afforded by a GI are misguided in our view. A merchant can sell Rioja wines on-line but is not entitled to identify its website as rioja.wine since it is depriving the right holder from using it. Note that article 23 of the TRIPS Agreement even forbids the registration of the GI as a trademark for wines. On the other hand, a GI right holder could sell other products in its website (appliances to keep wine cold...) as well as other wines, provided that they are clearly distinguished from the wine holding the GIs. GIs do not impose commerce restrictions on right holders.

- On the need to lay down adequate safeguards:

The most rightful conclusion of the report has not been taken into account by the NGPC. Jérôme Passa concludes that if there are indications that GIs can be subject to abuse as second level domains, ICANN should take precautions to prevent damage from being done (points 10 and 11). Indeed, the NGPC should be aware of the long history of abuse of GIs under other generic TLDs. WIPO has conducted studies, like the one mentioned above, on the matter with a view to setting up a UDRP for GIs.

Nonetheless, it is not enough to force the Registry to remind registrants of third-party rights, as Jérôme Passa suggests. There should be an enforcement mechanism which until now remains the main stumbling block in this process. This mechanism can only be decided by ICANN.

### **B.3 detailed explanation:**

The NGPC is bound by the Bylaws. Article XI Section 2.1 of the Bylaws –which Resolution 2014.03.22.NG01 refer to- is not the only section the Board must comply with in the implementation of the new gTLD programme. The Applicant Guidebook is not self-contained as the rule governing the gTLD programme and does not override the Bylaws, which is the superior norm to abide by.

Article XI-A Section 1 is also relevant as it details the procedure ICANN must follow to seek external expert advice. At least, two breaches have been committed in relation to the report commissioned to Mr. Passa:

- Article XI-A Section 1 3 b as to the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.
  
- Article XI-A Section 1 6 regarding the need to consult, among others, with the GAC on the analysis received before taking any action.

**9. What are you asking ICANN to do now?**

The undersigned respectfully request from ICANN to:

- a) reverse its Resolution 2014.03.22NG01 considering the aforementioned information and comments;
  
- b) while reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed in Section 8;
  
- c) grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a

proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

The grounds under which the Spanish Government has standing to assert this Reconsideration Request have been set forth in Section 6. They basically lie on the Spanish Constitution.

Below, we set out national and European regulations in the field of wines that support our request. International Treaties and EU bilateral agreements on the protection of GIs are not included. Please refer to letter from the EU Commission to GAC members on the 29<sup>th</sup> July 2013 for information.

- Law 24/2003, of 10<sup>th</sup> July, on Vine and Wine:

It must be highlighted that according to article 17 of this Law GIs are belong to the public domain in Spain, just the same as beaches, rivers or radio spectrum, so any misappropriation, sale or burden on them is forbidden. Like with other goods in the public domain, the Government has a duty to protect them.

## *Artículo 17 Titularidad, uso y gestión de los bienes protegidos*

*1. Los nombres geográficos protegidos por estar asociados con cada nivel según su respectiva norma específica, y en especial las denominaciones de origen, son bienes de dominio público y no pueden ser objeto de apropiación individual, venta, enajenación o gravamen.*

*La titularidad de estos bienes de dominio público corresponde al Estado cuando comprendan territorios de más de una comunidad autónoma y a las comunidades autónomas en los demás casos.*

*2. El uso y la gestión de los nombres protegidos estarán regulados por esta ley y las normas concordantes.*

*[...]*

## *Artículo 18 Protección*

*1. Los nombres geográficos asociados a cada nivel no podrán utilizarse para la designación de otros productos del sector vitivinícola, salvo los supuestos amparados en la normativa comunitaria.*

2. La protección se extenderá desde la producción a todas las fases de comercialización, a la presentación, a la publicidad, al etiquetado y a los documentos comerciales de los productos afectados. La protección implica la prohibición de emplear cualquier indicación falsa o falaz en cuanto a la procedencia, el origen, la naturaleza o las características esenciales de los vinos en el envase o en el embalaje, en la publicidad o en los documentos relativos a ellos.

3. Los nombres geográficos que sean objeto de un determinado nivel de protección no podrán ser empleados en la designación, presentación o publicidad de vinos que no cumplan los requisitos de dicho nivel de protección, aunque tales nombres vayan traducidos a otras lenguas o precedidos de expresiones como «tipo», «estilo», «imitación» u otros similares, ni aun cuando se indique el verdadero origen del vino. Tampoco podrán emplearse expresiones del tipo «embotellado en ...», «con bodega en ...» u otras análogas.

4. Las marcas, nombres comerciales o razones sociales que hagan referencia a los nombres geográficos protegidos por cada nivel únicamente podrán emplearse en vinos con derecho al mismo, sin perjuicio de lo previsto en la correspondiente normativa comunitaria.

5. Los operadores del sector vitivinícola deberán introducir en las etiquetas y presentación de los vinos, elementos suficientes para diferenciar de manera

*sencilla y clara su calificación y procedencia, y para evitar, en todo caso, la confusión en los consumidores.*

- European legislation:

European Regulations are directly enforceable in each of EU Member States (article 288 of the Treaty on the functioning of the European Union).

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against:

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or*



*essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Commission Regulation (EU) No 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No. 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof,

*that "In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue."*

It stems from the above that both the European Commission and EU Member States are bound to take the appropriate measures in order to tackle any misuse of protected GIs.

In the present circumstances, considering on one hand the worldwide coverage of Internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

The undersigned represents the Spanish Government (article 7 of the Law 50/1997, of 27<sup>th</sup> November, on the Government) and represents Spanish citizens and undertakings in the defense of the public policy interests that concerns them in the case in hand.

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

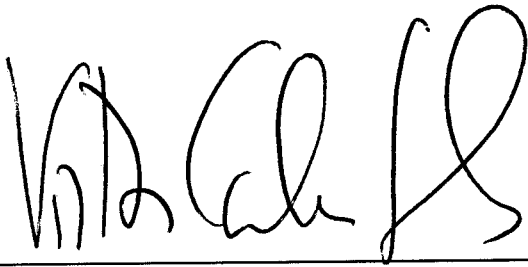
In Attachement:

**Letter from Linda Corugedo Steneberg to ICANN Board and the GAC:  
"Follow-up to the 47th ICANN meeting (Durban, South Africa, 14-18 July 2013) – GEOGRAPHIC INDICATIONS: “.wine” and “.vin”**

**Letter sent by Linda Couregedo Steneberg to the GAC Chair on 19th September 2013.**

**Spanish Institute for Foreign Trade (Instituto de Comercio Exterior, ICEX)**

**study on Spanish Wines statistics referred to 2012**



A handwritten signature in black ink, consisting of several loops and strokes, positioned above a horizontal line.

8<sup>th</sup> April 2014

Signature

Date

# **REQUEST 14-17**

## Reconsideration Request Form

### 1. Requester Information

**Name:** Víctor Calvo-Sotelo Ibáñez-Martín. Secretary of State for Telecommunications and Information Society (Ministry of Industry, Energy and Tourism of Spain)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

### 2. Request for Reconsideration of (check one only):

X Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered.

The undersigned requests that Resolutions 2014.04.04 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, as it resolved that "the NGPC concludes that there has been no process violation or procedural error under the Bylaws", and "the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in

order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do”.

The resolution is posted in the ICANN website under

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>

**4. Date of action/inaction:**

The ICANN Board New gTLD Program Committee (NGPC) took its decision on 04.04.2014 and it was published on the ICANN website the same day.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned became aware of this resolution on 05.04.2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Spanish Government is mandated by our Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.04.04.

This Resolution merely delays the start of the contracting process for the applications for “.vin” and “.wine” for 60 days which may or may not be enough

time to conclude the negotiations with all applicants or a number of them, as long as they carry out good faith negotiations, given the complexity of the issue and the diverging interests parties may have. Applicants reluctant to engage in negotiations are given an incentive not to negotiate because at the end of that period, they will have what they aim for, a Registry agreement (for those successful after the auction for “.wine”), without any penalty. The resolution adds to our anxiety when it points out that the Board should reflect whether ICANN is the proper venue to resolve these issues. As this mystifying statement cannot mean that ICANN is not the appropriate body to assign those TLDs, we are afraid that means that ICANN might not be entitled to impose additional conditions for the registration or use of second level domains. If this is the case, we disagree with that conception and the prospective outcome of this process, that is, delegation without substantive safeguards.

Furthermore, it appears that the GAC is not going to be consulted on the subsequent delegation of “.vin” and “.wine” if negotiations fail, thus ignoring the strong political interests behind this issue. We recall that the GAC Communiqué from the recent Singapore meeting states “The GAC needs to consider the above elements more fully.”

European GAC members have repeatedly declared that Category 0 Safeguard GAC Advice (Beijing Communiqué), specifically, safeguards 5 and 6, are not enough since there is no mention to geographic indications (GIs) and “applicable law” is a vague term that does not afford sufficient protection to GIs in all jurisdictions.



Whereas GIs are a token for quality wines worldwide, consumers, both within and outside Europe, may be led to think that they buy true Rioja, Penedés, Jerez, Ribera del Duero, Cava or whatever other GI protected wine when purchasing from [vinosderioja.wine](http://vinosderioja.wine), [bodegasriberadelduero.wine](http://bodegasriberadelduero.wine), [riasbaixas.vin](http://riasbaixas.vin), [truetxacoli.wine](http://truetxacoli.wine) or [tororedwines.vin](http://tororedwines.vin).

Cybersquatting and all sorts of GIs abuse have occurred in the domain name space as WIPO Standing Committee on the Law on Trademarks, Industrial Designs and Geographical Indications has proved in document SCT/10/6 dated April 3<sup>rd</sup>, 2003 on "Internet domain names and Geographical Indications" (see paragraphs 225 and 226 as well as its annexes).

The power these TLDs may have as a locus to find wines on the web increases the risk of deceiving acts happening. According to the Spanish laws<sup>1</sup> on unfair competition and consumer protection, these acts are illegal (articles 5, 6 and 7 of Law 3/1991, of 10<sup>th</sup> January, on Unfair Competition and articles 19 and 20 of Royal Legislative Decree 1/2007, of 16<sup>th</sup> January, approving the Consolidated Text on the Law for the defense of consumer rights) and public authorities have a duty to counter them (article 51 of the Spanish Constitution).

As noted above, the Spanish Government must behave and defend the rule of law (articles 9, 97 and 103 of the Spanish Constitution). Our Law 3/1991, of 10<sup>th</sup> January, stipulates that certain acts of imitation and all reputation damaging acts are unlawful (articles 11 and 12). According to article 12, the use of a

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<sup>1</sup> All Spanish laws and regulations can be founded at [www.boe.es](http://www.boe.es).

geographical indication identifying agricultural products for products not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is accompanied by expressions such as “kind”, “type”, “style”, “imitation” or the like is regarded as an unfair commercial practice. This provision is inspired by article 23 of the TRIPS Agreement, which is also the source of article 18 of the Law 24/2003, of 10<sup>th</sup> July, of Vineyard and Wine.

These provisions, together with the relevant European Regulations, are the basis of the Spanish legislation on geographic indication. We invite the Board Governance Committee to refer to the letter sent by the Commission on 29<sup>th</sup> July 2013 to GAC members to have a complete picture of the international and European legislation on the matter.

The Spanish Government must promote the development of all economic sectors, in particular, agriculture, according to article 130 of the Spanish Constitution. Spain was the third wine producing country in the World in 2012 in accordance with the International Organisation of Vine and Wine (29,7 million hectoliters and 11,8% of the total output). US ranked 4<sup>th</sup> with a production of 20,5 million hectoliters. 14,9 million hectoliters of the 29,7 million hectoliters of wine produced in Spain in 2012 carried an appellation of origin or any other geographic indication.

Spanish wine exports have been experiencing a decrease in quantity but a rise in selling price and that's due to a growing share of GIs wine exports. Spanish wine exports were 2.499,3 million euros worth in 2012, compared to 1.021.897 euros

US wines reached the same year (see International Trade Policy Wine Institute's letter to ICANN at <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en.pdf>). Spain remains as the third largest wine exporting country in 2012, after Italy and France while the US occupied the sixth position, with a total turnover of 1.077 million euros. French, Italian and Spanish wine products accounted for 56,4% of global output and 59% of export value. If we add to that group German and Portuguese exports, they make up a 63,9% share of all exports whereas the six new exporting countries (Australia, New Zealand, Chile, US, South Africa and Argentina) topped at 28,7% in 2011.

Germany, United Kingdom, US and France are the main destination markets for our quality wines although Japan and China are becoming more and more important as export markets for Spanish wines.

There are approximately 4.000 wineries in Spain amounting to 0,73% of Spanish GDP. They are generally small enterprises made of family asset with limited resources not only to litigate for their rights but to become aware of cybersquatters abusing their GI names.

The Spanish wine sector is, thus, one of the agricultural activities yielding more wealth to rural areas in Spain so it's vital for us to foster its sustainability and expansion.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

As reflected in section 6, consumers and right holders are the stakeholders affected by resolution 2014.04.04. The protection of their legitimate rights has a public value as demonstrated above. The Spanish Government represents that public interest and as such, it is also entitled to assert this reconsideration request.

**8. Detail of Board or Staff Action – Required Information**

**In the following section, the undersigned aims to provide the necessary details to prove that:**

- A) The Board has not considered certain material information and has relied on inaccurate and misleading materials.

Resolutions 2014.04.04 NG01-NG04 are nothing more than a re-statement of resolution 2014.03.22 with a postponement of its effect and a call for the full Board to decide on the matter.

Therefore, it is affected by the same shortcomings that would render Resolution 2014.03.22 null and void. It fails to take into account materials indicated in section 8 A) of our Reconsideration Request of Resolution 2014.03.22 as well as the Singapore GAC Communiqué and letter addressed by the European Commission to the Board on 26<sup>th</sup> March 2014, even though they acknowledge them.

The GAC Communiqué states: “The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and

interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.”

Neither of these statements has been considered. Concerned GAC members did not request to set a deadline for negotiations to come to an end, mindful as we are that they are counterproductive to arrive at agreeable solutions (experience learned from the tight deadline set in the Durban GAC Communiqué, Section IV.2).

The EU Commission letter contains a similar request: “Thus the European Commission, the EU Member States, Switzerland and Norway respectfully requests that the NGPC reviews its decision and does not allow the strings to proceed to evaluation until negotiations have closed and sufficient safeguards are in place.”

The NGPC forgets to link a letter sent by Rioja Governing Council on 2<sup>nd</sup> April 2014 to the ICANN Board that should also be considered.

If the NGPC had really considered this advice, it would have stalled the evaluation process indefinitely.

Insofar as Resolutions 2014.04.04 rest on Resolution 2014.03.22, they are also based on Mr. Jérôme Passa’s analysis, which, as we argued in our Reconsideration Request to Resolution 2014.03.22:

- Does not address the full picture of legal and political complexities of GIs protection, mainly and probably due to a bias in the questions posed to him.

- Makes a faulty assessment of the TRIPS Agreement and on the rights conferred on GI's right holders and constraints on its use. Nevertheless, it is right in highlighting the need for precautions if there is a serious risk of violation of GIs. ICANN Board has stood to his opinion that taking them is incumbent on the Registry, and not on ICANN, what is debatable given ICANN's mandate to exercise its mission in the public interest (article I. Section 2.6 of the ICANN Bylaws and points 3 and 4 of the Affirmation of Commitments). Thus, the NGPC let the process go in Resolution 2014.03.22 without even advising applicants to negotiate terms of agreement with right holders. Rectification done in Resolution 2014.04.04 is minimal: it "encourages" parties to engage in negotiations but only grants them two months with the "threat" of resuming the countdown for delegation afterwards.

On the other hand, Resolutions 2014.04.04 continue to quote the GAC Chair letter to the ICANN Board dated 9<sup>th</sup> September 2013 as part of GAC Advice on ".vin" and ".wine" when it should have been clear from materials at the disposal of the NGPC that the GAC never advised the Board to proceed with the evaluation process without adopting safeguards other than those referenced under Category 0 Beijing GAC Advice.

B) The NGPC has incurred in several procedural breaches of ICANN Bylaws:

Resolution 2014.04.04 refutes the alleged violation of ICANN Bylaws by stating that in the implementation stage of the gTLD programme the Applicant Guidebook controls. As we argued in our Reconsideration Request of Resolution 2014.03.22, ICANN Bylaws are the supreme governing rules of ICANN and we

cannot conceive, or have found any legal basis for it, how they can be overruled by "Guidelines". Besides, Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation. So, disapproval of NGPC actions on these grounds, stands.

Furthermore, the GAC has just received notice of the legal analysis commissioned to Mr. Passa on the issues surrounding the delegation of ".amazon" and a very kind invitation by Dr. Steve Crocker to the GAC to submit its views on the matter. Why shouldn't it do the same as regards ".vin" and ".wine"?

We note that Module 3.1 provides for that external consultation "in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures". However, there is no match between the issues raised by the applications for ".vin" and ".wine" –where the string as such is not problematic- and any of the four reasons for objections foreseen in the AGB: string confusion, legal rights, limited public interest and community objections. Therefore, it is doubtful Module 3.1 is a correct legal basis for the NGPC to seek external expert advice on the concerns raised by the applications for ".vin" and ".wine", which have more to do with registration policies under those TLDs and their peril for GI's right holders.

Against this backdrop, it is almost childish for the NGPC to claim that the GAC "did not ask the NGPC to provide the GAC with that advice (the independent Legal Analysis) before taking action *and accepting GAC's advice on the .WINE and .VIN applications.*" Neither did the GAC request to be forwarded the external

legal analysis commissioned by ICANN on the delegation of “.amazon”, and it has been sent to the GAC with an invitation to express our views on it (letter from Dr. Steve Crocker to the GAC Chair dated 7<sup>th</sup> April).

On the other hand, Resolutions 2014.04.04 entail an amendment to Resolution 2012.04.10.01 on the establishment of the new gTLD Programme Committee (<http://www.icann.org/en/groups/board/documents/resolutions-10apr12-en.htm>), whereby the Board delegated all powers to adjudicate on issues related to the the new gTLD programme on the Committee. We are delighted to have the whole Board deciding on this important issue, but we recall that one of the reasons why the Board set up that Committee was to prevent some Board members from incurring in conflict of interests with the applicants.

**9. What are you asking ICANN to do now?**

The undersigned respectfully request from ICANN to:

- a) reverse its Resolutions 2014.04.04,
- b) grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, **without a deadline;**



c) admit procedural errors and take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed in Section 8;

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

The grounds under which the Spanish Government has standing to assert this Reconsideration Request have been set forth in Section 6. They basically lie on the Spanish Constitution.

Below, we set out national and European regulations in the field of wines that support our request. International Treaties and EU bilateral agreements on the protection of GIs are not included. Please refer to letter from the EU Commission to GAC members on the 29<sup>th</sup> July 2013 for information.

- Law 24/2003, of 10<sup>th</sup> July, on Vine and Wine:

It must be highlighted that according to article 17 of this Law GIs are belong to the public domain in Spain, just the same as beaches, rivers or radio spectrum, so any misappropriation, sale or burden on them is forbidden. Like with other goods in the public domain, the Government has a duty to protect them.

*Artículo 17 Titularidad, uso y gestión de los bienes protegidos*

*1. Los nombres geográficos protegidos por estar asociados con cada nivel según su respectiva norma específica, y en especial las denominaciones de origen, son bienes de dominio público y no pueden ser objeto de apropiación individual, venta, enajenación o gravamen.*

*La titularidad de estos bienes de dominio público corresponde al Estado cuando comprendan territorios de más de una comunidad autónoma y a las comunidades autónomas en los demás casos.*

*2. El uso y la gestión de los nombres protegidos estarán regulados por esta ley y las normas concordantes.*

*[...]*

#### *Artículo 18 Protección*

*1. Los nombres geográficos asociados a cada nivel no podrán utilizarse para la designación de otros productos del sector vitivinícola, salvo los supuestos amparados en la normativa comunitaria.*

*2. La protección se extenderá desde la producción a todas las fases de comercialización, a la presentación, a la publicidad, al etiquetado y a los*

*documentos comerciales de los productos afectados. La protección implica la prohibición de emplear cualquier indicación falsa o falaz en cuanto a la procedencia, el origen, la naturaleza o las características esenciales de los vinos en el envase o en el embalaje, en la publicidad o en los documentos relativos a ellos.*

*3. Los nombres geográficos que sean objeto de un determinado nivel de protección no podrán ser empleados en la designación, presentación o publicidad de vinos que no cumplan los requisitos de dicho nivel de protección, aunque tales nombres vayan traducidos a otras lenguas o precedidos de expresiones como «tipo», «estilo», «imitación» u otros similares, ni aun cuando se indique el verdadero origen del vino. Tampoco podrán emplearse expresiones del tipo «embotellado en ...», «con bodega en ...» u otras análogas.*

*4. Las marcas, nombres comerciales o razones sociales que hagan referencia a los nombres geográficos protegidos por cada nivel únicamente podrán emplearse en vinos con derecho al mismo, sin perjuicio de lo previsto en la correspondiente normativa comunitaria.*

*5. Los operadores del sector vitivinícola deberán introducir en las etiquetas y presentación de los vinos, elementos suficientes para diferenciar de manera sencilla y clara su calificación y procedencia, y para evitar, en todo caso, la confusión en los consumidores.*

- European legislation:

European Regulations are directly enforceable in each of EU Member States (article 288 of the Treaty on the functioning of the European Union).

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against:

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the*

*packing of the product in a container liable to convey a false impression as to its origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Commission Regulation (EU) No 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No. 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on*

*their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue."*

It stems from the above that both the European Commission and EU Member States are bound to take the appropriate measures in order to tackle any misuse of protected GIs.

In the present circumstances, considering on one hand the worldwide coverage of Internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining

parties? Explain.

The undersigned represents the Spanish Government (article 7 of the Law 50/1997, of 27<sup>th</sup> November, on the Government) and represents Spanish citizens and undertakings in the defense of the public policy interests that concerns them in the case in hand.

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

In Attachement:

**Letter from Linda Corugedo Steneberg to ICANN Board and the GAC:  
"Follow-up to the 47th ICANN meeting (Durban, South Africa, 14-18 July 2013) – GEOGRAPHIC INDICATIONS: “.wine” and “.vin”**

**Letter sent by Linda Couregedo Steneberg to the GAC Chair on 19th September 2013.**

**Spanish Institute for Foreign Trade (Instituto de Comercio Exterior, ICEX) study on Spanish Wines statistics referred to 2012**

**Letter from Rioja Governing Council to ICANN dated 2<sup>nd</sup> April 2014 addressed, inter alia, to the ICANN Board of Directors.**

### **Terms and Conditions for Submission of Reconsideration Requests**

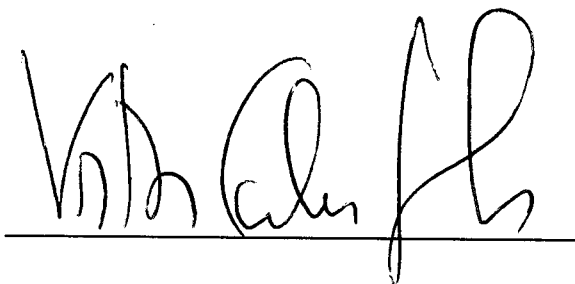
The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

A handwritten signature in black ink, appearing to be 'M. A. H.', written over a horizontal line.

Signature

8<sup>th</sup> April 2014

Date



# **REQUEST 14-18**

## Reconsideration Request

### 1. Requesters Information:

**Names:** The National Appellation of Origin Wines and Brandy Producers (CNAOC), the Comité Champagne (Comité Interprofessionnel du Vin de Champagne – CIVC), the European Federation of Origin Wines (EFOW), the Bureau National Interprofessionnel du Cognac (BNIC) and the Bordeaux Wine Council (Conseil Interprofessionnel du Vin de Bordeaux – CIVB) (hereinafter the "Requesters")

**Representative:** David Taylor, Hogan Lovells (Paris) LLP

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

### 2. Request for Reconsideration of (check one only):

**Board action/inaction**

**Staff action/inaction**

### 3. Description of specific action you are seeking to have reconsidered:

The Requesters seek reconsideration of Resolution 2014.03.22.NG01 (the "**Resolution**") issued by the ICANN Board New gTLD Program Committee ("**NGPC**").

The relevant parts of the Resolution read as follows:

*"Whereas, on 11 September 2013, the Governmental Advisory Committee (GAC) issued advice to the ICANN Board that it had finalized its consideration of the strings .WINE and .VIN.*

*Whereas, the GAC advised the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, in the Buenos Aires Communiqué, the GAC noted that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

Whereas, the NGPC commissioned an [analysis](#) [PDF, 772 KB] of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN, which the NGPC considered as part of its deliberations on the GAC's advice.

Whereas, the Bylaws (Article XI, Section 2.1) require the ICANN Board to address advice put to the Board by the GAC.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012 to exercise the ICANN Board's authority for any and all issues that may arise relating to the new gTLD Program.

Resolved (2014.03.22.NG01), the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process.

### **Rationale for Resolution 2014.03.22.NG01**

The NGPC's action today, addressing the open item of GAC advice concerning .WINE and .VIN, is part of the ICANN Board's role to address advice put to the Board by the Governmental Advisory Committee (GAC). Article XI, Section 2.1 of the ICANN Bylaws <<http://www.icann.org/en/about/governance/bylaws#XI>> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning .WINE and .VIN. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC "has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process." The effect of the NGPC's action concerning the GAC advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs.

As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant responses are provided at: <http://newgtlds.icann.org/en/applicants/gac-advice/>. The NGPC has considered the applicant responses in formulating its response to the item of GAC advice being addressed today.

Additionally, on 28 September 2013, the NGPC noted that it stood ready to hear from GAC members as to the nature of the differences in views expressed in the advice while the NGPC analyzed the GAC's advice. Several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed, with some individual governments expressing concerns that additional safeguards should be imposed before the strings are delegated, while others recommended that no additional safeguards should be imposed on the strings.

In response to the GAC's suggestion in the Buenos Aires Communiqué, the NGPC commissioned an analysis of the legally complex and politically sensitive background on this matter in the context of the GAC advice in order to consider the appropriate next steps of delegating .WINE and .VIN. The expert analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions.

As part of its deliberations, the NGPC reviewed the following materials and documents:

GAC Beijing Communiqué:

[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130718.pdf?version=1&modificationDate=1375787122000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB]

GAC Durban Communiqué:

[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 104 KB]

GAC Buenos Aires Communiqué:

[https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB]

Letter from H. Dryden to S. Crocker dated 11 September 2013 re:  
.vin and .wine:

<https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board%2020130909.pdf?version=1&modificationDate=1379026679000&api=v2>

[PDF, 63 KB]

Applicant responses to GAC advice:

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

Applicant Guidebook, Module 3:

<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]

*There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. As part of ICANN's organizational administrative function, ICANN posted the Buenos Aires GAC advice and officially notified applicants of the advice on 11 December 2013. The Durban Communiqué and the Beijing Communiqué were posted on 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1".*

The Requesters are requesting the Resolution to be reconsidered due to the Resolution's conclusion that "*the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process*". Such conclusion was drawn given the following Rationale: "*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*".

Unfortunately, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of Geographical Indications ("**GI**"s).

Therefore, if, as stated by the Resolution, the .WINE and .VIN applications were to proceed through the normal evaluation process, then there would be significant concern that the safeguards which are necessary for a sound and acceptable functioning of the TLDs would not be guaranteed.

The reasons for requesting the Reconsideration of the Resolution are detailed below.

**4. Date of action/inaction:**

The Resolution and the Resolution's Rationale were published on 22 March 2014.

**5. On what date did you become aware of the action or that action would not be taken?**

The Requesters became aware of the content of the Resolution on 26 March 2014, the Resolution itself having been published on 25 March 2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requesters represent the interests of grape growers and wine and spirit drink producers. In this quality, the Requesters have serious concerns with the content of the Resolution and its Rationale as well as with the procedural violations which the Resolution and its Rationale raise.

The Resolution, its Rationale and the procedural breaches connected to such Resolution and Rationale materially affect the Requestors for the following reasons:

1) Grounds for the Resolution

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

However, such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013 without it being circulated to GAC members.

Principle 47 of the GAC Operating Principles provides that "*[t]he GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where*

*consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board."*

Principle 47 of the GAC Operating Principles refers to the concept of "consensus" as per the practice of the United Nations. In this respect, consensus is understood as follows: *"the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions "without a vote", "by consensus" and "by general agreement" are, in the practice of the United Nations, synonymous and therefore interchangeable."*

The statement that the GAC *"has finalized its consideration of the strings .wine and .vin"* and further advised that *"the applications for .WINE and .VIN should proceed through the normal evaluation process"* is not a consensus view of the GAC.

Given the lack of consensus and the fact that the letter of 9 September 2013 did not convey the full range of views expressed by the GAC members, the Requesters conclude that such letter was sent to the ICANN Board in breach of the GAC Operating Principles.

Practically speaking, the fact that the GAC has actually not reached any consensus in this matter cannot have the effect of having the strings proceed through the normal evaluation process without further consideration. To the contrary, the lack of consensus means that this matter requires further consideration.

(b) an apparent lack of liaison

(i) in relation to the alleged consensus

The GAC Chair, as a non-voting liaison member of the NGPC, should surely have brought the lack of consensus and background to the attention of the NGPC more fully, or the NGPC should have enquired about this knowing the seriousness of the issue for a number of governments, and surely provided background to the letter of 11 September 2013 with the claim therein that the GAC has advised the ICANN Board that there was no GAC consensus advice on additional safeguards for the .WINE and .VIN TLDs, and the GAC *"has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process"*. Such claim is disingenuous at best as it was clear, and is still clear, if the subsequent correspondence from the European Commission, available at <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en>,

<http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en> and <https://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en.pdf>, is considered, that there was no consensus within the GAC that additional safeguards were not necessary, nor was there consensus to proceed through the normal evaluation process.

Indeed, Neelie Kroes, the Vice-President of the European Commission stated in her letter to ICANN of 12 September 2013 that the general safeguards proposed at Annex 1 of the Beijing GAC Communiqué *"were rejected by a few GAC members and it was therefore concluded, in consensus, that further considerations were needed and that, in the meantime, the Board should have advised not to proceed beyond initial evaluation"*. In the same letter, Neelie Kroes also stated that *"[a]lthough some of the GAC members seem to believe that the applications for .wine and .vin should proceed, I would like to recall that there has not been any consensus decision overruling the advice given in Beijing. We are therefore of the firm opinion that the advice provided at the GAC April meeting stands as long as there is no consensus on the matter."*

In addition, in its letter of 3 February 2014, the European Commission stated that:

*"According to the position collectively expressed in the Beijing GA Communiqué, the EU, its Member States, Switzerland and Norway will believe that these general safeguards are not sufficient and that the Beijing consensus was overruled inappropriately when the Chair advised the Board to proceed with the delegation of the wine gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached."*

(ii) in relation to the status of the negotiations between the interested parties

Some NGPC members have stated that they were under the impression that the negotiations with the applicants were concluded or almost concluded when this was not the case when the Resolution was passed. Such statement is based upon misinformation and, as such, in itself undermines the ongoing negotiations in that there is then no incentive for the applicants to finalise the negotiations or resolve the outstanding points.

In that regard, it should be noted that the subsequent Resolution issued by the NGPC on 4 April 2014 does grant additional time, namely 60 days, for the interested parties to negotiate. However, this Resolution provides that, *"[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting"*. This seems to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, once again, the applicants would be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once such deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to



its only applicant and the .WINE TLD will be delegated to one of its applicants. Such context is far from being favourable to negotiations in good faith and to the pursuit of a balanced agreement.

(c) Jérôme Passa's legal opinion

The Resolution is also based on an opinion issued to the ICANN Board NGPC by a University Professor, Jérôme Passa.

However, the NGPC has not provided the GAC with an opportunity to comment on such opinion, as provided for in the Bylaws.

Indeed, Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws provides as follows:

*"Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board".*

The Resolution is therefore based on a violation of the ICANN Bylaws.

The NGPC, in its new Resolution issued on 4 April 2014, considered whether its failure to give the GAC an opportunity to comment on Mr Passa's opinion was a violation of the ICANN Bylaws and concluded that there was no process violation or procedural error under the Bylaws, particularly because the opinion in question was not sought as External Expert Advice pursuant to any of the Bylaws provision but pursuant to Module 3.1 of the Applicant Guidebook, and partly at the GAC's suggestion.

The Requestors however maintain that, in their opinion, the NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Mr Passa was a violation of Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws. This provision indeed refers to "*any external advice*" and does not restrict the GAC's opportunity to comment on advice sought pursuant to the Bylaws provision.

2) Failure to consider relevant comments and communications

The Resolution fails to refer to and to take into consideration comments and documentation provided by the relevant stakeholders to the ICANN Board, such as follow up letters sent by the European Commission to the ICANN Board and the NGPC and letters sent by worldwide wine-related stakeholders.

This constitutes an additional breach of the ICANN Bylaws which promotes the notions of fairness, transparency and openness.

3) Lack of information from the GAC Chair

The GAC Chair is a non-voting liaison on the NGPC. In this respect, Article VI, Section 9 of the ICANN Bylaws provides that "*non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization*".

The GAC Chair therefore had a duty to inform the GAC of the Resolution but the GAC Chair failed to do so.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern:**

If the applications for .WINE and .VIN proceed through the normal evaluation process, as per the Resolution's conclusion, the direct consequence would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there is an important number of small wine producers which play a crucial role for the sustainability of their communities and regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the Requesters fear that the potential for abuse would considerably increase in online spaces where no specific protection would be granted to GIs. If wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse and fraudulent activities. The global scope of the .WINE and .VIN TLDs and a lack of clear rules and safeguards can indeed only amplify these problems including as follows:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited products may be facilitated;
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs and this is certainly not the result expected by the applicants to these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Europe and also across the globe but also is an incredible missed opportunity to create a secure and safe space in the DNS which is supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The Requesters therefore call for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

## **8. Detail of Board Action – Required Information**

This Request relates to a Board action, namely the adoption of the Resolution, which is both due to material information not considered by the Board (1) and based upon inaccurate, false, or misleading materials presented to the Board which formed the basis for the Resolution (2).

### 1) Failure to consider material information

The Rationale for the Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*". However, the Resolution lists materials and documents reviewed by the NGPC as part of its deliberations and the Requesters note that such list does not include the letters sent by the Requesters, EFOW and CNAOC, to the Chair of the ICANN Board, the Chair of the NGPC Board and the CEO and COO of ICANN. Such correspondence is available at:

<http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en.pdf>

and

<http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en.pdf>.

In addition, such list of materials and documents reviewed by the NGPC does not include any of the letters sent by the European Commission and other wine and spirit stakeholders.

Such correspondence would, or at least should, have had an important impact on any Resolution issued with respect to the delegation of the .WINE and .VIN

extensions.

2) The Resolution is based on inaccurate, false, or misleading materials

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013.

However:

(i) such letter was sent to the ICANN Board without being circulated to GAC members first.

(ii) as explained in section 6. above, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC.

This letter, which is one of the grounds of the Resolution, is therefore clearly misleading.

(b) the failure to give the GAC an opportunity to comment on the materials used by the NGPC

Although required to do so pursuant to Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws, the NGPC did not provide the GAC with an opportunity to comment on the legal opinion issued to the ICANN Board NGPC by a University Professor, Jérôme Passa, or on the other materials used by the NGPC to issue the Resolution. Although not inaccurate, false or misleading *per se*, the materials considered by the NGPC to issue the Resolution are marred by a procedural error. The materials which form the basis of the Resolution should therefore be considered as misleading and inaccurate.

On 27 March 2014, in the Singapore Communiqué, the GAC noted that "*there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6*" in the Resolution and advised that the ICANN Board reconsider the matter before delegating the .WINE and .VIN strings. The GAC further advised that "*concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.*"

In its recent Resolution of 4 April 2014, the NGPC accepted the GAC's advice in the Singapore Communiqué and recognized that "*some GAC members remain concerned about the .WINE and .VIN applications*" and that "*this is a matter of great importance to these GAC members, as well as to the interested applicants for these top level domains*".

However, the NGPC stated that there had been no process violation or procedural error under the Bylaws.

The NGPC concluded that the applications for .WINE and .VIN should not commence the contracting process for 60 days from the date of publication of its new resolution "*in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do*".

The NGPC recommended "*that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns*".

This recommendation underlines the larger picture here and the unintended consequences of allowing the gTLDs in question to proceed without adequate safeguards in place given the clear and present danger. The Requesters and many of the European governments have raised their significant concerns. The goal here is not to prevent the .WINE and .VIN TLDs proceeding to delegation but to ensure the applicants provide adequate safeguards. If there are not adequate safeguards in place then the only solution to avoid this complex subject having unintended consequences for consumers and wine producers alike would be to not allow these TLDs to proceed to delegation.

In light of the GAC's Singapore Communiqué and the NGPC Resolution of 4 April 2014, it would seem that, although recognized by the GAC, the NGPC refuses to acknowledge the procedural issues raised by the Resolution. However, both the GAC and the NGPC seem to now understand the importance of additional safeguards and the pursuit of an agreement between the interested parties.

(c) the content of the legal opinion issued by Mr Passa

Concerning the legal opinion provided by Mr Passa, the Requesters concur with the European Commission's comments concerning both the procedural aspects relating to such opinion and its content (available at <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>). In particular, like the European Commission, the Requesters question the transparency of such legal opinion given that the process of appointing Mr Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded has not

been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr Passa's external expert legal advice is sufficiently thought through and pertinent and whether Mr Passa has considered the politically sensitive background of this matter when issuing his advice. For example, the Requesters note that Mr Passa only refers to the application filed by one of the applicants, namely the Donuts company. The Requesters therefore suggest that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is however worthwhile noting that Mr Passa clearly states in his opinion that, if ICANN "*had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD.*"

This would certainly appear to be a key point in the advice provided by Mr Passa, and this point is completely ignored by the NGPC not being mentioned at all in the Rationale for the Resolution. The Rationale seeks to justify the Resolution by quoting from another part of the expert expert analysis saying that there is no rule of law or general principle which obliges ICANN to reject the applications. The Requesters agree with this point but respectfully submits that this is not the point to consider. The point is, exactly as Mr Passa states, that if the registry for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr Passa is of the opinion that ICANN should reject the application.

## **9. What are you asking ICANN to do now?**

The Requesters respectfully request from ICANN to:

- a) Reconsider and reverse the Resolution 2014.03.22NG01;
- b) As part of its reconsideration, take into account the existing relevant materials which failed to be considered when reaching the Resolution;
- c) Grant the necessary time to applicants and interested parties to reach a proper agreement before the delegation of the .WINE and .VIN gTLD strings, without setting a deadline for doing so.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

Under the language of the ICANN Bylaws, a Requester may bring a case if it has been affected by:

- one or more staff actions or inactions that contradict established ICANN policy(ies); or
- one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

In this case, the Requesters submit that they have been harmed by the series of process violations and procedural errors made by the NGPC in reaching the Resolution, as detailed in section 6. above.

The Requesters have a vested interest in the Resolution. The Resolution concluded that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*". The Requesters represent the interests of grape growers and wine and spirit drink producers, which are protected by GIs. They would therefore be most concerned by the delegation of the .WINE and .VIN extensions without the implementation of safeguards protecting GIs as such outcome would be highly detrimental to the interests of the wine and spirit industry. Indeed, proceeding through the normal evaluation process without additional safeguards would prevent the wine and spirit industry from protecting itself against any misuse, evocation or undue appropriation of the relevant GIs.

GIs are understood by consumers to denote the origin and the quality of products produced in a specific geographical area. GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality.

Since 1994, the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) – which has currently 159 Member States – recognizes GIs as an independent category of intellectual property, along with copyright, trade marks, patents and industrial designs. A

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<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPS"

vast majority of WTO Member States have issued specific laws on GIs and established transparent lists of the national and foreign GIs protected within their jurisdiction. Denying protection to GIs in the ICANN new gTLDs process would amount to not respecting the internationally recognised rules on intellectual property rights and would weaken the overall new gTLD system.

If GIs are not adequately protected as part of the .WINE and .VIN TLDs, this would indeed impede the application, in the .WINE and .VIN TLDs spaces, of the relevant legislation applicable to GIs, and more particularly the protection granted to GIs by the TRIPs and Lisbon Agreements as well as by the relevant EU and national regulations, and such spaces would then become tainted "lawless" zones in which the main actors of the wine industry could refuse to participate. Therefore, the adverse impact of the Resolution would likely be significant as it would undermine the business of a whole industry.

It would also be extremely unfair, unbalanced and inconsistent to end with a situation where GIs would be adequately protected both in the non-virtual space and in the general existing internet world but not in the soon to be created .WINE and .VIN spaces. Such discrepancy would be considerably dangerous and would threaten the otherwise stable business of the wine and spirit industry.

It should be noted that the applicants and interested parties are currently negotiating with a view to reach an agreement whereby the GIs would be adequately protected. Given the time and efforts invested by the Requesters to try to find an amicable solution with the .WINE and .VIN applicants, the outcome of the Resolution would negate these efforts to find a balanced solution in this respect. The delegation of the .WINE and .VIN TLDs without any of the safeguards which are at the core of the amicable solution, would thus contradict ICANN policies requiring, *inter alia*, fairness, non-discriminatory treatment, neutral application of established policies and predictability.

The three Requesters represent, together, the producers of wines and spirit from France, Hungary, Italy, Portugal and Spain. They therefore represent a wide array of interested parties and are supported by 34 others countries within the GAC, such as South America and Africa, and have the full support of other wine producers, whether located within or outside the European Union, such as in the United States, Canada and Australia.

The Requesters would indeed like to stress that this important issue is not just of concern to the wine producers in the European Union Member States, but also globally. Whilst the Requesters have sought to bring the subject to the attention of global wine producers this is by no means an easy task, especially when short timetables have been imposed previously for negotiations to take place. However, this outreach has borne fruit and raised concern in other countries and the letters dated 3 April 2014 from the Napa Valley Vintners and The Long Island Wine Council, both based in the USA highlight this.



The production of wines and spirits is not only of significant cultural importance to many countries, but also of considerable economic importance. Indeed, the important wine market accounts globally for more than \$270 billion in sales, of which on-line sales represent a significant and growing proportion. In the case of France, the wine sector is the second most important sector present on the international market (after aeronautics).

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

The Requesters represent, together, a number of wine and spirit producers and would suffer the same type of harm if the Resolution was enforced instead of being overruled as requested.

**Do you have any documents you want to provide to ICANN?**

1. [Resolution 2014.03.22.NG01](#)
2. [GAC Advice 2013-09-09-wine and vin](#)
3. [Letter dated 12 September 2013 from the European Commission](#)
4. [Letter dated 7 November 2013 from the European Commission](#)
5. [Letter dated 3 February 2014 from the European Commission](#)
6. [Jérôme Passa's legal opinion](#)
7. [GAC's Singapore Communiqué of 27 March 2014](#)
8. [Letter dated 18 March 2014 from the European Parliament](#)
9. [Letter dated 26 March 2014 from the European Commission](#)
10. Letter dated 1 April 2014 from the Consorzio Vino Chianti Classico (Annex I)
11. Letter dated 2 April 2014 from the European Commission (Annex I)

12. Letter dated 2 April 2014 from the Comité Interprofessionnel du Vin de Champagne (CIVC) (Annex I)
13. Letter dated 2 April 2014 from the CONSEJO REGULADOR de la denominación de Origen Calificada (D.O.Ca) RIOJA (Annex I)
14. Letter dated 3 April 2014 from the Instituto os Vinhos do Douro e do Porto (Annex I)
15. Letter dated 3 April 2014 from the Long Island Wine Council (Annex I)
16. Letter dated 3 April 2014 from the Napa Valley Vintners (Annex I)
17. Letter dated 3 April 2014 from the Consejo Regulador Do Jerez-Xérès-Sherry (Annex I)
18. Letter dated 7 April 2014 from the Santa Barbara Vintners (Annex I)
19. [Resolutions 2014.04.04.NG01 – 2014.04.04.NG04](#)

### **Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



8 April 2014

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Signature

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Date

# **REQUEST 14-19**

## Reconsideration Request Form

### 1. Requester Information

*Ministero dello Sviluppo Economico*  
Uffici di diretta collaborazione del Ministro  
Struttura: UDG  
**REGISTRO UFFICIALE**  
Prot. n. 0008326 - 09/04/2014 - USCITA

#### Requester Information

**Name:** Federica Guidi, Minister of Economic Development

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

### 2. Request for Reconsideration of (check one only):

X Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered.

This request is submitted against **Resolution 2014.03.22.NG01** since the NGPC did not consider it to be superseded by Resolutions 2014.04.04 NG01-2014.04.04 NG04. The undersigned considers that once Resolution 2014.03.22.NG01 is duly reconsidered, Resolutions 2014.04.04 NG01-2014.04.04 NG04 should be declared null and void, since they depart from the mistaken conclusions drawn in Resolution 2014.03.22.NG01.

The undersigned seeks that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, due to the Resolution conclusion that that *"the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process"*.

Such conclusion was drawn given the following Rationale 2014.03.22.NG01: *"The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process"*. The effect of the NGPC's action concerning the Governmental Advisory Committee advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs, and renders useless any on-going negotiations among the parties

It should be noted that the aforementioned the GAC Register of Advice identified as 2013-09-09-win e and vin, which constitutes the basis for this Resolution, **is the result of a breach of GAC Operating Procedure number 47 (OP47)**. The GAC Consensus given in Beijing (not to delegate the strings pending negotiations between the parties) was **overruled inappropriately when the GAC Chair advised the Board to proceed with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached, as clearly indicated in OP47**. Accordingly, the statement that "*The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*" is not a consensus view of the GAC as per the aforementioned Operating Principle, it does not convey the full range of views in the GAC, and does only represent a mere interpretation and opinion of the GAC Chair. As such, due to the procedural mistake, it should not be taken by the NGPC or the ICANN Board as a basis for any of its Resolutions.

In addition, reconsideration is requested on the grounds that the cited Resolution is not based on the relevant materials and communications addressed by European Commission and other stakeholders to the ICANN Board via ICANN's correspondence site, and on the grounds that, to the contrary, the Resolution is based on a piece of **flawed legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN**, provided by a selected expert to the ICANN's Board NGPC.

As per the legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the breach of **three** sections of the **Bylaws**.

a) **Bylaws Article XI-A, Section 1 subsection 3 which states:**

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice**". (emphasis added).

In this regard, the GAC can request "**at any time**" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, **will consult with the GAC regarding the appropriate source** from which to seek such advice including "**definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

b) **Bylaws Article XI-A, Section 1 subsection 6 which states:**

"6. *Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board*". (emphasis added)

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN is still trying to define appropriate safeguards for the protection of the public policy interest in the new gTLD Program. Despite the argument that the new gTLD policy development finalized in 2007, several policy changes had still taken place since 2007. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" received prior to "any" decision by the Board.

c) By-law XI.A Section 5 which states:

That the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its responsibilities", without specific reference to implementation or policy-development process.

In any event, and despite the fact that the case in hand is clearly a matter of public policy relevance, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its next Rationale due explanations as regards the reasons why

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- c) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

Unfortunately, to date none of the .WINE and .VIN applicants have unequivocally included in their applications appropriate safeguards for the protection of Geographical Indications (GI's). Therefore, if according to the Resolution 2014.03.22.NG01, these applications were to proceed through the normal evaluation process, then there would be significant concern that the safeguards which are necessary for a sound and acceptable functioning of the TLDs would not be guaranteed.

The text of the Resolution reads as follows:

"Main Agenda:

- a. Outstanding GAC Advice

Whereas, on 11 September 2013, the Governmental Advisory Committee (GAC) issued advice to the ICANN Board that it had finalized its consideration of the strings .WINE and .VIN.

*Whereas, the GAC advised the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, in the Buenos Aires Communiqué, the GAC noted that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

*Whereas, the NGPC commissioned an analysis [PDF, 772 KB] of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN, which the NGPC considered as part of its deliberations on the GAC's advice.*

*Whereas, the Bylaws (Article XI, Section 2.1) require the ICANN Board to address advice put to the Board by the GAC.*

*Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012 to exercise the ICANN Board's authority for any and all issues that may arise relating to the new gTLD Program.*

*Resolved (2014.03.22.NG01), the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process.*

#### *Rationale for Resolution 2014.03.22.NG01*

*The NGPC's action today, addressing the open item of GAC advice concerning .WINE and .VIN, is part of the ICANN Board's role to address advice put to the Board by the Governmental Advisory Committee (GAC). Article XI, Section 2.1 of the ICANN Bylaws <<http://www.icann.org/en/about/governance/bylaws#XI>> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning .WINE and .VIN. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.*

*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC "has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process." The effect of the NGPC's action concerning the GAC advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs.*

*As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant responses are provided at:*

<http://newgtlds.icann.org/en/applicants/gac-advice/>. The NGPC has considered the applicant responses in formulating its response to the item of GAC advice being addressed today.

Additionally, on 28 September 2013, the NGPC noted that it stood ready to hear from GAC members as to the nature of the differences in views expressed in the advice while the NGPC analyzed the GAC's advice. Several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed, with some individual governments expressing concerns that additional safeguards should be imposed before the strings are delegated, while others recommended that no additional safeguards should be imposed on the strings.

In response to the GAC's suggestion in the Buenos Aires Communiqué, the NGPC commissioned an analysis of the legally complex and politically sensitive background on this matter in the context of the GAC advice in order to consider the appropriate next steps of delegating .WINE and .VIN. The expert analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions.

As part of its deliberations, the NGPC reviewed the following materials and documents:

GAC Beijing Communiqué:

[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130718.pdf?version=1&modificationDate=1375787122000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB]

GAC Durban Communiqué:

[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 104 KB]

GAC Buenos Aires Communiqué:

[https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB]

Letter from H. Dryden to S. Crocker dated 11 September 2013 re: .vin and .wine:

[https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board\\_20130909.pdf?version=1&modificationDate=1379026679000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board_20130909.pdf?version=1&modificationDate=1379026679000&api=v2) [PDF, 63 KB]

Applicant responses to GAC advice: <http://newgtlds.icann.org/en/applicants/gac-advice/>

Applicant Guidebook, Module 3: <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]

There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. As part of ICANN's organizational administrative function, ICANN posted the Buenos Aires GAC advice and officially notified applicants of the advice on 11 December 2013. The Durban Communiqué and the Beijing



*Communiqué were posted on 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1".*

**4. Date of action/inaction:**

The ICANN Board New gTLD Program Committee (NGPC) Resolved on 22.03.2014. Even though the URL <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22.03.2014 has the date for Resolution 22.03.2014 it was only published on **25.03.2014**. The latter date was shown for some days on that very URL as the date of publication of the resolution and its rationale, **but it has now changed**.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned and the Italian Delegation to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communique drafting session. It should be highlighted that Governmental Advisory Committee was not informed of the existence of this Resolution during the specific session between the GAC and the NGPC that took place on 25.03.2014 (**the date of online publication of the Resolution challenged**).

**6. Describe how you believe you are materially affected by the action or inaction:**

Italy has serious concerns with the Resolution 2014.03.22.NG01 as well as its Rationale and the process that has been followed to arrive at this Resolution.

Despite having a GAC liaison member on the NGPC, the GAC was not aware until 26 March of this decision or its mistaken rationale. Had it been the case, the GAC could have corrected any misunderstandings and thus pre-empted the NGPC's resolution.

It is also worth noting that the NGPC resolved on the grounds of false information as it is our understanding, as reported by ICANN's CEO, that members of the NGPC were informed that the negotiations between applicants and wine rightholders had come to a satisfactory ending, which was not the case.

The Resolution, its Rationale and the procedural breaches connected to such Resolution and Rationale materially affect the Requestors for the following reasons:

1) Grounds for the Resolution

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that *"there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process"*.

However, such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 09.09.2013 without it being circulated to GAC members.

Principle 47 of the GAC Operating Principles provides that *"[t]he GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board."*

Principle 47 of the GAC Operating Principles refers to the concept of "consensus" as per the practice of the United Nations. In this respect, consensus is understood as follows: *"the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions "without a vote", "by consensus" and "by general agreement" are, in the practice of the United Nations, synonymous and therefore interchangeable."*

The statement that the GAC *"has finalized its consideration of the strings .wine and .vin"* and further advised that *"the applications for .WINE and .VIN should proceed through the normal evaluation process"* is not a consensus view of the GAC.

Given the lack of consensus and the fact that the letter of 09.09.2013 did not convey the full range of views expressed by the GAC members, the Requesters conclude that such letter was sent to the ICANN Board in breach of the GAC Operating Principles and can't therefore be taken as a basis for any Resolution.

Practically speaking, the fact that the GAC has actually not reached any consensus in this matter cannot have the effect of having the strings proceed through the normal evaluation process without further consideration. To the contrary, the lack of consensus means that this matter requires further consideration.

(b) an apparent lack of liaison

(i) in relation to the alleged consensus

The GAC Chair, as a non-voting liaison member of the NGPC, should surely have brought the lack of consensus and background to the attention of the NGPC more fully, or the NGPC should have enquired about this knowing the seriousness of the issue for a number of governments, and surely provided background to the letter of 11 September 2013 with the claim therein that the GAC has advised the ICANN Board that there was no GAC consensus advice on additional safeguards for the .WINE and .VIN TLDs, and the GAC *"has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process"*. Indeed such claim is disingenuous at best as it was clear, and is still clear, if the subsequent correspondence from the European Commission, available at <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en> and <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>, is considered, that there was no consensus within the GAC that additional

safeguards were not necessary, nor was there consensus to proceed through the normal evaluation process.

(ii) in relation to the status of the negotiations between the interested parties

Some NGPC members have stated that they were under the impression that the negotiations with the applicants were concluded or almost concluded when this was not the case when the Resolution was passed. Such statement is based upon misinformation and, as such, in itself undermines the ongoing negotiations in that there is then no incentive for the applicants to finalise the negotiations or resolve the outstanding points.

In that regard, it should be noted that the subsequent Resolution issued by the NGPC on 04.04.2014 does grant additional time, namely 60 days, for the interested parties to negotiate. However, this Resolution provides that, "*[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting*". This seems to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, once again, the applicants would be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once such deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to one of its applicants. Such context is far from being favourable to negotiations in good faith and to the pursuit of a balanced agreement.

(c) Jérôme Passa's legal opinion

The resolution challenged is also based on an opinion issued to the ICANN Board NGPC by a University Professor, Jérôme Passa, a piece of **flawed and misinterpreted legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN.**

As per such legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the **breach of at least three sections of the Bylaws.**

a) Bylaws Article XI-A, Section 1 subsection 3 which states:

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice**". (emphasis added).

In this regard, the GAC can request "**at any time**" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, "**shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements**

**including definition of scope and process"** for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

b) Bylaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon **any external advice** received prior to any decision by the Board". (emphasis added)*

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN and the GAC is still trying to define appropriate safeguards for the protection of the public policy interest in wine-related new gTLDs. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" receive prior to any decision by the Board.

Also By-law XI.A Section 5 clearly says that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its **responsibilities**", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its Rationale due explanations of the reasons why**

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- c) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

2) Failure to consider relevant comments and communications

The Resolution fails to refer to and to take into consideration comments and documentation provided by the relevant stakeholders to the ICANN Board, such as follow up letters sent by the European Commission to the ICANN Board and the NGPC and letters sent by worldwide wine-related stakeholders. **This constitutes an additional breach of the ICANN Bylaws which promotes the notions of fairness, transparency and openness.**

3) Lack of information from the GAC Chair

The GAC Chair is a non-voting liaison on the NGPC. In this respect, Article VI, Section 9 of the ICANN Bylaws provides that *"non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization"*.

The GAC Chair therefore had a duty to inform the GAC of the Resolution but the GAC Chair failed to do so. In addition, the GAC Chair should inform the GAC of its presence or absence at the meetings

in which the NGPC considers, among its agenda points, issues pertaining to the public policy interests and pertaining to the work of the GAC.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The protection of GIs serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Consumers procuring wine on line via Internet could indeed be deceived into believing that they are buying a genuine “Made in Italy” product with specific qualities and characteristics of a product with geographic indication, when they are in fact they are buying an imitation. Further the rights of holders of geographic indication would be impaired. Therefore, the adverse impact of the Resolution could be considerable.

If the applications for .WINE and .VIN proceed through the normal evaluation process, as per the Resolution's conclusion, the direct consequence would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there is an important number of small wine producers which play a crucial role for the sustainability of their communities and regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the Requesters fear that the potential for abuse would considerably increase in online spaces where no specific protection would be granted to GIs. If Italian wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse and fraudulent activities. The global scope of the .WINE and .VIN TLDs and a lack of clear rules and safeguards can indeed only amplify these problems including as follows:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited “Made in Italy” products may be facilitated;
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs and this is certainly not the result expected by the applicants to these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Italy and also across the globe but also is an incredible missed opportunity to create a secure and safe space in the DNS which is supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The Requesters therefore call for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

## 8. Detail of Board or Staff Action – Required Information

This request relates to a Board Action, namely the adoption of a Resolution which is due to: a) material information not considered by the Board and b) based upon inaccurate, false or misleading materials (and information) presented to the Board and which formed the basis for the Resolution to be reconsidered.

1) The Board has not considered certain material information. Although the body of the Rationale for Resolution notes that "several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union and fully supported by Italy (currently posted under ICANN's correspondence and which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>

Such correspondence would, or at least should, have had an important impact on any Resolution issues, with respect to the delegation of the .WINE and .VIN extensions.

2) The ICANN Board NGPC has also based its Resolution upon inaccurate, false and misleading materials (and information), and which formed the basis for the Board action being challenged.

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013.

However:

(i) such letter was sent to the ICANN Board without being circulated to GAC members first.

(ii) as explained in section 6. above, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC.

This letter, which is one of the grounds of the Resolution, is therefore clearly misleading.

(b) the failure to give the GAC an opportunity to comment on the materials used by the NGPC and the failure to clarify with the GAC the appropriate source from which the advice should be sought including the definition of the scope and process.

In first place, it should be clarified that the matter in hand it is a matter of public policy and not merely a matter of implementation. Additionally, the undersigned understands that the By-laws remain the main source of procedural rules for ICANN, and that in any case they prevail over the By-laws as it will be shown below.

- Bylaws Article XI-A, Section 1 subsection 3 states that the GAC can request "**at any time**" to board to seek advice in matters of public policy, and that the Board "**shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.
- Bylaws Article XI-A, Section 1 subsection 6 states that the GAC has the opportunity to comment upon "**any external advice**" received by the Board and prior to "**any decision**". In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation" matters, while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, the GAC (and subsequently ICANN) is still trying to define appropriate safeguards for the protection of the public policy interest.
- By-law XI.A Section 5 clearly indicates that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its **responsibilities**", without specific reference to implementation or policy-development process.

In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its rationale due explanations to clarify why:

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- c) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

(c) the content of the legal opinion issued by Mr Passa

Concerning the legal opinion provided by Mr Passa, the undersigned would like to remind of the content of the European Commission's comments concerning both the procedural aspects relating to such opinion and its content (available at <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>). In particular the European Commission questions the transparency of such legal opinion given that the process of appointing Mr Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr Passa's external expert legal advice is sufficiently thought through and pertinent and whether Mr Passa has considered the politically sensitive background of this matter when issuing his advice. For example, the undersigned notes that Mr Passa only refers to the application filed by one of the applicants, instead of referring, in general, to the three applications. It is therefore suggested that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is however worthwhile noting that Mr Passa clearly states in his opinion that, if ICANN "*had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD.*"

This would certainly appear to be a key point in the advice provided by Mr Passa, and this point is completely ignored by the NGPC not being mentioned at all in the Rationale for the Resolution. The Rationale seeks to justify the Resolution by quoting from another part of the expert analysis saying that there is no rule of law or general principle which obliges ICANN to reject the applications. The Requesters agree with this point but respectfully submits that this is not the point to consider. The point is, exactly as Mr Passa states, that if the registry for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr Passa is of the opinion that ICANN should reject the application.

**In terms of the form of the legal report provided to the NGPC and the conditions surrounding its authorship and its submission:**

The undersigned seeks clarification of the following issues:

- Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad*



*personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

- Taking into account that the Buenos Aires GAC Communique requested the Board to "seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?
- Taking into account that the expert report is not dated, can the NGPC confirm the date in which the report was drafted? Can the NGPC confirm that the report seems to have been delivered on 22.03.2014 as indicated in ICANN's website <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en> and that as such, the NGPC resolved on the matter on the very same day that the report was delivered being that the reason why the NGPC did not consult the GAC?

Pending clarification of the aforementioned matters through a response of the current reconsideration, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

**In terms of substance of the legal report provided to the NGPC**, the undersigned would like to make reference to the letter sent by the European Commission to the ICANN Board on 02.04.2014 (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), and seek clarification of why the content indicated in the following sections has not been taken into account in any NGPC Resolution, notably for what concerns the obligation for the Registry/Registrar of the .WINE and .VIN gTLDs to implement protective measures:

- In point 1, § 6, the author indicates that "*It then becomes the registrar of these third-party domain names, and as such, draws up its own naming conventions, laying down the conditions under which third parties can reserve these domain names*". This confirms our views that ICANN is not the best placed party to adjudicate on the matter and that the implementation of safeguards should be left to the concerned parties (applicants and rightholders)
- In Point 10, § 1 the author indicates that "*ICANN had serious reasons for believing that the registry of the new gTLD ".wine" or". vin" would assign domain names to third parties without taking account the protection of wine-related geographic indications, i.e.: without taking precautions designed to prevent infringements of these geographical indications in its relations with its contracting parties, that it would then be able to reject the application for the new gTLD" and "based on a simple precautionary measure designed to prevent what are deemed to be sufficiently serious risks of an infringement of the geographical indication" as set forth in Point 10, § 2, .* The application of this precautionary measure appears hence justified due to the lack of commitment of the applicants to the on-going negotiations.
- In point 2, § 1, the author rightfully acknowledges yet that "*reservation of a new gTLD may infringe prior third-party rights or, more generally, interests*".

- The author notes in Point 5, iii) that *"a party reserving a domain name does not necessarily have the right to use the geographical indication in question for wines or for products or another type which it sells on the website identified under the domain name in question"*, therefore recognizing the existence of a high risk of third-party rights misuse and misappropriation.
- It is also worth noting that the author, in Point 9, § 2 explicitly mentions that *"If, however, he [understood as the "registrant"] also sells, on his website, products which do not benefit from this geographical indication, it is likely that such sales may constitute an infringement of the geographical indication"*. The matter, indeed, as indicated in Point 9, § 2, would require a case by case analysis by reference to a given geographical indication *"which would allow to identify the international, regional –notably European- or national rules governing it and which are therefore applicable"*.
- Moreover, as already requested by European and other GAC members, in Point 11, § 1 the author concurs with our opinion and expressed that *"Naturally, pursuant to the rules laid down by ICANN, the registry agreement – an agreement concluded between ICANN and the owner of the new gTLD – may inform this owner of the need to ensure that its co-contracting parties respect third-party rights and, in particular, geographic indications"*.
- Furthermore, Point 11, § 2, also in full accordance to the views of the European Commission, Italy and other interested governments and parties, confirms that *"if this agreement did not make express provision for it, no fault could be attributed to ICANN for it is the registry of the new gTLD in its capacity as a professional to automatically take precautions designed to avoid domain name users, its partners, from infringing third party rights"*. It is for that reason that applicants have been continuously encouraged since the ICANN Beijing meeting in mid-2012 to come to an agreeable solution with wine rightholders to ensure that adequate safeguards are provided in the delegation of the ".wine" and ".vin" gTLDs.

## 9. What are you asking ICANN to do now?

The undersigned, on behalf of Italian Government, respectfully request from ICANN to:

- a) reverse its Resolution 2014.03.22NG01 considering the aforementioned information and comments; and further declare null and void Resolutions 2014.04.04 NG01-2014.04.04 NG04
- b) While reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed across this document and notably in Section 8.
- c) Provide explanations as regards:
  - a. How ICANN's Board NGPC resolutions are affected when they are based upon GAC advice given in breach of GAC Operating Principles.
  - b. Explanation of "policy vs. implementation" as regards the application of the By-laws for what concerns expert advice, and notably the By-laws breached by Resolution 2014.03.22.NG01 an taking into account the arguments listed under Sections 2, 6 and 8 of the current reconsideration request.
  - c. Explanation of cases in which the Applicant Guidebook may prevail of the general ICANN By-laws.

- d. Explanation of the questions raised by the undersigned in Section 8.c) and of how the relevant sections included in the expert legal advice provided by Jerome Passa and which favor the protection of GIs have been taken into account and will be taken into account.
- d) Grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline. In this regard, the undersigned notes that in previous negotiations under pressure due to a tight deadline (30 days after the Durban GAC Communique) those negotiations were rendered useless as applicants had the incentive to wait until the GAC as a whole or the Board resolved on the matter.
- e) Evaluate the negative effects for the Domain Name Security, Resilience and Stability produced by the NGPC Resolution challenged, taking into account that European Union, Italy and other Member States would have to seek blocking measures in order to safeguard the protection of EU Regulation in the field of Geographical Indications, as well as in the field of consumer protection and competition.
- f) Have the full ICANN Board reconsidering the matter, according to the External Expert advice rules set forth under ICANN By-laws.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

In addition to the elements noted in Section 6 of this Reconsideration Request, it is clear that the Resolution breached the ICANN Bylaws. The conclusion of the Resolution, which is based on such violation, is highly detrimental to the interests of the wine and spirit industry. Indeed, the Resolution concluded that *"the applications for .WINE and .VIN should proceed through the normal evaluation process"*. In Italy the overwhelming majority of wines produced are covered by geographical indications ("**GIs**"). Therefore, the risk of applications for second-level domain names as part of the .WINE and .VIN TLDs, that would constitute a misuse, evocation or otherwise undue appropriation of a vested right related to an Italian GI for wines is considerable. Proceeding through the normal evaluation process without additional safeguards would negate the Italian wine and spirit industry's ability to protect its GIs against such misuse, evocation or undue appropriation. In addition, this would prevent the applicants and interested parties to continue their negotiations with a view to reach an agreement on the matter. Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards, while the applicants and interested parties seeking GI protection have not had adequate time in order to reach proper agreement, would therefore seriously undermine the protection granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs also serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine "Made in Italy" product with specific qualities and characteristics, when they are in fact getting an imitation. Therefore, the adverse impact of the Resolution could be considerable.

Failure to follow the specific policies described above results in further contradiction of ICANN policies ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability.

Italy is the second Member State for worldwide sales of GIs. Indeed in 2010, the value of GIs is estimated at €11.8 billion at wholesale stage. Of these total sales, Italian GIs regarding wines actually account for 48% plus 1% for spirits.

Italian products represented by far the largest share of extra-EU exports (62%). The first five designations (3 PDOs and 2 PGIs) represented 55% of all extra-EU exports. The link below refers to comprehensive data in that respect:

[http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report\\_en.pdf](http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report_en.pdf)

It stems from the above that Italian GIs for wines represent an utterly high asset, whose reputation and considerable value are undisputed. Accordingly, their protection against misuse, evocation or otherwise undue appropriation is of the utmost importance.

In order to ensure such protection:

At international level, Article 23 of the Trips Agreement requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated, even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see Article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against :

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

Italy is accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member

States to ensure that "*The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Regulation (EU) No 607/2009, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue.*"

It stems from the above that Italy is bound to take the appropriate measures in order to tackle any misuse of protected GIs.

In the present circumstances, considering on one hand the worldwide coverage of internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the Italian GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to Italian GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these Italian GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

The undersigned represents the Italian Government and represents Italian citizens, consumers and wine producers in the defense of the national public policy interests that concerns them in the case in hand

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

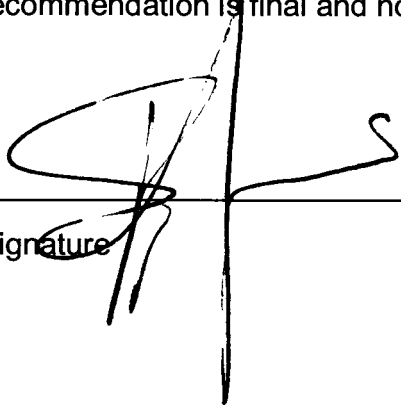
The Board Governance Committee may dismiss Reconsideration Requests that

are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

  
\_\_\_\_\_  
Signature

**- 9 APR. 2014**  
\_\_\_\_\_  
Date

# **REQUEST 14-20**



### Reconsideration Request Form

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

#### 1. Requester Information

**Name:** Nuno Crato, Minister of Education and Science, responsible for the coordination of Information Society, on behalf of the Portuguese Government

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

#### 2. Request for Reconsideration of (check one only)

Board action/inaction

Staff action/inaction

#### 3. Description of specific action you are seeking to have reconsidered

This request is submitted against **Resolution 2014.03.22.NG01** since the NGPC did not consider it to be superseded by Resolutions 2014.04.04 NG01-2014.04.04 NG04.

The undersigned seeks that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, due to the Resolution conclusion that that "*the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such conclusion was drawn given the following Rationale 2014.03.22.NG01: "*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*". The effect of the NGPC's action concerning the Governmental Advisory Committee advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs, and will be useless any on-going negotiations among the parties.

It should be noted that the aforementioned the GAC Register of Advice identified as 2013-09-09-wine and vin, which constitutes the basis for this Resolution, is the result of a breach of GAC Operating Procedure number 47 (OP47). The GAC Consensus given in Beijing (not to delegate the strings pending negotiations between the parties) was

Contact Information Redacted





overruled inappropriately as it has not presented the different views on the delegation of the WINE gTLDs as no consensus was reached, as clearly indicated in OP47. Accordingly, the statement that "*The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*" is not a consensus view of the GAC, as it does not convey the full range of views in the GAC. As such, due to the procedural mistake, it should not be taken by the NGPC or the ICANN Board as a basis for any of its Resolutions.

The Resolution 2014.03.22.NG01 was posted in the ICANN website. This request is submitted in case Resolution 2014.03.22NG01 is not deemed superseded by resolutions 2014.04.04 NG01-2014.04.04NG04.

#### **4. Date of action/inaction**

The ICANN Board New gTLD Program Committee (NGPC) Resolved on 22.03.2014. Even though the URI <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22.03.2014 has the date for Resolution 22.03.2014 it was only published on 25.03.2014. The latter date was shown for some days on that very URL as the date of publication of the resolution and its rationale, but it has now somehow changed.

#### **5. On what date did you become aware of the action or that action would not be taken?**

The undersigned and the Portuguese GAC representative to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communique drafting session. It should be highlighted that Governmental Advisory Committee was not informed of the existence of this Resolution during the specific session between the GAC and the NGPC that took place on 25.03.2014 (the date of online publication of the Resolution challenged).

#### **6. Describe how you believe you are materially affected by the action or inaction:**

The Portuguese Government is mandated by its Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interest and rule of law can be adversely impacted by the Resolution 2014.03.22.NG01.



Bearing this in mind, the grape growers and wine producers based in the Douro demarcated origin (PDO Porto) seek to increase the protection of wine quality and labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the [Joint Declaration to Protect Wine Place & Origin \(www.protectplace.com\)](http://www.protectplace.com) are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

In this context, the undersigned expresses deep concern with regard to how the new .wine and .vin gTLDs may negatively impact the ability to protect against fraudulent use of wine related Geographical Indications (GIs) and the wine regions. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin” (article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS). GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA’s perform a similar role in identifying for consumers where their wines come from.

The value of Portuguese wine exports has increased in the last few years, reaching a total 725 million euros in 2013 (a growth of 2.4% in comparison with the previous year), **being that wine is the main product in Portuguese food products exports (16% in 2011).**

Looking at Portuguese wine exports in 2013, Port Wine represented 22.8% of the whole lot and 43.6% of the total value, registering an increase of 6% in its average price, which leveraged the growth of the exported value.

It should also be noted that the subsequent Resolution issued by the NGPC on 04.04.2014 which grants additional time, namely 60 days, for the interested parties to negotiate, it provides, however, that, *"[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting"*. This seems to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, once again, the applicants would be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once such deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to one of its applicants. Such context is far from being favourable to negotiations in good faith and to the pursuit of a balanced agreement.



**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The protection of GIs serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Consumers procuring wine on line via Internet could indeed be deceived into believing that they are buying a genuine EU product with specific qualities and characteristics of a product with geographic indication, when they are in fact they are buying an imitation. Further the rights of holders of geographic indication would be impaired. Therefore, the adverse impact of the Resolution could be considerable.

As reflected in section 6, consumers and right holders are the stakeholders affected by Resolution 2014.03.22.NG02. The protection of their legitimate rights has a public value as demonstrated above. The Portuguese Government represents that public interest and as such, it is also entitled to assert this reconsideration request.

**8. Detail of Board or Staff Action – Required Information**

This request relates to a Board Action, namely the adoption of a Resolution which is due to: a) material information not considered by the Board and b) based upon inaccurate, false or misleading materials (and information) presented to the Board and which formed the basis for the Resolution to be reconsidered.

1) The Board has not considered certain material information. Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union (currently posted under ICANN's correspondence and which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other wine-related stakeholders (including US-based wine rightholders). The



following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>

Such correspondence would, or at least should, have had an important impact on any Resolution issues, with respect to the delegation of the .WINE and .VIN extensions.

2) The ICANN Board NGPC has also based its Resolution upon inaccurate, false and misleading materials (and information), and which formed the basis for the Board action being challenged.

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013. However:

(i) such letter was sent to the ICANN Board without being circulated to GAC members first,

(ii) as explained in section 6. above, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC.



This letter, which is one of the grounds of the Resolution, is therefore clearly misleading.

(b) the failure to give the GAC an opportunity to comment on the materials used by the NGPC and the failure to clarify with the GAC the appropriate source from which the advice should be sought including the definition of the scope and process.

In first place, it should be clarified that the matter in hand it is a matter of public policy and not merely a matter of implementation. Additionally, the undersigned understands that the By-laws remain the main source of procedural rules for ICANN, and that in any case they prevail over the By-laws as it will be shown below.

- Bylaws Article XI-A, Section 1 subsection 3 states that the GAC can request "at any time" to board to seek advice in matters of public policy, and that the Board "shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.
- Bylaws Article XI-A, Section 1 subsection 6 states that the GAC has the opportunity to comment upon "any external advice" received by the Board and prior to "any decision". In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation" matters, while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, the GAC (and subsequently ICANN) is still trying to define appropriate safeguards for the protection of the public policy interest.
- By-law XI.A Section 5 clearly indicates that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its responsibilities", without specific reference to implementation or policy-development process.

In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its rationale due explanations to clarify why:

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

(c) the content of the legal opinion issued by Mr Passa



The Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr Passa's external expert legal advice is sufficiently thought through and pertinent and whether Mr Passa has considered the politically sensitive background of this matter when issuing his advice. For example, Mr Passa only refers to the application filed by one of the applicants, namely the Donuts company. It is therefore suggested that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is however worthwhile noting that Mr Passa clearly states in his opinion that, if ICANN *"had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD."*

This would certainly appear to be a key point in the advice provided by Mr Passa, and this point is completely ignored by the NGPC not being mentioned at all in the Rationale for the Resolution. The Rationale seeks to justify the Resolution by quoting from another part of the expert expert analysis saying that there is no rule of law or general principle which obliges ICANN to reject the applications. The Requesters agree with this point but respectfully submits that this is not the point to consider. The point is, exactly as Mr Passa states, that if the registry for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr Passa is of the opinion that ICANN should reject the application.

**In terms of the form of the legal report provided to the NGPC and the conditions surrounding its authorship and its submission:**

The undersigned seeks clarification of the following issues:

- Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?
- Taking into account that the Buenos Aires GAC Communique requested the Board to *"seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings"* can the NGPC clarify why this



question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?

- Taking into account that the expert report is not dated, can the NGPC confirm the date in which the report was drafted? Can the NGPC confirm that the report seems to have been delivered on 22.03.2014 as indicated in ICANN's website <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en> and that as such, the NGPC resolved on the matter on the very same day that the report was delivered being that the reason why the NGPC did not consult the GAC?

Pending clarification of the aforementioned matters through a response of the current reconsideration, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

**In terms of substance of the legal report provided to the NGPC**, the undersigned would like to make reference to the letter sent by the European Commission to the ICANN Board on 02.04.2014 (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), and seek clarification of why the content indicated in the following sections has not been taken into account in any NGPC Resolution, notably for what concerns the obligation for the Registry/Registrar of the .WINE and .VIN gTLDs to implement protective measures:

- In point 1, § 6, the author indicates that *"It then becomes the registrar of these third-party domain names, and as such, draws up its own naming conventions, laying down the conditions under which third parties can reserve these domain names"*. This confirms our views that ICANN is not the best placed party to adjudicate on the matter and that the implementation of safeguards should be left to the concerned parties (applicants and rightholders)
- In Point 10, § 1 the author indicates that *"ICANN had serious reasons for believing that the registry of the new gTLD ".wine" or". vin" would assign domain names to third parties without taking account the protection of wine-related geographic indications, i.e.: without taking precautions designed to prevent infringements of these geographical indications in its relations with its contracting parties, that it would then be able to reject the application for the new gTLD" and "based on a simple precautionary measure designed to prevent what are deemed to be sufficiently serious risks of an infringement of the geographical indication" as set forth in Point 10, § 2, . The application of this precautionary*



measure appears hence justified due to the lack of commitment of the applicants to the on-going negotiations.

- In point 2, § 1, the author rightfully acknowledges yet that *"reservation of a new gTLD may infringe prior third-party rights or, more generally, interests"*.
- The author notes in Point 5, iii) that *"a party reserving a domain name does not necessarily have the right to use the geographical indication in question for wines of for products or another type which it sells on the website identified under the domain name in question"*, therefore recognizing the existence of a high risk of third-party rights misuse and misappropriation.
- It is also worth noting that the author, in Point 9, § 2 explicitly mentions that *"If, however, he [understood as the "registrant"] also sells, on his website, products which do not benefit from this geographical indication, it is likely that such sales may constitute an infringement of the geographical indication"*. The matter, indeed, as indicated in Point 9, § 2, would require a case by case analysis by reference to a given geographical indication *"which would allow to identify the international, regional –notably European- or national rules governing it and which are therefore applicable"*.
- Moreover, as already requested by European and other GAC members, in Point 11, § 1 the author concurs with our opinion and expressed that *"Naturally, pursuant to the rules laid down by ICANN, the registry agreement – an agreement concluded between ICANN and the owner of the new gTLD – may inform this owner of the need to ensure that its co-contracting parties respect third-party rights and, in particular, geographic indications"*.
- Furthermore, Point 11, § 2, also in full accordance to the views of other interested governments, the European Commission and parties, confirms that *"if this agreement did not make express provision for it, no fault could be attributed to ICANN for it is the registry of the new gTLD in its capacity as a professional to automatically take precautions designed to avoid domain name users, its partners, from infringing third party rights"*. It is for that reason that applicants have been continuously encouraged since the ICANN Beijing meeting in mid-2012 to come to an agreeable solution with wine rightholders to ensure that adequate safeguards are provided in the delegation of the ".wine" and ".vin" gTLDs.

9. **What are you asking ICANN to do now?**





The undersigned notes that, to date, none of the .wine and .vin applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names. In this context, the undersigned respectfully request from ICANN to:

- a) reverse its Resolution 2014.03.22NG01 considering the aforementioned information and comments; and further declare null and void Resolutions 2014.04.04 NG01-2014.04.04 NG04
- b) While reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed across this document and notably in Section 8.
  - a. Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary to ensure that, if the extensions are delegated, there are additional safeguards around the .wine and .vin domain names with protection for GIs and all wine growing place names at the second level  
or
  - b. *A minima*, respectfully call for ICANN to grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline, whilst adequate protection is not granted,

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

In addition to the elements noted in Section 6 of this Reconsideration Request, it is clear that the Resolution breached the ICANN Bylaws. The conclusion of the Resolution, which is based on such violation, is highly detrimental to the interests of the wine and spirit industry. Indeed, the Resolution concluded that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*". In the European Union (EU) the overwhelming majority of wines produced are covered by geographical indications ("GIs"). Therefore, the risk of applications for second-level domain names as part of the .WINE and .VIN TLDs, that would constitute a misuse, evocation or otherwise undue appropriation of a vested right related to an EU GI for wines is considerable. Proceeding through the normal evaluation process without additional safeguards would negate the EU wine and spirit industry's ability to protect its GIs against such misuse, evocation or undue appropriation. In addition, this would prevent the applicants and



interested parties to continue their negotiations with a view to reach an agreement on the matter.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards, while the applicants and interested parties seeking GI protection have not had adequate time in order to reach proper agreement, would therefore seriously undermine the protection granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations that have to be taken seriously. The protection of GIs also serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine Douro demarcated origin (PDO Porto) product with specific qualities and characteristics, when they are in fact getting an imitation. Therefore, the adverse impact of the Resolution could be considerable.

Failure to follow the specific policies described above results in further contradiction of ICANN policies ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability. Indeed, the Requester has spent a considerable amount of time and efforts into trying to reach an agreement with the applicants to try to obtain that safeguards be implemented before the .WINE and .VIN strings are delegated and the Resolution would unfairly prevent it from reaching an agreement in this respect.

Within the EU, the European Commission is bound, pursuant to Article 17 of the Treaty on European Union, to *"promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. (...)*

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see Article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against :

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*



- (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;
- (d) any other practice liable to mislead the consumer as to the true origin of the product."

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...). Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

- (a) be such as could mislead the purchaser to a material degree, particularly:
- (i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"

Regulation (EU) No 607/2009, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue.*"

It stems from the above that both the Member States and the European Commission are bound to take the appropriate measures in order to tackle any misuse of protected GIs.

In the present circumstances, considering on one hand the worldwide coverage of internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?



Explain.

The undersigned represents the Portuguese Government and is put forwards on behalf of Portuguese citizens and consumers in the defense of the public policy interests that concerns them in the case in hand, and to ensure the rule of law in the European Union.

Allowing the applications for .wine and .vin to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers and citizens worldwide expect and are granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

**Do you have any documents you want to provide to ICANN?**

The relevant documents are linked in the text of the Reconsideration Request.

*Man L.*

Signature

*9.4.14*

Date

# **REQUEST 14-21**

## Reconsideration Request Form

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### 1. Requester Information

**Name:** Jean-Paul Zens, Director General of the Media and Communications Department

**Prime Minister's Office**

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

### 2. Request for Reconsideration of (check one only)

**Board action/inaction**

**Staff action/inaction**

### 3. Description of specific action you are seeking to have reconsidered

This request is submitted against **Resolution 2014.03.22.NG01** since the NGPC did not consider it to be superseded by Resolutions 2014.04.04 NG01-2014.04.04 NG04. The undersigned considers that once Resolution 2014.03.22.NG01 is duly reconsidered, Resolutions 2014.04.04 NG01-2014.04.04 NG04 should be declared null and void, since they depart from the mistaken conclusions drawn in Resolution 2014.03.22.NG01.

The undersigned seeks that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, due to the Resolution conclusion that that "*the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such conclusion was drawn given the following Rationale 2014.03.22.NG01: "*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*". The effect of the NGPC's action concerning the Governmental Advisory Committee advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs, and reders useless any on-going negotiations among the parties

It should be noted that the aforementioned the GAC Register of Advice identified as 2013-09-09-win e and vin, which constitutes the basis for this Resolution, **is the result of a breach of GAC Operating Procedure number 47 (OP47)**. The GAC Consensus given in Beijing (not to delegate the strings pending negotiations between the parties) was **overruled inappropriately when the GAC Chair advised the Board to proceed with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached, as clearly indicated in OP47**. Accordingly, the statement that "*The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*" is not a consensus view of the GAC as per the aforementioned Operating Principle, it does not convey the full range of views in the GAC, and does only represent a mere interpretation and opinion of the GAC Chair. As such, due to the procedural mistake, it should not be taken by the NGPC or the ICANN Board as a basis for any of its Resolutions.

In addition, reconsideration is requested on the grounds that the cited Resolution is not based on the relevant materials and communications addressed by European Commission and other stakeholders to the ICANN Board via ICANN's correspondence site, and on the grounds that, to the contrary, the Resolution is based on a piece of **flawed legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN**, provided by a selected expert to the ICANN's Board NGPC.

As per the legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the breach of **three** sections of the **Bylaws**.

a) **Bylaws Article XI-A, Section 1 subsection 3 which states:**

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice**". (emphasis added).

In this regard, the GAC can request "**at any time**" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, **will consult with the GAC regarding the appropriate source** from which to seek such advice including "**definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

**b) Bylaws Article XI-A, Section 1 subsection 6 which states:**

*"6. Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board".* (emphasis added)

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN is still trying to define appropriate safeguards for the protection of the public policy interest in the new gTLD Program. Despite the argument that the new gTLD policy development finalized in 2007, several policy changes had still taken place since 2007. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" received prior to "any" decision by the Board.

**c) By-law XI.A Section 5 which states:**

That the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its responsibilities", without specific reference to implementation or policy-development process.

In any event, and despite the fact that the case in hand is **clearly a matter of public policy relevance**, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least **the Board failed to clarify on which basis it was seeking such advice, and would need to include on its next Rationale due explanations as regards the reasons why**

- a) the protection of new gTLDs is not a matter of public policy;**
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and**
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.**

Unfortunately, to date none of the .WINE and .VIN applicants have unequivocally included in their applications appropriate safeguards for the protection of Geographical Indications (GI's). Therefore, if according to the Resolution 2014.03.22.NG01, these applications were to proceed through the normal evaluation process, **then there would be significant concern that the safeguards which are necessary for a sound and acceptable functioning of the TLDs would not be guaranteed.**

The text of the Resolution reads as follows:

*"Main Agenda:*

*a. Outstanding GAC Advice*

*Whereas, on 11 September 2013, the Governmental Advisory Committee (GAC) issued advice to the ICANN Board that it had finalized its consideration of the strings .WINE and .VIN.*



*Whereas, the GAC advised the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, in the Buenos Aires Communiqué, the GAC noted that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

*Whereas, the NGPC commissioned an analysis [PDF, 772 KB] of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN, which the NGPC considered as part of its deliberations on the GAC's advice.*

*Whereas, the Bylaws (Article XI, Section 2.1) require the ICANN Board to address advice put to the Board by the GAC.*

*Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012 to exercise the ICANN Board's authority for any and all issues that may arise relating to the new gTLD Program.*

*Resolved (2014.03.22.NG01), the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Rationale for Resolution 2014.03.22.NG01*

*The NGPC's action today, addressing the open item of GAC advice concerning .WINE and .VIN, is part of the ICANN Board's role to address advice put to the Board by the Governmental Advisory Committee (GAC). Article XI, Section 2.1 of the ICANN Bylaws <<http://www.icann.org/en/about/governance/bylaws#XI>> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning .WINE and .VIN. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.*

*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC "has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process." The effect of the NGPC's action concerning the GAC advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs.*

*As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant*

responses are provided at: <<http://newgtlds.icann.org/en/applicants/gac-advice/>>. The NGPC has considered the applicant responses in formulating its response to the item of GAC advice being addressed today.

Additionally, on 28 September 2013, the NGPC noted that it stood ready to hear from GAC members as to the nature of the differences in views expressed in the advice while the NGPC analyzed the GAC's advice. Several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed, with some individual governments expressing concerns that additional safeguards should be imposed before the strings are delegated, while others recommended that no additional safeguards should be imposed on the strings.

In response to the GAC's suggestion in the Buenos Aires Communiqué, the NGPC commissioned an analysis of the legally complex and politically sensitive background on this matter in the context of the GAC advice in order to consider the appropriate next steps of delegating .WINE and .VIN. The expert analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions.

As part of its deliberations, the NGPC reviewed the following materials and documents:

GAC Beijing Communiqué:  
[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130718.pdf?version=1&modificationDate=1375787122000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB]

GAC Durban Communiqué:  
[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 104 KB]

GAC Buenos Aires Communiqué:  
[https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB]

Letter from H. Dryden to S. Crocker dated 11 September 2013 re: .vin and .wine:  
[https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board\\_20130909.pdf?version=1&modificationDate=1379026679000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board_20130909.pdf?version=1&modificationDate=1379026679000&api=v2) [PDF, 63 KB]

Applicant responses to GAC advice:  
<http://newgtlds.icann.org/en/applicants/gac-advice/>  
Applicant Guidebook, Module 3:  
<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]

There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. As part of ICANN's organizational administrative function, ICANN posted the Buenos Aires GAC advice and officially notified applicants of the advice on 11

*December 2013. The Durban Communiqué and the Beijing Communiqué were posted on 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1".*

**4. Date of action/inaction**

The ICANN Board New gTLD Program Committee (NGPC) Resolved on 22.03.2014. Even though the URL <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22.03.2014 has the date for Resolution 22.03.2014 it was only published on **25.03.2014**. The latter date was shown for some days on that very URL as the date of publication of the resolution and its rationale, **but it has now changed**.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned and the Luxembourg representative to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communiqué drafting session. It should be highlighted that Governmental Advisory Committee was not informed of the existence of this Resolution during the specific session between the GAC and the NGPC that took place on 25.03.2014 (**the date of online publication of the Resolution challenged**).

**6. Describe how you believe you are materially affected by the action or inaction:**

The Luxembourg Government deems consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.03.22.NG01.

A considerable number of GAC Members including Luxembourg, have serious concerns with the Resolution 2014.03.22.NG01 as well as its Rationale and the process that has been followed to arrive at this Resolution.

Despite having a GAC liaison member on the NGPC, the GAC was not aware until 26 March of this decision or its mistaken rationale. Had it been the case, the GAC could have corrected any misunderstandings and thus pre-empted the NGPC's resolution.

It is also worth noting that the NGPC resolved on the grounds of false information as it is our understanding, as reported by ICANN's CEO, that members of the NGPC were informed that the negotiations between applicants and wine rightholders had come to a satisfactory ending, which was not the case.

The Resolution, its Rationale and the procedural breaches connected to such Resolution and Rationale materially affect the Requestors for the following reasons:

1) Grounds for the Resolution

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

However, such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 09.09.2013 without it being circulated to GAC members.

Principle 47 of the GAC Operating Principles provides that "*[t]he GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.*"

Principle 47 of the GAC Operating Principles refers to the concept of "consensus" as per the practice of the United Nations. In this respect, consensus is understood as follows: "*the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions "without a vote", "by consensus" and "by general agreement" are, in the practice of the United Nations, synonymous and therefore interchangeable.*"

The statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC.

Given the lack of consensus and the fact that the letter of 09.09.2013 did not convey the full range of views expressed by the GAC members, the Requesters conclude that such letter was sent to the ICANN Board in breach of the GAC Operating Principles and can't therefore be taken as a basis for any Resolution.

Practically speaking, the fact that the GAC has actually not reached any consensus in this matter cannot have the effect of having the strings proceed through the normal evaluation process without further consideration. To the contrary, the lack of consensus means that this matter requires further consideration.

(b) an apparent lack of liaison

(i) in relation to the alleged consensus

The GAC Chair, as a non-voting liaison member of the NGPC, should surely have brought the lack of consensus and background to the attention of the NGPC more fully, or the NGPC should have enquired about this knowing the seriousness of the issue for a number of governments, and surely provided background to the letter of 11 September 2013 with the claim therein that the GAC has advised the ICANN Board that there was no GAC consensus advice on additional safeguards for the .WINE and .VIN TLDs, and the GAC "*has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*". Indeed such claim is disingenuous at best as it was clear, and is still clear, if the subsequent correspondence from the European Commission, available at <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en> and <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>, is considered, that there was no consensus within the GAC that additional safeguards were not necessary, nor was there consensus to proceed through the normal evaluation process. (ii) in relation to the status of the negotiations between the interested parties.

Some NGPC members have stated that they were under the impression that the negotiations with the applicants were concluded or almost concluded when this was not the case when the Resolution was passed. Such statement is based upon misinformation and, as such, in itself undermines the ongoing negotiations in that there is then no incentive for the applicants to finalise the negotiations or resolve the outstanding points.

In that regard, it should be noted that the subsequent Resolution issued by the NGPC on 04.04.2014 does grant additional time, namely 60 days, for the interested parties to negotiate. However, this Resolution provides that, "*[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting*". This seems to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, once again, the applicants would be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once such deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to one of its applicants. Such context is far from being favourable to negotiations in good faith and to the pursuit of a balanced agreement.

(c) Jérôme Passa's legal opinion

The resolution challenged is also based on an opinion issued to the ICANN Board NGPC by a University Professor, Jérôme Passa, a piece of **flawed and misinterpreted legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN.**

As per such legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the **breach of at least three sections of the Bylaws.**

i) Bylaws Article XI-A, Section 1 subsection 3 which states:

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice**". (emphasis added).

In this regard, the GAC can request "**at any time**" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, "**shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

ii) Bylaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon **any external advice** received prior to any decision by the Board".* (emphasis added)

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN and the GAC is still trying to define appropriate safeguards for the protection of the public policy interest in wine-related new gTLDs. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" receive prior to any decision by the Board.

iii) Also By-law XI.A Section 5 clearly says that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its **responsibilities**", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its Rationale due explanations of the reasons why**

**a) the protection of new gTLDs is not a matter of public policy;**

- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

2) Failure to consider relevant comments and communications

The Resolution fails to refer to and to take into consideration comments and documentation provided by the relevant stakeholders to the ICANN Board, such as follow up letters sent by the European Commission to the ICANN Board and the NGPC and letters sent by worldwide wine-related stakeholders. **This constitutes an additional breach of the ICANN Bylaws which promotes the notions of fairness, transparency and openness.**

3) Lack of information from the GAC Chair

The GAC Chair is a non-voting liaison on the NGPC. In this respect, Article VI, Section 9 of the ICANN Bylaws provides that "*non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization*".

The GAC Chair therefore had a duty to inform the GAC of the Resolution but the GAC Chair failed to do so. In addition, the GAC Chair should inform the GAC of its presence or absence at the meetings in which the NGPC considers, among its agenda points, issues pertaining to the public policy interests and pertaining to the work of the GAC.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The protection of GIs serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Consumers procuring wine on line via Internet could indeed be deceived into believing that they are buying a genuine EU product with specific qualities and characteristics of a product with a proven geographic indication, when they are in fact buying an imitation. Further the rights of holders of geographic indication would be impaired. Therefore, the adverse impact of the Resolution could be considerable.

If the applications for .WINE and .VIN proceed through the normal evaluation process, as per the Resolution's conclusion, the direct consequence would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there is an important number of small wine producers which play a crucial role for the sustainability of their communities and

regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the Requesters fear that the potential for abuse would considerably increase in online spaces where no specific protection would be granted to GIs. If wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse and fraudulent activities. The global scope of the .WINE and .VIN TLDs and a lack of clear rules and safeguards can indeed only amplify these problems including as follows:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited products may be facilitated;
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs and this is certainly not the result expected by the applicants to these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Europe and also across the globe but also is an incredible missed opportunity to create a secure and safe space in the DNS which is supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The Requesters therefore call for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

#### **8. Detail of Board or Staff Action – Required Information**

**This request relates to a Board Action, namely the adoption of a Resolution which is due to: a) material information not considered by the Board and b) based upon inaccurate, false or misleading materials (and information) presented to the Board and which formed the basis for the Resolution to be reconsidered.**

1) The Board has not considered certain material information. Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN*



*TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union (currently posted under ICANN's correspondence and which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>

Such correspondence would, or at least should, have had an important impact on any Resolution issues, with respect to the delegation of the .WINE and .VIN extensions.

2) The ICANN Board NGPC has also based its Resolution upon inaccurate, false and misleading materials (and information), and which formed the basis for the Board action being challenged.

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013. However:

(i) such letter was sent to the ICANN Board without being circulated to GAC members first.

(ii) as explained in section 6. above, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC.

This letter, which is one of the grounds of the Resolution, is therefore clearly misleading.

(b) the failure to give the GAC an opportunity to comment on the materials used by the NGPC and the failure to clarify with the GAC the appropriate source from which the advice should be sought including the definition of the scope and process.

In first place, it should be clarified that the matter in hand it is a matter of public policy and not merely a matter of implementation. Additionally, the undersigned understands that the By-laws remain the main source of procedural rules for ICANN, and that in any case they prevail over the By-laws as it will be shown below.

- Bylaws Article XI-A, Section 1 subsection 3 states that the GAC can request "**at any time**" to board to seek advice in matters of public policy, and that the Board "**shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.
- Bylaws Article XI-A, Section 1 subsection 6 states that the GAC has the opportunity to comment upon "**any external advice**" received by the Board and prior to "**any decision**". In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation" matters, while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, the GAC (and subsequently ICANN) is still trying to define appropriate safeguards for the protection of the public policy interest.
- By-law XI.A Section 5 clearly indicates that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its **responsibilities**", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its rationale due explanations to clarify why:**

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

(c) the content of the legal opinion issued by Mr Passa

Concerning the legal opinion provided by Mr Passa, the undersigned would like to remind of the content of the European Commission's comments concerning both the procedural aspects relating to such opinion and its content (available at <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>). In particular the European Commission questions the transparency of such legal opinion given that the process of appointing Mr Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr Passa's external expert legal advice is sufficiently thought through and pertinent and whether Mr Passa has considered the politically sensitive background of this matter when issuing his advice. For example, the undersigned notes that Mr Passa only refers to the application filed by one of the applicants, namely the Donuts company. It is therefore suggested that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is however worthwhile noting that Mr Passa clearly states in his opinion that, if ICANN *"had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD."*

This would certainly appear to be a key point in the advice provided by Mr Passa, and this point is completely ignored by the NGPC not being mentioned at all in the Rationale for the Resolution. The Rationale seeks to justify the Resolution by quoting from another part of the expert expert analysis saying that there is no rule of law or general principle which obliges ICANN to reject the applications. The Requesters agree with this point but respectfully submits that this is not the point to consider. The point is, exactly as Mr Passa states, that if the registry for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr Passa is of the opinion that ICANN should reject the application.

**In terms of the form of the legal report provided to the NGPC and the conditions surrounding its authorship and its submission:**

The undersigned seeks clarification of the following issues:

- Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?
- Taking into account that the Buenos Aires GAC Communique requested the Board to "*seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings*" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?
- Taking into account that the expert report is not dated, can the NGPC confirm the date in which the report was drafted? Can the NGPC confirm that the report seems to have been delivered on 22.03.2014 as indicated in ICANN's website <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en> and that as such, the NGPC resolved on the matter on the very same day that the report was delivered being that the reason why the NGPC did not consult the GAC?

Pending clarification of the aforementioned matters through a response of the current reconsideration, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

**In terms of substance of the legal report provided to the NGPC**, the undersigned would like to make reference to the letter sent by the European Commission to the ICANN Board on 02.04.2014 (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), and seek clarification of why the content indicated in the following sections has not been taken into account in any NGPC Resolution, notably for what concerns the obligation for the Registry/Registrar of the .WINE and .VIN gTLDs to implement protective measures:

- In point 1, § 6, the author indicates that "*It then becomes the registrar of these third-party domain names, and as such, draws up its own naming conventions, laying down the conditions under which third parties can reserve these domain*

names". This confirms our views that ICANN is not the best placed party to adjudicate on the matter and that the implementation of safeguards should be left to the concerned parties (applicants and rightholders)

- In Point 10, § 1 the author indicates that *"ICANN had serious reasons for believing that the registry of the new gTLD ".wine" or". vin" would assign domain names to third parties without taking account the protection of wine-related geographic indications, i.e.: without taking precautions designed to prevent infringements of these geographical indications in its relations with its contracting parties, that it would then be able to reject the application for the new gTLD"* and *"based on a simple precautionary measure designed to prevent what are deemed to be sufficiently serious risks of an infringement of the geographical indication"* as set forth in Point 10, § 2, . The application of this precautionary measure appears hence justified due to the lack of commitment of the applicants to the on-going negotiations.
- In point 2, § 1, the author rightfully acknowledges yet that *"reservation of a new gTLD may infringe prior third-party rights or, more generally, interests"*.
- The author notes in Point 5, iii) that *"a party reserving a domain name does not necessarily have the right to use the geographical indication in question for wines of for products or another type which it sells on the website identified under the domain name in question"*, therefore recognizing the existence of a high risk of third-party rights misuse and misappropriation.
- It is also worth noting that the author, in Point 9, § 2 explicitly mentions that *"If, however, he [understood as the "registrant"] also sells, on his website, products which do not benefit from this geographical indication, it is likely that such sales may constitute an infringement of the geographical indication"*. The matter, indeed, as indicated in Point 9, § 2, would require a case by case analysis by reference to a given geographical indication *"which would allow to identify the international, regional –notably European- or national rules governing it and which are therefore applicable"*.
- Moreover, as already requested by European and other GAC members, in Point 11, § 1 the author concurs with our opinion and expressed that *"Naturally, pursuant to the rules laid down by ICANN, the registry agreement – an agreement concluded between ICANN and the owner of the new gTLD – may inform this owner of the need to ensure that its co-contracting parties respect third-party rights and, in particular, geographic indications"*.
- Furthermore, Point 11, § 2, also in full accordance to the views of the European Commission and other interested governments and parties, confirms that *"if this agreement did not make express provision for it, no fault could be attributed to ICANN for it is the registry of the new gTLD in its capacity as a professional to automatically take precautions designed to avoid domain name users, its*

*partners, from infringing third party rights*". It is for that reason that applicants have been continuously encouraged since the ICANN Beijing meeting in mid-2012 to come to an agreeable solution with wine rightholders to ensure that adequate safeguards are provided in the delegation of the ".wine" and ".vin" gTLDs.

## 9. What are you asking ICANN to do now?

The undersigned, on behalf of the Luxembourg Government, respectfully request from ICANN to:

- a) reverse its Resolution 2014.03.22NG01; considering the aforementioned information and comments; and further declare null and void Resolutions 2014.04.04 NG01-2014.04.04 NG04
- b) While reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed across this document and notably in Section 8.
- c) Provide explanations as regards:
  - a. How ICANN's Board NGPC resolutions are affected when they are based upon GAC advice given in breach of GAC Operating Principles.
  - b. Explanation of "policy vs. implementation" as regards the application of the By-laws for what concerns expert advice, and notably the By-laws breached by Resolution 2014.03.22.NG01 an taking into account the arguments listed under Sections 2, 6 and 8 of the current reconsideration request.
  - c. Explanation of cases in which the Applicant Guidebook may prevail of the general ICANN By-laws.
  - d. Explanation of the questions raised by the undersigned in Section 8.c) and of how the relevant sections included in the expert legal advice provided by Jerome Passa and which favor the protection of GIs have been taken into account and will be taken into account.
- d) Grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, **without a deadline**. In this regard, the undersigned notes that in previous negotiations under pressure due to a tight deadline (30 days after the Durban GAC Communique) those negotiations were rendered useless as applicants had the incentive to wait until the GAC as a whole or the Board resolved on the matter.
- e) Evaluate the negative effects for the Domain Name Security, Resilience and Stability produced by the NGPC Resolution challenged, taking into account that European Union and its Member States would have to seek blocking measures in

order to safeguard the protection of EU Regulation in the field of Geographical Indications, as well as in the field of consumer protection and competition.

- f) Have the full ICANN Board reconsidering the matter, according to the External Expert advice rules set forth under ICANN By-laws.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

In addition to the elements noted in Section 6 of this Reconsideration Request, it is clear that the Resolution breached the ICANN Bylaws. The conclusion of the Resolution, which is based on such violation, is highly detrimental to the interests of the wine and spirit industry. Indeed, the Resolution concluded that *"the applications for .WINE and .VIN should proceed through the normal evaluation process"*. In the EU the overwhelming majority of wines produced are covered by geographical indications ("GIs"). Therefore, the risk of applications for second-level domain names as part of the .WINE and .VIN TLDs, that would constitute a misuse, evocation or otherwise undue appropriation of a vested right related to an EU GI for wines is considerable. Proceeding through the normal evaluation process without additional safeguards would negate the EU wine and spirit industry's ability to protect its GIs against such misuse, evocation or undue appropriation. In addition, this would prevent the applicants and interested parties to continue their negotiations with a view to reach an agreement on the matter.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards, while the applicants and interested parties seeking GI protection have not had adequate time in order to reach proper agreement, would therefore seriously undermine the protection granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs also serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine EU product with specific qualities and characteristics, when they are in fact getting an imitation. Therefore, the adverse impact of the Resolution could be considerable.

Failure to follow the specific policies described above results in further contradiction of ICANN policies ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability. Indeed, the Requester has spent a considerable amount of time and efforts into trying to reach an agreement with the applicants to try to obtain that safeguards be implemented before the .WINE and .VIN strings are delegated and the Resolution would unfairly prevent it from reaching an agreement in this respect.

The worldwide sales value of EU GIs is estimated at € 54.3 billion in 2010, at wholesale stage. Of these total sales, EU GIs regarding wines actually account for 56 %, (€ 30.4 billion), regarding agricultural products and foodstuffs for 29 % (€ 15.8 billion), and

regarding spirit drinks for 15 % (€ 8.1 billion). These sales were made in: the country of production (60 %), EU countries (20 %), outside the EU (20 %).

The main export destinations are the US (30 % of total exports), Switzerland and Singapore (7 % each), Canada, China, Japan and Hong-Kong (6 % each). The total value of EU GIs exported outside the EU is estimated at € 11.5 billion. This represents 15 % of the total EU food and drinks exports. Of these total GI exports (in value), wines account for 47 %, spirits for 44 %, agricultural products and foodstuffs for 10 %.

Products benefiting from a GI clearly enjoy a value premium, i.e.: the premium that a GI can expect from the market, compared to similar non-GI products.

In average, the whole value premium rate in the EU 27 for GI products was estimated at 2.23, which means that GI products were sold 2.23 times as high as the same quantity of non-GI products. A comparison of the average value premium rates between schemes shows that GI wines and spirits received far higher prices than their related standard products (2,75), compared to spirits (2.57) and agricultural products and foodstuffs (1,55).

The link below refers to comprehensive data in that respect:

[http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report\\_en.pdf](http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report_en.pdf)

It stems from the above that EU GIs for wines represent an utterly high asset, whose reputation and considerable value are undisputed. Accordingly, their protection against misuse, evocation or otherwise undue appropriation is of the utmost importance.

In order to ensure such protection:

At international level, Article 23 of the Trips Agreement requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated, even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see Article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against :

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the*



*product in a container liable to convey a false impression as to its origin;  
(d) any other practice liable to mislead the consumer as to the true origin of the product."*

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...). Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:  
(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Regulation (EU) No 607/2009, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue."*

It stems from the above that both the European Commission and its Member States are bound to take the appropriate measures in order to tackle any misuse of protected GIs. In the present circumstances, considering on one hand the worldwide coverage of internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes  
 No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

The undersigned represents the Luxembourg Government and acts in the public interests as regards the case in hand.

**Do you have any documents you want to provide to ICANN?**

The relevant documents are linked in the text of the Reconsideration Request.



Signature

- 9 AVR. 2014

Date

# **REQUEST 14-22**

## **Reconsideration Request Form**

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### **1. Requester Information**

**Name:** Annalise Eggimann, Director of Telecommunications Division,  
Federal Office of Communication, Federal Department of Environment, Transport,  
Energy and Communication, on behalf of the Swiss Government

**Address:** Contact Information Redacted  
Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

### **2. Request for Reconsideration of (check one only):**

**Board action/inaction**

**Staff action/inaction**

### **3. Description of specific action you are seeking to have reconsidered.**

The undersigned requests that Resolution 2014.04.04 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, as it – in reaction to the letter from the European Commission on behalf of the EU Member States, Switzerland and Norway, dated 26 March 2014 and the GAC Singapore Communiqué dated 27 March 2014 which both refer to at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6 in the ICANN Board's final deliberation of Resolution 2014.03.22.NG01 – resolved that “the NGPC concludes that there has been no process violation or procedural error under the Bylaws” and “the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do”.

The resolution is posted in the ICANN website under  
<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>

### **4. Date of action/inaction:**

The ICANN Board New gTLD Program Committee (NGPC) took its decision on 04.04.2014 and it was published on the ICANN website the same day.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned became aware of this resolution on 05.04.2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Swiss Government is mandated by our Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.04.04.

This Resolution merely directs the President and CEO, or his designee, to not commence the contracting process for the applications for .wine and .vin for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do. It thus implies that in case the mentioned negotiations would not be successfully concluded within the set period of time, the evaluation procedure of applications to .wine and .vin would be allowed to proceed without adequate safeguards. This decision does not take into account the position of a significant number of GAC members from Europe, including Switzerland, and Latin America which is that the .wine and .vin applications should not proceed through ICANN's evaluation processes until additional safeguards are established with the agreement of the registry operators for the protection of geographical indications (GIs). There is no GAC consensus that the applications should proceed without such safeguards.

GIs are a token for reputation and typical characteristics that are directly linked to the geographical origin of the designated products. As such, GIs are important marketing tools in trade and particular relevant for wines. When purchasing from lavaux.wine, rossodelticino.wine or dezaley.vin, consumers may be led to think that they buy wine originating in the region of Lavaux, Ticino or Dézaley while this could not be the case.

Cybersquatting and all sorts of GIs abuse have occurred in the domain name space as WIPO Standing Committee on the Law on Trademarks, Industrial Designs and Geographical Indications has proved in document SCT/10/6 dated April 3<sup>rd</sup>, 2003 on "Internet domain names and Geographical Indications" (see paragraphs 225 and 226 as well as its annexes).

The power the TLDs .wine and .vin may have as a locus to find wines on the web increases the risk of deceiving acts happening, both in Switzerland and elsewhere in the world. The Swiss legislation prohibits such acts. The Swiss Federal Law on the Protection of Trademarks and Indications of Source prohibits in particular both the incorrect use of GIs and the use of designations that may be confused with them (see Article 47).

In addition to the provisions of this Law that is applicable independently of the product category, the Swiss Ordinance on viticulture and wine importation includes further specific requirements with respect to wines and provides in particular that wines designated by appellations of origin have to comply with the specifications set by the relevant Canton as regards the geographical origin and the specific characteristics of the

product (see Article 21). Geographical names, therefore, traditionally served not only as a statement of origin, but also as a guarantee of specific qualities and the maintenance of certain characteristics that must be taken into account.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

As reflected in section 6, consumers and right holders are the stakeholders affected by resolution 2014.04.04. The protection of their legitimate rights has a public value as demonstrated above. The Swiss Government represents that public interest and as such, it is also entitled to assert this reconsideration request.

**8. Detail of Board or Staff Action – Required Information**

**In the following section, the undersigned aims to provide the necessary details to prove that:**

**The Board has not considered certain material information and has relied on inaccurate and misleading materials.**

Resolutions 2014.04.04 NG01-NG04 are nothing more than a re-statement of resolution 2014.03.22 with a postponement of its effect and a call for the full Board to decide on the matter.

Therefore it is affected by the same shortcomings that would render Resolution 2014.03.22 null and void. These are the following:

A) The Board has not considered certain material information.

Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other organisations and wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>
- Letter 8: <http://www.icann.org/en/news/correspondence/baptista-to-crocker-15nov13-en>

They all point out at harm that can be caused to consumer interests and wine right holders if delegation is done without proper safeguards. However, applicants are worried about the «commercial viability of theTLDs» if more safeguards are applied (see, for instance, June Station LLC comment to the Buenos Aires Communiqué).

ICANN has a duty to serve public interest (article I. Section 2.6 of the ICANN Bylaws and points 3 and 4 of the Affirmation of Commitments) and it should not slant towards the applicants' interests only because they are only a limited subset of stakeholders (point 4 of the Affirmation of Commitments).

**B) The ICANN Board NGPC has also based its Resolution upon inaccurate and misleading materials.**

**B.1 Misunderstanding about GAC consensus on ".vin" and ".wine":**

The action that was approved by the NGPC on 22.03.2014 is allegedly based on GAC consensus, whereas in reality a significant number of GAC members were in consensus not to allow the .WINE and .VIN applications to proceed through evaluation until sufficient additional safeguards were in place. The reality is that the GAC as a whole could not reach consensus, what does not necessarily imply that the strings can proceed through the normal evaluation process without further consideration.

The letter from the GAC Chair to the Chair of the ICANN Board dated 09.09.2013 was sent without prior consultation of GAC members. As such, it represents a breach of GAC operating principle number 47. For it to have been given the weight that it deserves, the "opinion" conveyed by the GAC Chair should have been previously cleared with the GAC. The European Commission in its letter dated 03.02.2014 specifically covered this point and said "the EU, its Member States, Switzerland and Norway still believe that these general safeguards are not sufficient and that the Beijing Consensus was overruled inappropriately when the GAC Chair advised the Board to proceed with the

delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached." More details of this EU position can be found on the two letters sent on behalf of the EU Commission to GAC members and GAC Chair quoted above.

The GAC Chair's statement that "The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process" is not a consensus view of the GAC as per the aforementioned Operating Principle, but a mere interpretation and opinion of the GAC Chair.

#### B.2 Insufficient analysis of the legally complex and politically sensitive background:

The Buenos Aires Communique specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings.

The GAC has not received the terms of reference of the consultation addressed to Mr. Jérôme Passa. We wish we have received it for full transparency and proper evaluation of the NGPC action. However, it can be inferred from page 2 of Mr. Passa's report that the questions made fell short of the analysis the GAC recommended to carry out. The politically sensitive background of this matter has not been considered at all by ICANN's request of advice and the resulting report (i.e. the various attempts at creating a multilateral system of notification and registration of geographical indications for wines according to article 23.4 of the TRIPS Agreement or at launching a UDRP for GIs in WIPO).

Moreover, it is debatable whether the external expert legal advice is sufficiently reasoned. In addition, the Rationale for Resolution is vague and does not make reference to the specific grounds on the basis of which the resolution is taken, nor it addresses the specific arguments laid down in the legal advice received or makes reference to the panoply of letters and additional materials shared with the ICANN Board via formal correspondence.

#### B.3 Breach of ICANN Bylaws:

Perhaps one of the most relevant arguments is that Article XI-A section 1 subsection 6 of the ICANN By-Laws requires that "the GAC - in addition to the supporting organisations or other advisory committees - shall have an opportunity to comment upon any external advice received prior to any decision by the Board". This important prerogative has not been respected.

#### **Required Detailed Explanation:**

The undersigned wishes to elaborate on points B.2 and B.3 contained above. Point B.1 is sufficiently developed as set forth above.



## B.2 detailed explanation:

- On the process followed to seek expert external advice:

Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

Taking into account that the Buenos Aires GAC Communique requested the Board to "*seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings*" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?

Pending clarifications from the NGPC expressed on its reconsideration of the challenged Resolution, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

- On the scope of the consultation:

Although the Buenos Aires Communique seeks clarification of the legally complex and politically sensitive background and the next steps in order to delegate the two strings (please note that the GAC did not ask for the refusal to delegate the strings), Point 3, § 2 evidences that the author has only been "consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be bound: a) to assign the new gTLDs in question to the applicant, or, to the contrary, to refuse to assign them in order to protect prior rights as mentioned above." The question is by all means misleading and it was clear from the outset that ICANN is not legally bound by international law to automatically grant or reject an application. On the contrary, our understanding is that for all domain names for which an application was submitted, a series of legal safeguards should be put in place by ICANN or by the potential Registries in order to efficiently protect public and private rights and interests. These safeguards vary however depending *inter alia* on the nature of the domain names concerned, on the specific concerns expressed by the GAC and the objectors, on the applicable legislation.

The scope of the analysis is intentionally limited by ICANN as indicated in Point 3, § 6 since the author confirms that "Given the wording of ICANN's questions to the undersigned, this opinion will concentrate exclusively on the reasons why ICANN might be led to assign or refuse to assign the new gTLDs in question, in other words on the disputes which have arisen during the evaluation stage of the applications. It will not examine as its main focus questions and disputes likely to arise in the subsequent stage, following assignment of these new gTLDs during which the second-level domains open in the gTLDs will be exploited". In this regard, the most essential question is left out of

the analysis and therefore it does not provide the necessary insights for the NGPC to respond adequately to GAC's requests.

As a consequence, half of the report (until "Secondly") is useless. Of course, "vin" and "wine" are generic terms and are not protected by geographic indications or any other intellectual property right. So, ICANN is obviously legally unimpeded to grant those TLDs to whoever applies for them. But, that is not the question that has held up GAC advice for a year.

The NGPC has chosen to stick to this part of the report to accept "GAC advice" to proceed with the evaluation process without additional safeguards and does not reason on the concerns expressed by Governments and right holders or on the considerations expressed in other sections of Mr. Passa's report. Thus, Resolution 2014.03.22.NG01 is ill reasoned.

- On the author's opinion on the scope of GIs:

The second part of the report is severely wrong. He indicates that "a geographical indication does not enjoy absolute or automatic protection against any use of an identical or similar name by a third party", and refers to Article 22 of the TRIPS agreement which allegedly provides for protection where an indication is used in a manner which misleads the public. He further indicates that there are other provisions (i.e.: the Lisbon Agreement of 1958 or the EU relevant legislation (EU) No 1308/2013 on wines) that allow for a more extensive protection that includes the concept of evocation.

However, not only Article 22 of the TRIPS agreement also broadly encompasses (see point 2.b) thereof) "any use which constitutes an act of unfair competition (...)" but in addition, Article 22 of the TRIPS agreement is an incorrect legal basis as far as wines are concerned. Actually, wines (and spirits) enjoy an additional explicit protection under Article 23 of the TRIPS agreement which is considered in international fora as including the aforementioned concept of evocation, and which does not require any "misleading test" to be performed. Concretely, should an operator use the term "JapanChampagne.vin" there would be a clear indication of the actual origin thereof, so at first sight no misleading of the consumer as to the geographical origin, and accordingly no infringement of Article 22 TRIPS; but there would be nonetheless a clear violation of the relevant Article 23.1 TRIPS which prohibits any inappropriate use of a geographical indication, including in translation and where the true origin of the product is indicated.

- On the need to lay down adequate safeguards:

The most rightful conclusion of the report has not been taken into account by the NGPC. Jérôme Passa concludes that if there are indications that GIs can be subject to abuse as second level domains, ICANN should take precautions to prevent damage from being done (points 10 and 11). Indeed, the NGPC should be aware of the long history of abuse of GIs under other generic TLDs. WIPO has conducted studies, like the one mentioned above, on the matter with a view to setting up a UDRP for GIs.

Nonetheless, it is not enough to force the Registry to remind registrants of third-party rights, as Jérôme Passa suggests. There should be an enforcement mechanism which until now remains the main stumbling block in this process. This mechanism can only be

decided by ICANN.

### **B.3 detailed explanation:**

The NGPC is bound by the Bylaws. Article XI Section 2.1 of the Bylaws –which Resolution 2014.03.22.NG01 refer to- is not the only section the Board must comply with in the implementation of the new gTLD programme. The Applicant Guidebook is not self-contained as the rule governing the gTLD programme and does not override the Bylaws, which is the superior norm to abide by.

Article XI-A Section 1 is also relevant as it details the procedure ICANN must follow to seek external expert advice. At least, two breaches have been committed in relation to the report commissioned to Mr. Passa:

- Article XI-A Section 1 3 b as to the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.
- Article XI-A Section 1 6 regarding the need to consult, among others, with the GAC on the analysis received before taking any action.

In addition to the shortcomings that would render Resolution 2014.03.22 null and void, Resolution 2014.04.04 fails to take into account the Singapore GAC Communiqué and the letter addressed by the European Commission on behalf of all EU member states plus Switzerland and Norway to the Board on 26<sup>th</sup> March 2014, even though they acknowledge them.

The GAC communiqué states: "The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."

Neither of these statements has been considered. Concerned GAC members did not request to set a deadline for negotiations to come to an end, mindful as we are that they are counterproductive to arrive at agreeable solutions (experience learned from the tight deadline set in the Durban GAC communiqué, Section IV.2).

The EU Commission letter contains a similar request: "Thus the European Commission, the EU Member States, Switzerland and Norway respectfully requests that the NGPC reviews its decision and does not allow the strings to proceed to evaluation until negotiations have closed and sufficient safeguards are in place."

If the NGPC had really considered this advice, it would have stalled the evaluation process indefinitely.

**9. What are you asking ICANN to do now?**

The undersigned respectfully request from ICANN to:

- a) reverse its Resolution 2014.04.04 and thus consequently its Resolution 2014.03.22.NG01;
- b) while reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and 2014.04.04 and listed in Section 8;
- c) grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

As a member of the GAC, the Swiss Government has a duty to ensure that the public policy interests are taken fully into account in all ICANN decisions. This public interest mandate includes consumer protection, protecting legal rights, preventing fraud, combatting criminality and protecting the legitimate interests of business stakeholders including entrepreneurs, investors, and innovators. Switzerland considers that these public policy interests can be adversely impacted by Resolution 2014.04.04.

Given the worldwide coverage of Internet, the delegation of the strings .wine and .vin without adequate safeguards aiming at ensuring the protection of GIs against undue appropriation would potentially entail huge potential confusion for the consumer, considerable losses for the right holders of these GIs, and extremely high costs in seeking judicial redress. Furthermore, such a situation would be detrimental to the on-going negotiations at international level on the protection of GIs. Our national legislation concerning GIs in the field of wines is mentioned above (see point 6 above). The Swiss Government is also mindful of its international obligations and commitments in respect of tackling misuses of GIs, in particular those arising from Article 23 of the TRIPS Agreement that requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

Explain.

The undersigned represents the Swiss Government and represents Swiss citizens and undertakings in the defense of the public policy interests that concerns them in the case in hand.

**Do you have any documents you want to provide to ICANN?**

The relevant documents are linked in the text of the Reconsideration Request.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



17<sup>th</sup> April 2014

Signature

Date

# **REQUEST 14-24**

## Reconsideration Request

1. Requesters Information:

**Names:** The National Appellation of Origin Wines and Brandy Producers (CNAOC), the Comité Champagne (Comité Interprofessionnel du Vin de Champagne – CIVC), the European Federation of Origin Wines (EFOW), the Bureau National Interprofessionnel du Cognac (BNIC) and the Bordeaux Wine Council (Conseil Interprofessionnel du Vin de Bordeaux – CIVB) (hereinafter the "Requesters")

**Representative:** David Taylor, Hogan Lovells (Paris) LLP

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):** Contact Information Redacted

2. Request for Reconsideration of (check one only):

**Board action/inaction**

**Staff action/inaction**

3. Description of specific action you are seeking to have reconsidered:

The Requesters seek reconsideration of Resolutions 2014.04.04.NG01 – 2014.04.04.NG04 (the "**Resolutions**") issued by the ICANN Board New gTLD Program Committee ("**NGPC**").

The relevant parts of the Resolutions read as follows:

*"Whereas, on 9 September 2013, in a letter to the ICANN Board, the Governmental Advisory Committee (GAC) advised the Board that the GAC had finalized its consideration of the strings .WINE and .VIN, that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and that the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, on 20 November 2013, the GAC issued its Buenos Aires Communiqué, wherein it suggested that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

*Whereas, the NGPC asked staff to commission an independent legal analysis ("Independent Legal Analysis") of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN.*

*Whereas, on 22 March 2014, in Resolution 2014.03.22.NG01, the NGPC "accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and direct[ed] the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process."*

*Whereas, as noted in the Rationale of Resolution 2014.03.22.NG01, the NGPC considered the Independent Legal Analysis as part of its deliberations on the GAC's advice, which is published at <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf> [PDF, 771 KB].*

*Whereas, on 27 March 2014, in the Singapore Communiqué, the GAC noted that "there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6" in the ICANN Board's final deliberation of Resolution 2014.03.22.NG01 and advised that the ICANN Board reconsider the matter before delegating these strings.*

*Whereas, in the Singapore Communiqué, the GAC further advised that "concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."*

*Whereas, the NGPC has reviewed and considered the matter set forth in the Singapore Communiqué, specifically the issue raised by the GAC relating to its suggestion of a possible process violation or procedural error under ICANN Bylaws Article XI-A, Section 1, subsection 6.*

*Whereas, the NGPC recognizes that some GAC members remain concerned about the .WINE and .VIN applications, and the NGPC recognizes that this is a matter of great importance to these GAC members, as well as to the interested applicants for these top level domains.*

*Resolved (2014.04.04.NG01), the NGPC accepts the GAC advice identified in the Singapore Communiqué as it relates to the applications for .WINE and .VIN.*

*Resolved (2014.04.04.NG02), upon having considered the matter set forth in the GAC Singapore Communiqué suggesting that there may have been a process violation or procedural error, the NGPC concludes that there has been no process violation or procedural error under the Bylaws.*

*Resolved (2014.04.04.NG03), the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in*



*order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do.*

*Resolved (2014.04.04.NG04), the NGPC recommends that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.*

#### *Rationale for Resolutions 2014.04.04.NG01 – 2014.04.04.NG04*

*The NGPC's action today, addressing the Governmental Advisory Committee's ("GAC") advice in the Singapore Communiqué concerning the .WINE and .VIN applications, is part of the ICANN Board's role to address advice put to the Board by the GAC. Article XI, Section 2.1 of the ICANN Bylaws <http://www.icann.org/en/about/governance/bylaws#XI> permits the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." Module 3.1 of the Applicant Guidebook ("AGB") sets forth the parameters in which GAC Advice will be given under the New gTLD Program. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.*

#### *Factual Background*

*The GAC previously issued advice to the Board on the New gTLD Program, and specifically on the .WINE and .VIN applications, through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning the .WINE and .VIN applications. In the Buenos Aires Communiqué, the GAC suggested that the Board may "wish to seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. GAC members may wish to write to the Board to further elaborate their views." ([https://gacweb.icann.org/download/attachments/33849634/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1390438464000&api=v2](https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1390438464000&api=v2)) [PDF, 97 KB].)*

*Following the Buenos Aires Communiqué, the NGPC directed staff to commission independent legal analysis as to whether international law or*

*national law in wine-growing regions -- France, Italy, Spain, Australia, elsewhere -- establish a bar that would entitle governments or administrative agencies to prevent administration of the .WINE and .VIN gTLDs and whether any rights or protections granted to wine-related geographic indications impose a duty on ICANN to provide for protection at the second level if the .WINE or .VIN strings were to be delegated (the "Independent Legal Analysis").*

*The Independent Legal Analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions."* (<http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf> [PDF, 771 KB] at Pg. 7.)

*On 22 March 2014, the NGPC adopted Resolution 2014.03.22.NG01, whereby it "accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and direct[ed] the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process." (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.) The NGPC noted that it considered the Independent Legal Analysis as part of its deliberations on the GAC's advice. (See *id.*) As part of Resolution 2014.03.22.NG01, the NGPC published the Independent Legal Analysis at <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf> [PDF, 771 KB].*

*On 27 March 2014, the GAC published its Singapore Communiqué. On the topic of .WINE and .VIN, the GAC stated as follows:*

*The GAC notes the NGPC Resolution 2014.03.22.NG01 concerning .wine and .vin as well as its rationale. In the final deliberation of the Board there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:*

*6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.*

*The GAC therefore advises:*

*That the Board reconsider the matter before delegating these strings.*

*The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.*

<https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=1&modificationDate=1395925159241&api=v2> [PDF, 448 KB].)

### Discussion and Analysis

*In sum, the NGPC has accepted the GAC advice and has carefully reviewed and evaluated whether there was a procedure or process violation under the Bylaws. The NGPC has determined that there was not because, among other reasons, ICANN did not seek the Independent Legal Analysis as External Expert Advice pursuant to Article XI-A, or any other portion of the Bylaws.*

*The GAC's advice on the .WINE and .VIN applications was issued pursuant to the GAC-related procedures in Module 3.1 of the Applicant Guidebook and not as External Expert Advice for purposes of the policy development process on new gTLDs, which was concluded in August 2007. Rather, the Independent Legal Analysis was obtained as part of the implementation of the New gTLD Program.*

*Under Module 3.1 of the Guidebook, the Board has the discretion to seek independent expert analysis on issues raised in the GAC Advice on new gTLD applications. This provision does not mention a Board consultation with the GAC after independent analysis has been obtained and before a decision is taken. There is no reference in Module 3.1, or elsewhere in the Applicant Guidebook, to Article XI-A, or any of its subsections.*

*Further, because the NGPC did not ". . . determine[] to take an action that is not consistent with the Governmental Advisory Committee advice, . . ." the NGPC did not "inform the Committee [of its determination] and state the reasons why it decided to not follow the advice" ((Bylaws, Article XI, Section 2.1.j). Specifically, as noted in the Rationale of Resolution 2014.03.22.NG01, "[t]he action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC 'has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process.'" (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.) The NGPC obtained the Independent Legal Analysis, which it has the discretion to do under the Module 3.1 of the Applicant Guidebook, and in part at the suggestion of the GAC. Further, when the GAC suggested that the NGPC may want to seek such advice, the GAC did not ask the NGPC to provide the GAC with that advice (the Independent Legal Analysis) before taking action and accepting the GAC's advice on the .WINE and .VIN applications.*

### Decision

*The NGPC has taken the GAC's suggestion of a potential process violation or procedural error very seriously and recognizes the import of the matters at issue. After careful consideration, the NGPC has concluded that there was no process violation or procedural error under the Bylaws, particularly because the Independent Legal Analysis was not sought as External Expert Advice pursuant to Article X1-A, or any other Bylaws provision. Rather, the Independent Legal Analysis was sought pursuant to Module 3.1 of the Applicant Guidebook, and partly at the GAC's suggestion.*

*Although NGPC did not find a process violation or procedural error under the Bylaws, consistent with ICANN's commitment to transparency, ICANN did attach to Resolution 2014.03.22.NG01 the Independent Legal Analysis concerning .WINE and .VIN. Further, for ease of reference, ICANN will provide a copy of the Independent Legal Analysis directly to the GAC.*

*Additional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting to allow the relevant impacted parties additional time to try to work out their differences.*

*Further, the full Board should consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.*

*In taking this action today, the NGPC acknowledges the correspondence received on .WINE and .VIN since the ICANN Singapore meeting, including:*

- [Letter dated 19 March 2014](#) [PDF, 120 KB] from Mr. Martin Schulz, President, The European Parliament
- [Letter dated 26 March 2014](#) [PDF, 141 KB] from Ms. Linda Corugedo-Steneberg, Director – European Commission, Directorate-General for Communications Networks, Content and Technology
- [Letter dated 1 April 2014](#) [PDF, 500 KB] from Mr. Sergio Zingarelli, President - Consorzio Vino Chianti Classico
- [Letter dated 2 April 2014](#) [PDF, 68 KB] from Ms. Linda Corugedo-Steneberg, Director – European Commission, Directorate-General for Communications Networks, Content and Technology
- [Letter dated 2 April 2014](#) [PDF, 1.23 MB] from Mr. Jean-Luc Barbier, General Director - Comité Interprofessionnel du Vin de Champagne (CIVIC)
- [Letter dated 3 April 2014](#) [PDF, 226 KB] from Mr. Manuel de Novae Cabral, Presidente - Instituto os Vinhos do Douro e do Porto

- [Letter dated 3 April 2014 \[PDF, 739 KB\]](#) from Mr. Steven L. Bate, Executive Director - The Long Island Wine Council
- [Letter dated 3 April 2014 \[PDF, 924 KB\]](#) from Ms. Linda Reiff, President & CEO - Napa Valley Vintners
- [Letter dated 3 April 2014 \[PDF, 179 KB\]](#) from Mr. César Saldaña, Director General, Consejo Regulador Do Jerez-Xérès-Sherry"

The reasons for requesting the Reconsideration of the Resolution are detailed below.

**4. Date of action/inaction:**

The Resolutions were published on 4 April 2014.

**5. On what date did you become aware of the action or that action would not be taken?**

The Requesters became aware of the content of the Resolutions on 5 April 2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requesters represent the interests of grape growers and wine and spirit drink producers. In this capacity, the Requesters have serious concerns with three out of four aspects of the Resolutions, namely (1) the NGPC's position that there was no process violation or procedural error in accordance with Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for failing to give the GAC an opportunity to comment on an opinion issued to the NGPC by a University Professor, Jérôme Passa; (2) the 60 days deadline given to the interested parties to negotiate and; (3) the question raised by the NGPC as to whether ICANN is the proper venue in which to resolve the issues raised by the .VIN and WINE TLDs.

**1) The NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Mr Passa**

In the Resolutions, the NGPC considered whether its failure to give the GAC an opportunity to comment on Mr Passa's opinion was a violation of the ICANN Bylaws and concluded that there was no process violation or procedural error under the Bylaws, particularly because the opinion in question was not sought as External Expert Advice pursuant to any of the Bylaws provision but rather

pursuant to Module 3.1 of the Applicant Guidebook, and partly at the GAC's suggestion.

The Requesters however maintain their position, detailed in their Request for Reconsideration regarding Resolution 2014.03.22.NG01, that, in their opinion, the NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Mr Passa was a violation of Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for the reasons set out in Section 8. 2) (b) below.

## **2) The 60 days deadline**

In the Resolutions, the NGPC concluded that "*[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting*".

First, the Requesters note an inconsistency in the Resolutions. Indeed, the Resolutions state that "*the NGPC accepts the GAC advice identified in the Singapore Communiqué*". Such advice was as follows:

***"The GAC therefore advises:***

***That the Board reconsider the matter before delegating these strings.***

***The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."***

Nowhere in its Singapore Advice did the GAC mention a deadline to reach an agreement and the objective pursued by the GAC is that the applicants and interested parties do reach an agreement, without any arbitrary deadlines. Therefore, the deadline of 60 days set by the Resolutions considerably restricts the GAC advice and therefore the NGPC does not appear to have fully accepted GAC advice as it states. This is not a minor point as a deadline appearing to allow the applications to proceed regardless of whether agreement is reached at the expiry of a certain time is clearly not conducive to reaching agreement. Simply put it is in some ways akin to negotiating the purchase of a house which is listed for sale at a certain price, but with a deadline whereby after 60 days the sale proceeds at the asking price regardless of the state of negotiations or offer prices. There is no incentive for the seller to lower his price as he knows he will obtain his asking price.

The Requesters stress that they fully appreciate that the applicants have business interests and thereby a wish for the delegation of .VIN and .WINE to proceed rapidly. The Requesters are not adverse to the delegation of these strings per se, they simply seek sufficient and appropriate safeguards to prevent abuse of consumers around the globe and risk material detriment to the interests of the grape growers and wine and spirit producers that rely on Geographical

Indications for their livelihood. The legally complex and politically sensitive background makes for a challenging negotiation by itself plus whilst there is only one applicant for .VIN, there are three applicants for .WINE each with differing interests and business plans with varied ideas and commitment of how domain names would be allocated to third parties. It is important that these discussions can come to conclusion without interference from outside entities and the arbitrary deadline of 60 days serves to stifle the discussions. Indeed, Resolution 2014.03.22.NG01 which precedes this Resolution 2014.04.04.NG01-2014.04.04.NG04 shocked the Requesters as the ICANN NGPC effectively brought a close to the negotiations without any warning when they were in fact far from completion. The subsequent Resolution 2014.04.04.NG01-2014.04.04.NG04 perhaps serves to mitigate this earlier Resolution, by setting a time frame, but this time frame is not based on the state of the negotiations and is an arbitrary one, which only encourages successful negotiations if the outcome is dependent on the fact of a negotiated settlement occurring.

The result of including such a deadline materially affects the Requesters and their ability to discuss and negotiate effectively. Depending on the extent of the applicants' cooperation and good faith, 60 days to reach an agreement between the applicants and the interested parties, will most likely not be sufficient and risks simply postpone the problem rather than fully addressing it.

It is of uttermost importance that the applicants negotiate with the interested parties in good faith so as to ensure that the agreement ultimately reached is fully balanced, thought through and transparent. This is not something that can be achieved under the pressure of an artificial deadline of 60 days which is why there should not be a time limitation but rather a situation that enables both sides to come to an agreement, before the .VIN and .WINE are delegated. It is respectfully submitted that the inclusion of the 60 day deadline in the Resolution serves to work against the parties negotiating rather than encouraging it as the GAC requested in its Singapore Communiqué.

The Resolutions' wording that "**[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting**" would appear to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, as has been the case in the past when deadlines were set, the applicants may be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once this deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to its successful applicant after contention set resolution. Such a situation is far from being conducive to good faith negotiations and to reaching a balanced agreement. It may be that this is not the intention of the Resolution as a whole and that when 2014.04.04.NG03 is considered together with 2014.04.04.NG04 that the applications for .WINE and .VIN will still not proceed and commence the contracting process until the full Board has considered the larger implications. It is hard for the Requesters to

know which the correct interpretation is, and as such the Resolution is unclear and would benefit from being reconsidered so as to avoid misunderstanding and different interpretations.

In addition, if the first interpretation of the Resolutions is accurate, *i.e.* if the Resolutions' wording actually means that, if no agreement is reached within the 60 days deadline set by the NGPC, the new gTLDs for .VIN and .WINE will proceed to the contracting phase (though for .WINE the applicants remain in a contention set so cannot proceed immediately), this would also mean that the delegation of the .VIN and .WINE TLDs would be conducted without further consultation of the GAC. This would contradict the GAC's advice in its Singapore Communiqué that the Board should "*reconsider the matter before delegating these strings*" and "*the GAC needs to consider the elements more fully*" while such advice has been accepted by the NGPC in the Resolutions.

It would therefore seem that there is an inconsistency in the wording used by the NGPC in the Resolutions and that the NGPC would need to clarify its statements with respect to the consequences of a failure to reach an agreement within the 60 days deadline.

### **3) Whether ICANN is the proper venue in which to resolve the issues raised by the .VIN and WINE TLDs**

The Resolutions raise the question of whether ICANN is the proper venue to resolve the issues raised by the .VIN and .WINE TLDs. ICANN needs to comply with International Laws on the subject of Geographical Indications ("GI"s) which are recognized by the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) which currently has 159 Member States. As such GI's need sufficient protection in the .VIN and .WINE TLDs and ICANN needs to ensure that sufficient precautions are in place to prevent infringement of GIs, if not then the Requesters respectfully submit that the TLDs should not be delegated. Indeed this very point is included in the opinion of Mr Passa, though it appears to have been overlooked, where he states:

***"[if ICANN] had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD."***

### **7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern:**



If no acceptable agreement is reached between the relevant applicants and the interested parties within the 60 days deadline and the .WINE and .VIN TLDs are delegated as a consequence, as suggested by the text of the Resolutions, the direct outcome of this would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there is an important number of small wine producers which play a crucial role for the sustainability of their communities and regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the Requesters fear that the potential for abuse would considerably increase in online spaces were no specific protection to be granted to GIs. If wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse and fraudulent activities. The continued abuse in the existing TLDs such as .com, .net and ccTLDs demonstrates this is a valid concern. The global scope of having a new gTLD dedicated to WINE or VIN with a lack of clear rules and safeguards will only exacerbate these problems including:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited products may be facilitated with wide implications, including commercial detriment and health risks for consumers (non-compliance with product specifications);
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs as they would see it as a rogue space and this is certainly not the result expected or wished for by the applicants of these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Europe and also across the globe (and we refer here to the numerous letters from wine producers and grape growers in the wine

community) but also is an incredible missed opportunity to create a secure and safe space in the DNS which is supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The Requesters therefore call for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

## **8. Detail of Board Action – Required Information**

This Request relates to a Board action, namely the adoption of the Resolutions, which is both due to material information not considered by the Board (1) and based upon inaccurate, false, or misleading materials presented to the Board which formed the basis for the Resolution (2).

### **1) Failure to consider material information**

The Resolutions list materials and documents reviewed by the NGPC as part of its deliberations and the Requesters note that such list does not include the letters sent by two of the Requesters, EFOW and CNAOC, to the Chair of the ICANN Board, the Chair of the NGPC Board and the CEO and COO of ICANN. Such correspondence is available at:

<http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en.pdf>

and

<http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en.pdf>.

In addition, the list of materials and documents reviewed by the NGPC does not include all relevant letters sent by the European Commission and by other wine and spirit stakeholders.

Such correspondence would, or at least should, have had an important impact on any Resolution issued with respect to the delegation of the .WINE and .VIN extensions.

### **2) The Resolutions are based on inaccurate, false, or misleading materials**

The Resolutions and Resolution 2014.03.22NG01, which the Requesters already sought the reconsideration of (see <http://www.icann.org/en/groups/board/governance/reconsideration/14-18/request-annex-cnaoc-et-al-08apr14-en.pdf>), are both partly based on the following elements: the GAC Chair letter to the ICANN Board dated 9 September

2013 as part of the GAC Advice on .VIN and .WINE (a) and Mr. Jerome Passa's analysis (b).

In this respect, the Requesters reiterate the statements included in their Request for Reconsideration regarding Resolution 2014.03.22NG01 that such materials are inaccurate, false, and / or misleading for the following reasons:

**(a) the GAC's alleged consensus**

One of the grounds for the Resolutions is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013.

However:

(i) Such letter was sent to the ICANN Board without being circulated to GAC members first.

(ii) As explained in the Request for Reconsideration regarding Resolution 2014.03.22NG01 filed by the Requesters, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement quoted in the Rationale of Resolution 2014.03.22.NG01 and reiterated in 2014.04.04.NG01- 2014.04.04.NG04 that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC. As such the NGPC is taking action that is not consistent with the GAC Advice, it is rather taking action based on a letter that was never supported by a consensus of the GAC – see subsequent letters from the European Commission already referred to.

(iii) Moreover, as can be noted from the intense GAC discussions in their meetings and Communiqués since this letter of 9 September 2013 which was used as a basis for the Resolutions of 22 March 2014 and 4 April 2014, the fact of the matter is that the GAC has NOT finalized its consideration as claimed in the letter. Indeed, even the latest GAC Singapore Communiqué states that: "**The GAC needs to consider the above elements more fully**". Respectfully that does not appear to the Requesters to be an indication that the GAC finalized its consideration back in September 2013.

This letter is therefore clearly misleading.

**(b) the failure to give the GAC an opportunity to comment on Mr Passa's opinion**

Although required to do so pursuant to Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws, the NGPC did not provide the GAC with an opportunity to comment on the legal opinion issued to the ICANN Board NGPC by Jérôme Passa. Although not inaccurate, false or misleading *per se*, Mr Passa's opinion, which is one of the materials considered by the NGPC to issue the Resolutions, is marred by a procedural error. It should therefore be considered as misleading and inaccurate.

On 27 March 2014, in the Singapore Communiqué, the GAC noted that "*there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6*" in the Resolution and advised that the ICANN Board reconsider the matter before delegating the .WINE and .VIN strings. The GAC further advised that "*concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.*"

Although recognized by the GAC, the NGPC refuses, in the Resolutions, to acknowledge the procedural issues raised. The NGPC indeed explains that "*the Module 3.1 of the Applicant Guidebook ("AGB") sets forth the parameters in which GAC Advice will be given under the New gTLD Program*" and that Module 3.1 "*does not mention a Board consultation with the GAC after independent analysis has been obtained and before a decision is taken*".

The Requesters however maintain their statements included in their Request for Reconsideration regarding Resolution 2014.03.22NG01 that the NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Mr Passa was a violation of Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for the following reasons:

- Module 3.1 "GAC Advice on New gTLDs", referred to by the NGPC, provides that "*[T]he Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures*". The subject matter areas of the objection procedures is defined by Module 3.2.1 relating to the Grounds for Objection which provides that "*[A] formal objection may be filed on any one of the following four grounds (...) String Confusion Objection (...), Legal Rights Objection (...), Limited Public Interest Objection (...) and Community Objection*". The issues relating to the .WINE and .VIN TLDs have never been raised in any of the types of objections listed in Module 3.2.1. and therefore, the Requesters are surprised to note that the NGPC considers that Mr Passa's advice was provided in accordance with Module 3.1.
- Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws refers to "*any external advice*" and does not restrict the GAC's opportunity to comment on advice sought pursuant to the Bylaws provision.

- It is difficult for the Requesters to understand how the NGPC can consider that the Applicant Guidebook supersedes the ICANN Bylaws. Indeed, there are repeated references to the ICANN Bylaws in the Applicant Guidebook which reflect the fact that the Applicant Guidebook is governed by the ICANN Bylaws which govern any actions from ICANN in accordance with article 4 of ICANN's Article of Incorporation.
- The NGPC claims that *"when the GAC suggested that the NGPC may want to seek such advice, the GAC did not ask the NGPC to provide the GAC with that advice (the Independent Legal Analysis) before taking action and accepting the GAC's advice on the .WINE and .VIN applications"*. However, the Requesters consider it obvious that if the GAC asked the NGPC to seek advice, the GAC was interested in reading such advice and thus actually expected such advice to be shared with it!
- The Requesters note that Mr Passa provided a legal opinion on another "problematic" TLD, namely .AMAZON on 31 March 2014. On 7 April 2014, the GAC received a letter from Steve Crocker, the Chair of the ICANN Board of Directors, where he indicated that *"ICANN provides this analysis to keep the parties informed and welcomes any additional information that they believe is relevant to the NGPC in making its final decision on the GAC's advice on .AMAZON (and related IDNs)"*. Therefore, the Requesters find it strange that the same process was not followed with respect to Mr Passa's legal opinion on the .WINE and .VIN TLDs, especially considering that the GAC never requested the legal opinion on .AMAZON to be shared with it. Why was a different process followed in this case?

### **(c) the content of the legal opinion issued by Mr Passa**

Concerning the legal opinion provided by Mr Passa, the Requesters, like the European Commission (see <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), question the transparency of such legal opinion given that the process of appointing Mr Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded, has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr Passa's external expert legal advice is sufficiently in depth and unclear whether Mr Passa has considered the politically sensitive background of this matter when issuing his advice. For example, the Requesters note that Mr Passa only refers to the application filed by one of the applicants, namely the Donuts company. What of the other

applicants for .WINE? The Requesters therefore suggest that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is specifically worthwhile noting that Mr Passa clearly states in his opinion that, if ICANN "*had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD.*"

This would certainly appear to be a key point in the advice provided by Mr Passa, and this point is completely ignored by the NGPC as it is not mentioned at all in the Rationale for the Resolutions. The Rationale seeks to justify the Resolutions by quoting from another part of the expert analysis saying that "*there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions*". The Requesters agree with this point but respectfully submit that this is not the point to consider. The point is, exactly as Mr Passa states, that if the registry(ies) for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr Passa is of the opinion that ICANN should reject the application.

## **9. What are you asking ICANN to do now?**

The Requesters respectfully request from ICANN to:

- a) Reconsider the Resolutions 2014.04.04.NG02 – 2014.04.04.NG04;
- b) As part of its reconsideration, take into account the existing relevant materials which failed to be considered when reaching the Resolutions as well as the lack of consensus of the GAC in this matter;
- c) Grant the necessary time to applicants and interested parties to reach a balanced, satisfactory and adequate agreement before the delegation of the .WINE and .VIN gTLD strings, without setting a deadline for doing so.
- d) Clarify the interplay between Resolutions 2014.04.04.NG03 and 2014.04.04.NG04 so that the parties to the discussions can have a clear understanding and not have different interpretations of the Resolutions. If the intention of 2014.04.04.NG03 is to allow the applications to proceed to contracting after the 60 day deadline then this is a clear concern to the Requesters. However, it may be that this is not the intention of the Resolution as a whole when 2014.04.04.NG03 is considered together with 2014.04.04.NG04, which recommends that the full Board consider the larger implications of the legally complex and politically sensitive issues in

relation to the .WINE and .VIN applications. Indeed, the Requesters would like to know at what point the full Board will consider the larger implications. Is this in parallel to the 60 day period that the applicants and Requesters are now in themselves seeking to find an acceptable solution to the legally complex and politically sensitive subject, or after the 60 day period is over? If Resolutions 2014.04.04.NG03 and 2014.04.04.NG04 together mean that the contracting process will not commence until the expiry of those 60 days as well as the full Board consideration of whatever the state of play is at the end of those 60 days together with the wider implications, then the two Resolutions appear to be compatible i.e. the process itself will not continue until both the full Board has considered matters and in the meantime the GAC has had further time as per its advice in the Singapore Communiqué to “consider the elements more fully”.

The Requesters fully intend to provide a report of the status of the discussions and negotiations whether concluded or not at the end of the 60 day period so as to assist both the ICANN Board and the GAC. It would thus be helpful to have clarification earlier than later of the above given the 60 days are now running.

In any event the Requesters respectfully request that the contracting process does not commence immediately after the 60 day period is over, but only when the full Board has considered the larger implications as per 2014.04.04.NG04 and the GAC has also been in a position to consider the elements more fully as per its advice in the Singapore Communiqué.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

Under the language of the ICANN Bylaws, a Requester may bring a case if it has been affected by:

- one or more staff actions or inactions that contradict established ICANN policy(ies); or
- one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

In this case, the Requesters submit that they have been harmed by the series of process violations and procedural errors made by the NGPC in reaching the Resolutions, as detailed in sections 6. and 8. above.

The Requesters have a vested interest in the Resolutions. The Requesters represent the interests of grape growers and wine and spirit drink producers, which are protected by GIs and are thus entitled to take the appropriate measures in order to protect wine and spirit GIs from any misuse. If no agreement is reached between the applicants and the interested parties within the 60 days deadline set by the NGPC in the Resolutions and as a result of this the .WINE and .VIN TLDs are then delegated without any adequate protection to GIs, the Requesters would be most concerned as such an outcome would be highly detrimental to the interests of the wine and spirit industry. Indeed, proceeding through the normal evaluation process without additional safeguards would prevent the wine and spirit industry from protecting itself against any misuse, evocation or undue appropriation of the relevant GIs.

GIs are understood by consumers to denote the origin and the quality of products produced in a specific geographical area. GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality.

Since 1994, the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) – which has currently 159 Member States – recognizes GIs as an independent category of intellectual property, along with copyright, trade marks, patents and industrial designs. A vast majority of WTO Member States have issued specific laws on GIs and established transparent lists of the national and foreign GIs protected within their jurisdiction. Denying protection to GIs in the ICANN new gTLDs process would amount to not respecting the internationally recognised rules on intellectual property rights and would weaken the overall new gTLD system.

If GIs are not adequately protected as part of the .WINE and .VIN TLDs, this would indeed impede the application, in the .WINE and .VIN TLDs spaces, of the relevant legislation applicable to GIs, and more particularly the protection granted to GIs by the TRIPs and Lisbon Agreements as well as by the relevant EU and national regulations, and such spaces would then become tainted "lawless" zones in which the main actors of the wine industry could refuse to participate. Therefore, the adverse impact of the Resolution would likely be significant as it would undermine the business of a whole industry.

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<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPs"



It would also be extremely unfair, unbalanced and inconsistent to find ourselves in a situation where GIs would be adequately protected both in the non-virtual space and in the general existing internet world but not in the soon to be created .WINE and .VIN spaces. Such a discrepancy would threaten the otherwise stable business of the wine and spirit industry.

It should be noted that the applicants and interested parties are currently negotiating with a view to reaching an agreement whereby the GIs would be adequately protected. Given the time and efforts invested by the Requesters to try to find an amicable solution with the .WINE and .VIN applicants, if the negotiations do not come to an end within the 60 days deadline set by the NGPC in the Resolutions, the deadline set by the Resolutions would have negated these efforts to find a balanced solution in this respect. The Resolutions would thus contradict ICANN policies requiring, *inter alia*, fairness, non-discriminatory treatment, neutral application of established policies and predictability.

The five Requesters represent, together, producers of wines and spirit from France, Hungary, Italy, Portugal and Spain. They therefore represent a wide array of interested parties and are supported by 34 others countries within the GAC, such as South America and Africa, and have the full support of other wine producers, whether located within or outside the European Union, such as in the United States, Canada and Australia.

The Requesters would indeed like to stress that this important issue is not just of concern to the wine producers in the European Union Member States, but also globally. Whilst the Requesters have sought to bring the subject to the attention of global wine producers this is by no means an easy task, especially when short timetables have been imposed previously for negotiations to take place. However, this outreach has borne fruit and raised concern in other countries and the letters dated 3 April 2014 from the Napa Valley Vintners and The Long Island Wine Council, both based in the USA highlight this.

The production of wines and spirits is not only of significant cultural importance to many countries, but also of considerable economic importance. Indeed, the important wine market accounts globally for more than \$270 billion in sales, of which on-line sales represent a significant and growing proportion. In the case of France, the wine sector is the second most important sector present on the international market (after aeronautics).

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining

parties? Explain.

The Requesters represent, together, a number of wine and spirit producers and would suffer the same type of harm if the Resolutions were enforced instead of being overruled as requested.

**Do you have any documents you want to provide to ICANN?**

1. Resolutions 2014.04.04.NG01 – 2014.04.04.NG04  
(<https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>)
2. Resolution 2014.03.22.NG01  
(<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm>)
3. GAC Advice 2013-09-09-wine and vin  
([https://gacweb.icann.org/download/attachments/33849356/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board\\_20130909.pdf?version=1&modificationDate=1379634339000&api=v2](https://gacweb.icann.org/download/attachments/33849356/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board_20130909.pdf?version=1&modificationDate=1379634339000&api=v2))
4. Letter dated 23 April 2013 from EFOR  
(<http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en.pdf>)
5. Letter dated 19 August 2013 from EFOR and CNAOC  
(<http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en.pdf>)
6. Letter dated 12 September 2013 from the European Commission  
(<https://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en.pdf>)
7. Letter dated 7 November 2013 from the European Commission  
(<http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>)
8. Letter dated 3 February 2014 from the European Commission  
(<https://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en.pdf>)
9. Jérôme Passa's legal opinion (undated)  
(<http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf>)
10. GAC's Singapore Communiqué of 27 March 2014

- <https://gacweb.icann.org/download/attachments/27132037/Final%20Comunique%20-%20Singapore%202014.pdf?version=2&modificationDate=139642977600&api=v2>
11. Letter dated 19 March 2014 from the European Parliament (<https://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en.pdf>)
  12. Letter dated 26 March 2014 from the European Commission (<https://www.icann.org/en/news/correspondence/steneberg-to-icann-board-26mar14-en.pdf>)
  13. Letter dated 2 April 2014 from the European Commission (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>)
  14. Letter dated 1 April 2014 from the Consorzio Vino Chianti Classico (Annex I)
  15. Letter dated 2 April 2014 from the Comité Interprofessionnel du Vin de Champagne (CIVC) (Annex I)
  16. Letter dated 2 April 2014 from the CONSEJO REGULADOR de la denominación de Origen Calificada (D.O.Ca) RIOJA (Annex I)
  17. Letter dated 3 April 2014 from the Instituto os Vinhos do Douro e do Porto (Annex I)
  18. Letter dated 3 April 2014 from the Long Island Wine Council (Annex I)
  19. Letter dated 3 April 2014 from the Napa Valley Vintners (Annex I)
  20. Letter dated 3 April 2014 from the Consejo Regulador Do Jerez-Xérès-Sherry (Annex I)
  21. Letter dated 7 April 2014 from the Santa Barbara Vintners (Annex I)

### **Terms and Conditions for Submission of Reconsideration Requests**

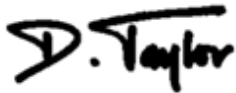
The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requesters may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



18 April 2014

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Signature

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Date

# **REQUEST 14-25**

## Reconsideration Request Form

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### 1. Requester Information

**Name:** Pierre Sellal, Secretary General, French Ministry of Foreign Affairs and International Development, on behalf of the French Government

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

### 2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered:

The undersigned seek reconsideration of Resolutions 2014.04.04.NG01 – 2014.04.04.NG04 (the "Resolutions") issued by the ICANN Board New gTLD Program Committee ("NGPC"). The relevant parts of the Resolutions read as follows:

*"Whereas, on 9 September 2013, in a letter to the ICANN Board, the Governmental Advisory Committee (GAC) advised the Board that the GAC had finalized its consideration of the strings .WINE and .VIN, that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and that the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, on 20 November 2013, the GAC issued its Buenos Aires Communiqué, wherein it suggested that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

*Whereas, the NGPC asked staff to commission an independent legal analysis ("Independent Legal Analysis") of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN.*

*Whereas, on 22 March 2014, in Resolution 2014.03.22.NG01, the NGPC "accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and direct[ed] the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process."*

*Whereas, as noted in the Rationale of Resolution 2014.03.22.NG01, the NGPC*

considered the Independent Legal Analysis as part of its deliberations on the GAC's advice, which is published at <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf> [PDF, 771 KB].

Whereas, on 27 March 2014, in the Singapore Communiqué, the GAC noted that "there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6" in the ICANN Board's final deliberation of Resolution 2014.03.22.NG01 and advised that the ICANN Board reconsider the matter before delegating these strings.

Whereas, in the Singapore Communiqué, the GAC further advised that "concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."

Whereas, the NGPC has reviewed and considered the matter set forth in the Singapore Communiqué, specifically the issue raised by the GAC relating to its suggestion of a possible process violation or procedural error under ICANN Bylaws Article XI-A, Section 1, subsection 6.

Whereas, the NGPC recognizes that some GAC members remain concerned about the .WINE and .VIN applications, and the NGPC recognizes that this is a matter of great importance to these GAC members, as well as to the interested applicants for these top level domains.

Resolved (2014.04.04.NG01), the NGPC accepts the GAC advice identified in the Singapore Communiqué as it relates to the applications for .WINE and .VIN.

Resolved (2014.04.04.NG02), upon having considered the matter set forth in the GAC Singapore Communiqué suggesting that there may have been a process violation or procedural error, the NGPC concludes that there has been no process violation or procedural error under the Bylaws.

Resolved (2014.04.04.NG03), the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do.

Resolved (2014.04.04.NG04), the NGPC recommends that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.

#### **Rationale for Resolutions 2014.04.04.NG01 – 2014.04.04.NG04**

The NGPC's action today, addressing the Governmental Advisory Committee's ("GAC") advice in the Singapore Communiqué concerning the .WINE and .VIN applications, is part of the ICANN Board's role to address advice put to the Board by the GAC. Article XI, Section 2.1 of the ICANN Bylaws <http://www.icann.org/en/about/governance/bylaws#XI> permits the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."

*Module 3.1 of the Applicant Guidebook ("AGB") sets forth the parameters in which GAC Advice will be given under the New gTLD Program. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.*

#### *Factual Background*

*The GAC previously issued advice to the Board on the New gTLD Program, and specifically on the .WINE and .VIN applications, through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning the .WINE and .VIN applications. In the Buenos Aires Communiqué, the GAC suggested that the Board may "wish to seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. GAC members may wish to write to the Board to further elaborate their views." ([https://gacweb.icann.org/download/attachments/33849634/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1390438464000&api=v2](https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1390438464000&api=v2) [PDF, 97 KB].)*

*Following the Buenos Aires Communiqué, the NGPC directed staff to commission independent legal analysis as to whether international law or national law in wine-growing regions -- France, Italy, Spain, Australia, elsewhere -- establish a bar that would entitle governments or administrative agencies to prevent administration of the .WINE and .VIN gTLDs and whether any rights or protections granted to wine-related geographic indications impose a duty on ICANN to provide for protection at the second level if the .WINE or .VIN strings were to be delegated (the "Independent Legal Analysis").*

*The Independent Legal Analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions." (<http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf> [PDF, 771 KB] at Pg. 7.)*

*On 22 March 2014, the NGPC adopted Resolution 2014.03.22.NG01, whereby it "accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and direct[ed] the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process." (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.) The NGPC noted that it considered the Independent Legal Analysis as part of its deliberations on the GAC's advice. (See *id.*) As part of Resolution 2014.03.22.NG01, the NGPC published the Independent Legal Analysis at <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf>*



[PDF, 771 KB].

On 27 March 2014, the GAC published its Singapore Communiqué. On the topic of .WINE and .VIN, the GAC stated as follows:

The GAC notes the NGPC Resolution 2014.03.22.NG01 concerning .wine and .vin as well as its rationale. In the final deliberation of the Board there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

The GAC therefore advises:

That the Board reconsider the matter before delegating these strings. The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

<https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=1&modificationDate=1395925159241&api=v2>

[PDF, 448 KB].)

#### Discussion and Analysis

In sum, the NGPC has accepted the GAC advice and has carefully reviewed and evaluated whether there was a procedure or process violation under the Bylaws. The NGPC has determined that there was not because, among other reasons, ICANN did not seek the Independent Legal Analysis as External Expert Advice pursuant to Article XI-A, or any other portion of the Bylaws.

The GAC's advice on the .WINE and .VIN applications was issued pursuant to the GAC-related procedures in Module 3.1 of the Applicant Guidebook and not as External Expert Advice for purposes of the policy development process on new gTLDs, which was concluded in August 2007. Rather, the Independent Legal Analysis was obtained as part of the implementation of the New gTLD Program.

Under Module 3.1 of the Guidebook, the Board has the discretion to seek independent expert analysis on issues raised in the GAC Advice on new gTLD applications. This provision does not mention a Board consultation with the GAC after independent analysis has been obtained and before a decision is taken. There is no reference in Module 3.1, or elsewhere in the Applicant Guidebook, to Article XI-A, or any of its subsections.

Further, because the NGPC did not " . . . determine[] to take an action that is not consistent with the Governmental Advisory Committee advice, . . ." the NGPC did not "inform the Committee [of its determination] and state the reasons why it decided to not follow the advice" (Bylaws, Article XI, Section 2.1.j). Specifically, as noted in the Rationale of Resolution 2014.03.22.NG01, "[t]he action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC 'has finalized its

consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process." (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.) The NGPC obtained the Independent Legal Analysis, which it has the discretion to do under the Module 3.1 of the Applicant Guidebook, and in part at the suggestion of the GAC. Further, when the GAC suggested that the NGPC may want to seek such advice, the GAC did not ask the NGPC to provide the GAC with that advice (the Independent Legal Analysis) before taking action and accepting the GAC's advice on the .WINE and .VIN applications.

#### Decision

The NGPC has taken the GAC's suggestion of a potential process violation or procedural error very seriously and recognizes the import of the matters at issue. After careful consideration, the NGPC has concluded that there was no process violation or procedural error under the Bylaws, particularly because the Independent Legal Analysis was not sought as External Expert Advice pursuant to Article XI-A, or any other Bylaws provision. Rather, the Independent Legal Analysis was sought pursuant to Module 3.1 of the Applicant Guidebook, and partly at the GAC's suggestion.

Although NGPC did not find a process violation or procedural error under the Bylaws, consistent with ICANN's commitment to transparency, ICANN did attach to Resolution 2014.03.22.NG01 the Independent Legal Analysis concerning .WINE and .VIN. Further, for ease of reference, ICANN will provide a copy of the Independent Legal Analysis directly to the GAC.

Additional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting to allow the relevant impacted parties additional time to try to work out their differences.

Further, the full Board should consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.

In taking this action today, the NGPC acknowledges the correspondence received on .WINE and .VIN since the ICANN Singapore meeting, including:

- [Letter dated 19 March 2014 \[PDF, 120 KB\]](#) from Mr. Martin Schulz, President, The European Parliament
- [Letter dated 26 March 2014 \[PDF, 141 KB\]](#) from Ms. Linda Corugedo-Steneberg, Director – European Commission, Directorate-General for Communications Networks, Content and Technology
- [Letter dated 1 April 2014 \[PDF, 500 KB\]](#) from Mr. Sergio Zingarelli, President - Consorzio Vino Chianti Classico
- [Letter dated 2 April 2014 \[PDF, 68 KB\]](#) from Ms. Linda Corugedo-Steneberg, Director – European Commission, Directorate-General for Communications Networks, Content and Technology

- Letter dated 2 April 2014 [PDF, 1.23 MB] from Mr. Jean-Luc Barbier, General Director - Comité Interprofessionnel du Vin de Champagne (CIVIC)
- Letter dated 3 April 2014 [PDF, 226 KB] from Mr. Manuel de Novae Cabral, Presidente - Instituto os Vinhos do Douro e do Porto
- Letter dated 3 April 2014 [PDF, 739 KB] from Mr. Steven L. Bate, Executive Director - The Long Island Wine Council
- Letter dated 3 April 2014 [PDF, 924 KB] from Ms. Linda Reiff, President & CEO - Napa Valley Vintners
- Letter dated 3 April 2014 [PDF, 179 KB] from Mr. César Saldaña, Director General, Consejo Regulador Do Jerez-Xérès-Sherry

The reasons for requesting the Reconsideration of the Resolution are detailed below.

4. **Date of action/inaction:**

The Resolutions were published on 4 April 2014.

The resolution is posted in the ICANN website under <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

5. **On what date did you become aware of the action or that action would not be taken?**

The undersigned and the French GAC representatives to the Governmental Advisory Committee became aware of the content of the Resolutions on 5 April 2014.

6. **Describe how you believe you are materially affected by the action or inaction:**

The French Government is mandated by the French Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.04.04.NG01, NG02, NG03 and NG04. The French government has serious concerns with three out of four aspects of the Resolutions:

- (i) the NGPC's position that there was no process violation or procedural error in accordance with Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for failing to give the GAC an opportunity to comment on an opinion issued to the NGPC by a University Professor, Jérôme Passa;
- (ii) the 60 days deadline given to the interested parties to negotiate; and

(iii) the question raised by the NGPC as to whether ICANN is the proper venue in which to resolve the issues raised by the .VIN and WINE TLDs.

(i) The NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Mr Passa

In the Resolutions, the NGPC considered whether its failure to give the GAC an opportunity to comment on Pr. Passa's opinion was a violation of the ICANN Bylaws and concluded that there was no process violation or procedural error under the Bylaws, particularly because the opinion in question was not sought as External Expert Advice pursuant to any of the Bylaws provision but rather pursuant to Module 3.1 of the Applicant Guidebook, and partly at the GAC's suggestion.

The French Government however maintain their position, detailed in its Request for Reconsideration regarding Resolution 2014.03.22.NG01, that the NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Pr. Passa was a violation of Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for the reasons set out in Section 8. 2) (b) below.

(ii) The 60 days deadline

In the Resolutions, the NGPC concluded that "[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting".

First, the French Government notes an inconsistency in the Resolutions. Indeed, the Resolutions state that "the NGPC accepts the GAC advice identified in the Singapore Communiqué". Such advice was as follows:

*"The GAC therefore advises:*

*That the Board reconsider the matter before delegating these strings.*

*The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."*

Nowhere in its Singapore Advice did the GAC mention a deadline to reach an agreement and the objective pursued by the GAC is that the applicants and interested parties do reach an agreement, without any arbitrary deadlines. Therefore, the deadline of 60 days set by the Resolutions considerably restricts the GAC advice and therefore the NGPC does not appear to have fully accepted GAC advice as it states. This is not a minor point as a deadline appearing to allow the applications to proceed regardless of whether agreement is reached at the expiry of a certain time is clearly not conducive to reaching agreement.

The undersigned stresses that he fully appreciates that the applicants have business interests and thereby a wish for the delegation of .VIN and .WINE to proceed rapidly.

The French Government is not adverse to the delegation of these strings per se, it simply seeks sufficient and appropriate safeguards to prevent abuse of consumers around the globe and risk material detriment to the interests of the grape growers and wine and spirit producers that rely on Geographical Indications for their livelihood.

The legally complex and politically sensitive background makes for a challenging negotiation by itself plus whilst there is only one applicant for .VIN, there are three applicants for .WINE each with differing interests and business plans with varied ideas and commitment of how domain names would be allocated to third parties. It is important that these discussions can come to conclusion without interference from outside entities and the arbitrary deadline of 60 days serves to stifle the discussions.

Indeed, Resolution 2014.03.22.NG01 which precedes this Resolution 2014.04.04.NG01-2014.04.04.NG04 shocked the French Government as the ICANN NGPC effectively brought a close to the negotiations without any warning when they were in fact far from completion. The subsequent Resolution 2014.04.04.NG01-2014.04.04.NG04 perhaps serves to mitigate this earlier Resolution, by setting a time frame.

But this time frame is not based on the state of the negotiations and is an arbitrary one, which only encourages successful negotiations if the outcome is dependent on the fact of a negotiated settlement occurring. Depending on the extent of the applicants' cooperation and good faith, 60 days to reach an agreement between the applicants and the interested parties, will most likely not be sufficient and risks simply postpone the problem rather than fully addressing it.

As far as the French government is concerned, it is of uttermost importance that the applicants negotiate with the interested parties in good faith so as to ensure that the agreement ultimately reached is fully balanced, thought through and transparent. This is not something that can be achieved under the pressure of an artificial deadline of 60 days. The sole inclusion of the 60 days deadline in the Resolution serves to work against the parties negotiating rather than encouraging it as the GAC requested in its Singapore Communiqué. This is why there should not be a time limitation but rather a situation that enables both sides to come to an agreement, before the .VIN and .WINE are delegated.

The Resolutions' wording that "[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting" would appear to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, as has been the case in the past when deadlines were set, the applicants may be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once this deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to its successful applicant after contention set resolution. Such a situation is far from being conducive to good faith negotiations and to reaching a balanced agreement.

It may be that this is not the intention of the Resolution as a whole and that when 2014.04.04.NG03 is considered together with 2014.04.04.NG04 that the applications for

.WINE and .VIN will still not proceed and commence the contracting process until the full Board has considered the larger implications. It is hard for the undersigned to know which the correct interpretation is, and as such the Resolution is unclear and would benefit from being reconsidered so as to avoid misunderstanding and different interpretations.

In addition, if the first interpretation of the Resolutions is accurate, i.e. if the Resolutions' wording actually means that, if no agreement is reached within the 60 days deadline set by the NGPC, the new gTLDs for .VIN and .WINE will proceed to the contracting phase (though for .WINE the applicants remain in a contention set so cannot proceed immediately), this would also mean that the delegation of the .VIN and .WINE TLDs would be conducted without further consultation of the GAC. This would contradict the GAC's advice in its Singapore Communiqué that the Board should "reconsider the matter before delegating these strings" and "the GAC needs to consider the elements more fully" while such advice has been accepted by the NGPC in the Resolutions.

It would therefore seem that there is an inconsistency in the wording used by the NGPC in the Resolutions and that the NGPC would need to clarify its statements with respect to the consequences of a failure to reach an agreement within the 60 days deadline.

(iii) Whether ICANN is the proper venue in which to resolve the issues raised by the .VIN and WINE TLDs

The Resolutions raise the question of whether ICANN is the proper venue to resolve the issues raised by the .VIN and .WINE TLDs. ICANN needs to comply with International Laws on the subject of Geographical Indications ("GI"s) which are recognized by the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) which currently has 159 Member States. As such, GIs need sufficient protection in the .VIN and .WINE TLDs and ICANN needs to ensure sufficient precautions are in place to prevent infringement of GIs. Otherwise the French Government is of the opinion that the TLDs should not be delegated. Indeed this very point is included in the opinion of Pr. Passa, though it appears to have been overlooked, where he states:

*"[if ICANN] had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD."*

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

As reflected in section 6, consumers and right holders are the stakeholders affected by

resolution 2014.04.04.NG01, NG02, NG03 and NG04. The protection of their legitimate rights has a public value as demonstrated above. The French Government represents that public interest and as such, it is also entitled to assert this reconsideration request.

If no acceptable agreement is reached between the relevant applicants and the interested parties within the 60 days deadline and the .WINE and .VIN TLDs are delegated as a consequence, as suggested by the text of the Resolutions, the direct outcome of this would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there is an important number of small wine producers which play a crucial role for the sustainability of their communities and regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the French Government fears that the potential for abuse would considerably increase in online spaces were no specific protection to be granted to GIs. If wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse and fraudulent activities. The continued abuse in the existing TLDs such as .com, .net and ccTLDs demonstrates this is a valid concern. The global scope of having a new gTLD dedicated to WINE or VIN with a lack of clear rules and safeguards will only exacerbate these problems including:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited products may be facilitated with wide implications, including commercial detriment and health risks for consumers (non-compliance with product specifications);
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs as they would see it as a rogue space and this is certainly not the result expected or wished for by the applicants of these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Europe and also across the globe and we refer here to the numerous letters from wine producers and grape growers in the wine community but also is an incredible missed opportunity to create a secure and safe space in the DNS which is

supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The French Government therefore favors and calls for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

## **8. Detail of Board or Staff Action – Required Information**

This Request relates to a Board action, namely the adoption of the Resolutions, which is based upon inaccurate, false, or misleading materials presented to the Board. The Resolutions and Resolution 2014.03.22NG01, which the French Government already sought the reconsideration of (

<http://www.icann.org/en/groups/board/governance/reconsideration/14-15/request-french-government-08apr14-en.pdf>), are both partly based on the following elements: the GAC Chair letter to the ICANN Board dated 9 September 2013 as part of the GAC Advice on .VIN and .WINE and Pr. Jerome Passa's analysis. In this respect, the French Government reiterates the statements included in their Request for Reconsideration regarding Resolution 2014.03.22NG01 that such materials are inaccurate, false, and/or misleading for the following reasons:

### **(i) The GAC's alleged consensus**

One of the grounds for the Resolutions is the GAC's alleged statement to the ICANN Board that "there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process". Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013. However:

- This letter was sent to the ICANN Board without being circulated to GAC members first.
- As explained in the Request for Reconsideration regarding Resolution 2014.03.22NG01 filed by the French Government, it is also clear that the statement quoted in the Rationale of Resolution 2014.03.22.NG01 and re-iterated in 2014.04.04.NG01-2014.04.04.NG04 that the GAC "has finalized its consideration of the strings .wine and .vin" and further advised that "the applications for .WINE and .VIN should proceed through the normal evaluation process" is not a consensus view of the GAC. As such the NGPC is taking action that is not consistent with the GAC Advice, it is rather taking action based on a letter that was never supported by a consensus of the GAC (see subsequent letters from the European Commission already referred to).
- And as can be noted from the intense GAC discussions in their meetings and Communiqués since this letter of 9 September 2013 which was used as a basis for the Resolutions of 22 March 2014 and 4 April 2014, the fact of the matter is that the



GAC has not finalized its consideration as claimed in the letter. Indeed, even the latest GAC Singapore Communiqué states that: "The GAC needs to consider the above elements more fully". It does not appear to the French Government to be an indication that the GAC finalized its consideration back in September 2013.

This letter is therefore clearly misleading.

(iii) The failure to give the GAC an opportunity to comment on Pr. Passa's opinion

Although required to do so pursuant to Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws, the NGPC did not provide the GAC with an opportunity to comment on the legal opinion issued to the ICANN Board NGPC by Jérôme Passa. Although not inaccurate, false or misleading per se, Mr Passa's opinion, which is one of the materials considered by the NGPC to issue the Resolutions, is marred by a procedural error. It should therefore be considered as misleading and inaccurate.

On 27 March 2014, in the Singapore Communiqué, the GAC noted that "there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6" in the Resolution and advised that the ICANN Board reconsider the matter before delegating the .WINE and .VIN strings. The GAC further advised that "concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."

Although recognized by the GAC, the NGPC refuses, in the Resolutions, to acknowledge the procedural issues raised. The NGPC indeed explains that "the Module 3.1 of the Applicant Guidebook (AGB) sets forth the parameters in which GAC Advice will be given under the New gTLD Program" and that Module 3.1 "does not mention a Board consultation with the GAC after independent analysis has been obtained and before a decision is taken".

The French Government however maintain its statements included in their Request for Reconsideration regarding Resolution 2014.03.22NG01 that the NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Pr. Passa was a violation of Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for the following reasons:

- Module 3.1 "GAC Advice on New gTLDs", referred to by the NGPC, provides that "[T]he Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures". The subject matter areas of the objection procedures is defined by Module 3.2.1 relating to the Grounds for Objection which provides that "[A] formal objection may be filed on any one of the following four grounds (...) String Confusion Objection (...), Legal Rights Objection (...), Limited Public Interest Objection (...) and Community Objection". The issues relating to the .WINE and .VIN TLDs have never been raised in any of the types of objections listed in Module

3.2.1. and therefore, the undersigned finds it surprising to note that the NGPC considers that Pr. Passa's advice was provided in accordance with Module 3.1.

- Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws refers to "any external advice" and does not restrict the GAC's opportunity to comment on advice sought pursuant to the Bylaws provision.
- It is difficult for the French Government to understand how the NGPC can consider that the Applicant Guidebook supersedes the ICANN Bylaws. Indeed, there are repeated references to the ICANN Bylaws in the Applicant Guidebook which reflect the fact that the Applicant Guidebook is governed by the ICANN Bylaws which govern any actions from ICANN in accordance with article 4 of ICANN's Article of Incorporation.
- The NGPC claims that "when the GAC suggested that the NGPC may want to seek such advice, the GAC did not ask the NGPC to provide the GAC with that advice (the Independent Legal Analysis) before taking action and accepting the GAC's advice on the .WINE and .VIN applications". However, the French Government considers it obvious that if the GAC asked the NGPC to seek advice, the GAC was interested in reading such advice and thus actually expected such advice to be shared with it.
- The undersigned notes that Pr. Passa provided a legal opinion on another "problematic" TLD, namely .AMAZON on 31 March 2014. On 7 April 2014, the GAC received a letter from Steve Crocker, the Chair of the ICANN Board of Directors, where he indicated that "ICANN provides this analysis to keep the parties informed and welcomes any additional information that they believe is relevant to the NGPC in making its final decision on the GAC's advice on .AMAZON (and related IDNs)". Therefore, the undersigned finds it strange that the same process was not followed with respect to Mr Passa's legal opinion on the .WINE and .VIN TLDs, especially considering that the GAC never requested the legal opinion on .AMAZON to be shared with it.

(iv) The content of the legal opinion issued by Pr. Passa

Concerning the legal opinion provided by Pr. Passa, the French Government, like the European Commission (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), questions the transparency of such legal opinion given that the process of appointing Pr. Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded, has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a "clear understanding of the legally complex and politically sensitive background" on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Pr. Passa's external expert legal advice is sufficiently in depth and unclear whether Pr. Passa has considered the politically sensitive background of this

matter when issuing his advice. For example, Pr. Passa only refers to the application filed by one of the applicants, namely the Donuts company, without consideration for the other applicants for .WINE. It therefore appears that additional legal advice, from other experts, designated in a transparent manner, should be considered.

It is also specifically worthwhile noting that Pr. Passa clearly states in his opinion that, if ICANN "had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD." This would certainly appear to be a key point in the advice provided by Pr. Passa, although it is completely ignored by the NGPC as it is not mentioned at all in the Rationale for the Resolutions.

The Rationale seeks to justify the Resolutions by quoting from another part of the expert analysis saying that "there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions". The undersigned agrees with this point but underlines that if the registry(ies) for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Pr. Passa is of the opinion that ICANN should reject the application.

#### **8. What are you asking ICANN to do now?**

The undersigned respectfully request from ICANN to:

- (i) Reconsider the Resolutions 2014.04.04.NG02 – 2014.04.04.NG04;
- (ii) As part of its reconsideration, take into account the existing relevant materials which failed to be considered when reaching the Resolutions as well as the lack of consensus of the GAC in this matter;
- (iii) Grant the necessary time to applicants and interested parties to reach a balanced, satisfactory and adequate agreement before the delegation of the .WINE and .VIN gTLD strings, without setting a deadline for doing so.
- (iv) Clarify the interplay between Resolutions 2014.04.04.NG03 and 2014.04.04.NG04 so that the parties to the discussions can have a clear understanding and not have different interpretations of the Resolutions.

If the intention of 2014.04.04.NG03 is to allow the applications to proceed to contracting after the 60 day deadline then this is a clear concern to the undersigned. However, it may be that this is not the intention of the Resolution as a whole when 2014.04.04.NG03 is considered together with 2014.04.04.NG04 which recommends that the full Board consider the larger implications of the legally complex and politically sensitive issues in relation to the .WINE and .VIN applications.

Indeed, the French Government would like to know at what point the full Board will consider the larger implications: in parallel to the 60 day period that negotiations are undertaken to find an acceptable solution to the legally complex and politically sensitive subject, or after the 60 days period is over?

If Resolutions 2014.04.04.NG03 and 2014.04.04.NG04 together mean that the contracting process will not commence until the expiry of those 60 days as well as the full Board consideration of whatever the state of play is at the end of those 60 days together with the wider implications then the two Resolutions appear to be compatible i.e. the process itself will not continue until both the full Board has considered matters and in the meantime the GAC has had further time as per its advice in the Singapore Communiqué to “consider the elements more fully”.

This is why the French Government requests that the contracting process does not commence immediately after the 60 day period is over, but only when the full Board has considered the larger implications as per 2014.04.04.NG04 and the GAC has also been in a position to consider the elements more fully as per its advice in the Singapore Communiqué.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

The grounds under which the French Government has standing to assert this Reconsideration Request are numerous. Below, we set out national and European regulations in the field of wines that support our request. International Treaties and EU bilateral agreements on the protection of GIs are not included. Please refer to letter from the EU Commission to GAC members on 29 July 2013 for information.

France is the first country that developed the systematic legal protection of geographical indications. As soon as at the beginning of last century, the *Law of 1 August 1905*<sup>1</sup> made the French government responsible for the administrative recognition of appellations of origin and allowed imposition of fines on those who would mislead or even attempted to mislead the contracting party as to the origin of goods.

In 1990 the Law on Protection of Appellations of Origin of 1919 was amended substantially and has since been incorporated into the Consumer code (Code de la Consommation). Later on, the changes required by EC Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs were incorporated to the French Law by the Law 94-2 of 3 January 1994 on the recognition of the quality of agricultural products and foodstuffs.

All the relevant Regulatory Framework of France can be found in the dedicated sections of the Consumer Code. Article L115-1 of the Consumer Code defines an appellation of

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<sup>1</sup> Journal Officiel, August 5, 1905.

origin as follows:

"... the name of a country, region or locality serving to designate a product originating therein the quality and characteristics of which are due to the geographical environment, including both natural and human factors".

An *Appellation d'origine contrôlée* is defined by Articles L115-6 of the Consumer Code as:

*"... an appellation of origin in the agricultural products and foodstuffs sector, with a duly established reputation and an approval procedure defined by a decree passed on an INAO proposal setting out the relevant boundaries and requirements pertaining to production and approval."*

The Ministry of Agriculture and Fisheries is the national authority responsible for overall quality policy in France and the INAO has now the responsibility to conduct the national examination of the appellations of origin and geographical indications for all products as provided in Regulation 510/2006.

- European legislation:

European Regulations are directly enforceable in each of EU Member States (article 288 of the Treaty on the functioning of the European Union).

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against:

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Commission Regulation (EU) No 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No. 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue.*"

It stems from the above that both the European Commission and its Member States are bound to take the appropriate measures in order to tackle any misuse of protected GIs.

In the present circumstances, considering on one hand the worldwide coverage of Internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

The undersigned represents the French Government and represents French citizens and undertakings in the defense of the public policy interests that concerns them in the case in hand.

**Do you have any documents you want to provide to ICANN?**

The relevant documents are linked in the text of the Reconsideration Request.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

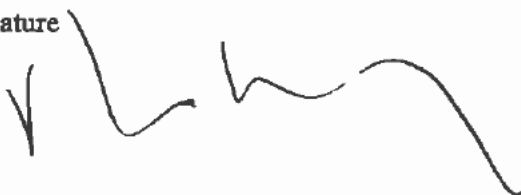
The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

18<sup>th</sup> April 2014

Signature

Date



**Pierre SELLAL**

# **REQUEST 14-26**





## Reconsideration Request Form

Version of 11 April 2013

### 1. Requester Information

**Name:** Rita Forsi, Director General, Ministry of Economic Development

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

### 2. Request for Reconsideration of (check one only):

X Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered.

The undersigned requests that Resolution 2014.04.04 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, as it resolved that

**2014.04.04.NG02:** upon having considered the matter set forth in the GAC Singapore Communiqué suggesting that there may have been a process violation or procedural error, the NGPC concludes that there has been no process violation or procedural error under the Bylaws.

**2014.04.04.NG03:** the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do.

**2014.04.04.NG04:** the NGPC recommends that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.

The resolution is posted in the ICANN website under

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>

**4. Date of action/inaction:**

The ICANN Board New gTLD Program Committee (NGPC) took its decision on 04-04-2014 and it was published on the ICANN website the same day.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned became aware of this resolution on 05-04-2014.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requester has serious concerns with the Resolution 2014.04.04 as explained below.

**2014.04.04.NG02:** *the NGPC concludes that there has been no process violation or procedural error under the Bylaws"*

It is the opinion of the Undersigned that the NGPC's failure to provide the GAC with an opportunity to make comments on the legal advice issued by the legal expert, prof. Jerome Passa (<http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf>), was a violation of Article XI-A, Section 1, subsection 6 of the ICANN Bylaws. As clearly described by the Italian Minister of Economic Development, Mrs. Federica Guidi, in her Request for Reconsideration on Resolution 2014.03.22.NG01 (<http://www.icann.org/en/groups/board/governance/reconsideration/14-19/request-italian-government-09apr14-en.pdf>), our belief is that there is a violation for the reasons set out below.

**Bylaws Article XI-A, Section 1 subsection 6 states:**

*"6. Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon **any** external advice received prior to any decision by the Board". (emphasis added)*

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation

phase, ICANN is still trying to define appropriate safeguards for the protection of the public policy interest in the new gTLD Program. Despite the argument that the new gTLD policy development finalized in 2007, several policy changes had still taken place since 2007. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" received prior to "any" decision by the Board.

**2014.04.04.NG03** *"the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do".*

This Resolution seems only to delay the delegation process for the .WINE and .VIN TLDs for 60 days, whatever the result of the negotiations may be .

An artificial, not-result-based deadline for the end of negotiations could encourage the applicants not to be conducive to good faith negotiations and not to reach a balanced agreement with the interested parties. It seems that the Applicants should have only to wait for 60 days and then their applications would proceed through normal ICANN process, without any penalty.

**2014.04.04.NG04:** *the NGPC recommends that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.*

The Resolution raises the question of whether ICANN is the proper venue to resolve the issues raised by the .VIN and .WINE TLDs.

ICANN needs to comply with International Laws on the subject of Geographical Indications ("**GIs**") which are recognized by the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) which currently has 159 Member States.

As such if GIs need sufficient protection in the .VIN and .WINE TLDs and ICANN needs to ensure sufficient precautions to prevent infringement of GIs, if not then the Undersigned respectfully submit that the TLDs should not be delegated.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The protection of GIs serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness.

Consumers procuring wine online via, for example, *chianti.wine* or *barolo.wine* could indeed be deceived into believing that they are buying a genuine Chianti or Barolo wine with specific qualities and characteristics of a product with geographical indication, when they are in fact buying an imitation. Further the rights of holders of geographical indication would be impaired. Therefore, the adverse impact of the Resolution could be considerable.

If no agreement is reached after the 60 day period, the applications for .WINE and .VIN will proceed through the normal evaluation process (2014.04.04.NG03). The direct consequence would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there are an important number of small wine producers which play a crucial role for the sustainability of their communities and regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the Requesters fear that the potential for abuse would considerably increase in online spaces where no specific protection would be granted to GIs. If Italian GI wines and spirits are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse and fraudulent activities. The global scope of the .WINE and .VIN TLDs and a lack of clear rules and safeguards can indeed only amplify these problems including as follows:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited "Made in Italy" products may be facilitated;
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs and this is certainly not the result expected by the applicants to these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the wine industry be delegated with no protection for GIs is not only clearly something that will affect

the industry in Italy but also across the globe. It will be also an incredible missed opportunity to create a secure and safe space in the DNS which is supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The Requester therefore calls for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

#### **8. Detail of Board or Staff Action – Required Information**

**In the following section, the undersigned aims to provide the necessary details to prove that**

- 1) The Board has not considered certain material information

While the Singapore GAC Communiqué reports:

*The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.*

The Resolution **2014.04.04.NG03** states “*the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do*”.

The Board, in its Resolution, has not considered neither of the two statements of GAC Communiqué. Indeed the Board seems to give the green light to the delegation process of the strings after 60 days, without further consulting the GAC and, as explained above, negotiations between applicant and interested parties would not be propelled by an unconditioned deadline.

- 2) The Board has also based its Resolution upon inaccurate, false and misleading materials (and information), and which formed the basis for the Board action being challenged.

**Resolutions 2014.04.04.NG01-NG04** are a direct result of Resolution 2014.03.22.NG01 for which the Italian Minister of Economic Development, Mrs. Federica Guidi, filed a Reconsideration Request

<http://www.icann.org/en/groups/board/governance/reconsideration/14-19/request-italian-government-09apr14-en.pdf>

For this reason, the Requester reiterates the statements included in her Request for Reconsideration regarding Resolution 2014.03.22NG01 that such materials

are inaccurate, false, and/or misleading for the following reasons:

a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that *"there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process"*.

Such statement is based on a letter sent by the GAC Chair to the ICANN Board on 9 September 2013.

However:

(i) such letter was sent to the ICANN Board without being circulated to GAC members first.

(ii) as explained in section 6. above, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement that the GAC *"has finalized its consideration of the strings .wine and .vin"* and further advised that *"the applications for .WINE and .VIN should proceed through the normal evaluation process"* is not a consensus view of the GAC.

This letter, which is one of the grounds of the Resolution, is therefore clearly misleading.

(b) the failure to give the GAC an opportunity to comment on the materials used by the NGPC and the failure to clarify with the GAC the appropriate source from which the advice should be sought including the definition of the scope and process.

In first place, it should be clarified that the matter in hand it is a matter of public policy and not merely a matter of implementation. Additionally, the undersigned understands that the By-laws remain the main source of procedural rules for ICANN, and that in any case they prevail over the Applicant Guidebook as it will be shown below.

- By-laws Article XI-A, Section 1 subsection 3 states that the GAC can request **"at any time"** to the Board to seek advice in matters of public policy, and that the Board **"shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process"** for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.
- By-laws Article XI-A, Section 1 subsection 6 states that the GAC has the opportunity to comment upon **"any external advice"** received by the Board and prior to **"any decision"**. In this regard, the NGPC seems to

have followed the Applicant Guidebook section 3.1, applicable to "implementation" matters, while it is clear that the By-laws prevail over the Applicant Guidebook and that rather than in the implementation phase, the GAC (and subsequently ICANN) is still trying to define appropriate safeguards for the protection of the public policy interest.

- By-laws XI.A Section 5 clearly indicates that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its **responsibilities**", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the By-laws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its rationale due explanations to clarify why:**

- a) the protection of new gTLDs is not a matter of public policy;**
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and**
- c) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.**

(c) the content of the legal opinion issued by Mr. Passa

Concerning the legal opinion provided by Mr. Passa, the Undersigned would like to reassert the content of the European Commission's comments concerning both the procedural aspects relating to such opinion and its content (available at <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>). In particular, the European Commission questions the transparency of such legal opinion given that the process of appointing Mr. Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr. Passa's external expert legal advice is sufficiently thought through and pertinent and whether Mr. Passa has considered the politically sensitive background of this matter when issuing his advice. For example, the undersigned notes that Mr. Passa only refers to the

application filed by one of the applicants, instead of referring, in general, to the three applications. It is therefore suggested that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is specifically worthwhile noting that Mr. Passa clearly states in his opinion that, if ICANN "*had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD.*"

This would certainly appear to be a key point in the advice provided by Mr. Passa, and this point is completely ignored by the NGPC not being mentioned at all in the Rationale for the Resolution. The Rationale seeks to justify the Resolution by quoting from another part of the expert analysis saying that there is no rule of law or general principle, which obliges ICANN to reject the applications. The Requester agrees with this point but respectfully submits that this is not the point to consider. The point is, exactly as Mr. Passa states, that if the registry for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr. Passa is of the opinion that ICANN should reject the application.

#### **9. What are you asking ICANN to do now?**

The undersigned respectfully request from ICANN to:

- a) Reconsider the Resolution 2014.04.04.NG02-2014.04.04.NG04 in the light of the aforementioned information and comments;
- b) Grant sufficient time to applicants and interested parties to define the necessary safeguards for the .WINE and .VIN gTLDs, in order to reach a proper agreement before the delegation of the .WINE and .VIN gTLD strings, without a deadline.

#### **10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

The Resolution 2014.04.04NG03 is highly detrimental to the interests of the Italian wine and spirit industry. Indeed, the Resolution concluded "*the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions*". As explained above, in case no agreement is reached between the applicants and the interested parties, the delegation



process would continue without binding Applicants to implement safeguards clauses for geographical indications.

In Italy the overwhelming majority of wines produced are covered by geographical indications ("GIs"). Therefore, the risk of applications for second-level domain names as part of the .WINE and .VIN TLDs, that would constitute a misuse, evocation or otherwise undue appropriation of a vested right related to an Italian GI for wines is considerable. Proceeding through the normal evaluation process without additional safeguards would negate the Italian wine and spirit industry's ability to protect its GIs against such misuse, evocation or undue appropriation. In addition, this would prevent the applicants and interested parties to continue their negotiations with a view to reach an agreement on the matter. Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards, while the applicants and interested parties seeking GI protection have not had adequate time in order to reach proper agreement, would therefore seriously undermine the protection granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations.

The protection of GIs also serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine "Made in Italy" product with specific qualities and characteristics (such as Chianti, Barolo and many other GI wines) when they are in fact getting an imitation. Therefore, the adverse impact of the Resolution could be considerable.

Failure to follow the specific policies described above results in further contradiction of ICANN policies ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability.

Italy is the second Member State for worldwide sales of GIs. Indeed in 2010, the value of GIs is estimated at €11.8 billion at wholesale stage. Of these total sales, Italian GIs regarding wines actually account for 48% plus 1% for spirits.

Italian products represented by far the largest share of extra-EU exports (62%). The first five designations (3 PDOs and 2 PGIs) represented 55% of all extra-EU exports.

The link below refers to comprehensive data in that respect:

[http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report\\_en.pdf](http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report_en.pdf)

It stems from the above that Italian GIs for wines represent an utterly high asset, whose reputation and considerable value are undisputed. Accordingly, their protection against misuse, evocation or otherwise undue appropriation is of the utmost importance.

In order to ensure such protection:

At international level, Article 23 of the Trips Agreement requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated, even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see Article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against :

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

Italy is accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that *"The labelling and methods used must not:*

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"

Regulation (EU) No 607/2009, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue.*"

It stems from the above that Italy is bound to take the appropriate measures in order to tackle any misuse of protected GIs.

In the present circumstances, considering on one hand the worldwide coverage of internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the Italian GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to Italian GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these Italian GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

The undersigned represents Italian citizens, consumers and wine producers in the defense of the national public policy interests that concerns them in the case in hand.

**Do you have any documents you want to provide to ICANN?**

1. Resolutions 2014.04.04.NG01 – 2014.04.04.NG04
2. Resolution 2014.03.22.NG01

3. GAC Advice 2013-09-09-wine and vin
4. GAC's Singapore Communiqué of 27 March 2014
5. Request for Reconsideration 2014.03.22.NG01 From Italian Government

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

18/04/2014

Date

Ribe Font

Signature

# Attachment B

## El Vino en Cifras – Año 2012

*España es uno de los grandes productores mundiales de vino: primero en el ranking por superficie plantada, tercero por producción (debido a un rendimiento menor que el de Francia e Italia) y segundo exportador mundial en términos de volumen, aunque tercero en términos de valor. Por su importancia en términos económicos, pero también sociales y medioambientales, así como por la importancia del vino como imagen del país en el exterior, el sector es de extraordinaria relevancia en España.*

### 1. SITUACIÓN DEL MERCADO MUNDIAL

#### Viñedo

Según datos de la OIV<sup>1</sup>, en 2012 la superficie vitícola mundial disminuyó en 17.000 hectáreas respecto a 2011, estimándose el total mundial en 7.575.000 ha. El viñedo comunitario total (UE-27) está reduciendo progresivamente su superficie plantada, pasando de las 3.792.000 has en el año 2008 a las 3.492.000 has en el año 2012. Este proceso es consecuencia de la combinación de factores como la reestructuración

<b>El viñedo en el mundo</b>						
Fuente: Datos OIV; elaboración OeMv						
Datos						
(miles Ha)	2008	2009	2010	2011	Prev. 2012	% s/ total
España	1.165	1.113	1.082	1.032	1.018	13,44%
Francia	858	836	818	806	800	10,56%
Italia	825	812	795	776	769	10,15%
Portugal	246	244	243	240	239	3,16%
Rumania	207	206	204	204	205	2,71%
Otros UE	491	479	474	461	461	6,09%
<b>Total UE</b>	<b>3.792</b>	<b>3.692</b>	<b>3.619</b>	<b>3.521</b>	<b>3.492</b>	<b>46,10%</b>
EEUU	402	403	404	407	407	5,37%
Turquía	518	515	513	515	517	6,83%
China	480	518	539	560	570	7,52%
Argentina	226	229	228	218	221	2,92%
Chile	198	199	200	200	205	2,71%
Sudáfrica	132	132	132	131	131	1,73%
Australia	173	176	170	174	169	2,23%
<b>Total no UE</b>	<b>3.945</b>	<b>4.009</b>	<b>4.053</b>	<b>4.071</b>	<b>4.083</b>	<b>53,90%</b>
<b>TOTAL MUNDO</b>	<b>7.737</b>	<b>7.702</b>	<b>7.672</b>	<b>7.592</b>	<b>7.575</b>	<b>100,00%</b>

del viñedo y el impacto de la crisis vitícola, que por otra parte, se ha dejado sentir de forma distinta por zonas y tipos de vino y a la que se ha añadido el programa europeo de ayuda a los arranques. La disminución del viñedo comunitario queda compensada por el mantenimiento de las superficies plantadas del resto del mundo. Mientras disminuyen las plantaciones en Australia, éstas crecen en Chile, Argentina, China y, en menor medida, en Turquía, manteniéndose invariables en EE.UU. y Sudáfrica.

#### Producción Mundial

Según la estimación de la OIV, la producción mundial de vino de 2012 (sin contar zumo y mosto) puede situarse en 251 millones de hectolitros, 15,8 millones menos que en 2011. El primer país productor de vino es Francia, con 42,2 millones de hl (16,8% mundial), seguido por Italia, con 40,1 millones de hl (16% mundial), y España, con 29,7 millones de hl (11,8% mundial y 21% de la UE). Ya con menor volumen, la producción crece en Portugal (+500.000 hl), Grecia (+400.000 hl) y Alemania (+368.000 hl), y cae en Hungría (-876.000 hl), Austria (-703.000 hl) y, en menor medida, Bulgaria (-197.000 hl).

<sup>1</sup> Organización Internacional de la Viña y del Vino.

Fuera de la UE, el nivel de producción en 2012 es ligerísimamente inferior, con 109,59 millones de hl, a 2011 (109,63 millones de hl). EE.UU. es el país no europeo de mayor producción de vino con 20,5 millones de hl, lo que supone un crecimiento de 1,3 millones de hl respecto a 2011. En segundo lugar, se encuentra Chile, país que supera a Australia y a Argentina con 12,6 millones de hl el pasado año, 2,1 millones más que en 2011. Por el contrario, con 11,8 millones de hl, Argentina disminuye sus cifras en 3,7 millones de hl con respecto a la producción del año anterior, cuando se redujo igualmente, aunque de forma mucho más suave. En el cuarto puesto aparece Australia con una producción de vino de 11,6 millones de hl (+500.000 hl).

Respecto a otros países de fuera de la UE, Sudáfrica pasa de producir 9,3 millones de hl en 2011 a superar levemente los 10 millones en 2012. Brasil pasa de los de 3,4 millones de hl producidos en 2011 a 2,9 millones en 2012, volviendo a registrar datos negativos. Nueva Zelanda vuelve a bajar de los 2 millones de hl tras superarlos con creces en 2011. Suiza, por su parte, redujo ligeramente la producción, en 115.000 hl.

Según las estimaciones, de los 15,8 millones de hectolitros que se dejaron de producir en 2012 a nivel mundial, 15 millones de pierden en los tres primeros productores mundiales: Francia, España e Italia, mientras que fuera del Viejo Continente, destaca la caída de Argentina. Por el contrario, países como Chile, EEUU. y, en menor medida, Sudáfrica o Portugal, rompieron con el descenso mundial.

<b>Producción Mundial de Vino</b>					
Fuente: Datos OIV; elaboración OeMv					
<b>Datos (miles hl)</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>Prev. 2012</b>	<b>% s/ total</b>
Francia	46.361	45.704	50.764	42.243	16,8%
Italia	47.450	48.525	42.772	40.060	16,0%
<b>España</b>	<b>35.166</b>	<b>35.235</b>	<b>33.397</b>	<b>29.665</b>	<b>11,8%</b>
Otros UE	33.921	26.912	31.371	29.447	11,7%
<b>Total UE</b>	<b>162.898</b>	<b>156.376</b>	<b>157.171</b>	<b>141.415</b>	<b>56,3%</b>
EEUU	21.690	20.887	19.187	20.510	8,2%
Argentina	12.135	16.250	15.473	11.778	4,7%
Chile	10.093	9.152	10.464	12.554	5,0%
Australia	11.710	11.240	11.090	11.554	4,6%
<b>Total No UE</b>	<b>108.302</b>	<b>108.724</b>	<b>109.629</b>	<b>109.585</b>	<b>43,7%</b>
<b>TOTAL MUNDO</b>	<b>271.200</b>	<b>265.100</b>	<b>266.800</b>	<b>251.000</b>	<b>100,0%</b>

### Producción Unión Europea

De acuerdo con los últimos datos publicados por la OIV y siendo estos aún estimaciones sujetas a modificación, la producción de vino de la Unión Europea en 2012 se sitúa en 141,4 millones de hl, bastante inferior a la de 2011, que fue de 157,2 millones (-10%). Por el contrario, la producción del conjunto de países externos a la UE se sitúa en 2102 en los 109,59 millones de

hl, sólo un 0,04% menor que en 2011, que fue de 109,63 millones. Siguiendo estas estimaciones, la Unión Europea representaría el 56,3% de la producción vinícola mundial en 2012.

Según las cifras de la Comisión Europea, actualizadas a enero de 2013, la producción de vino y mosto de uva en la Unión Europea alcanzaría los 144,5 millones de hectolitros en la campaña 2012/2013, lo que supondría un descenso del 11,6% con respecto a la campaña 2011/12, y una caída algo mayor (-14,3%) en relación a la media de las cinco últimas campañas. La producción destinada a vinificación se estima en los 138,8 millones de hectolitros, el 96% del volumen total. De ellos, 61,6 millones de hectolitros habrían sido destinados para vinos con DOP<sup>2</sup> (44,4%), 29 millones para vinos con IGP<sup>3</sup> (20,9%), 3,5 millones para vinos varietales sin DOP ni IGP (2,5%) y 44,7 millones para los demás vinos (32,2%).

Por tipo de vino, Francia ocupa la primera posición como productor de vinos con DOP, con 19,4 millones de hectolitros, frente a los 13,2 de Italia y los 12,5 de España. En lo que respecta a los vinos con IGP, la producción francesa asciende a 11,4 millones de hectolitros, la italiana a 11,2 y la española a 2,4 millones. En cuanto a vinos varietales, sin DOP ni IGP, España se sitúa en cabeza con 2,5 millones de hectolitros, seguida de Italia (0,4 millones de hl) y Bulgaria (0,29 millones de hl). Por último, en lo que respecta a la categoría de otros vinos, Italia es la principal productora con 15,2 millones de hl, por delante de España con 12 millones, y de Francia con algo menos de 10 millones.

<b>Producción Europea de Vino (campaña 2012/13)</b>				
Fuente: Datos UE; elaboración OeMv				
País (datos en miles de hl)	<u>2012/13</u>	<u>% s/ total</u>	<u>Var. % con</u>	<u>Var. % con</u>
			<u>2011/12</u>	<u>media 5 camp. 07/12</u>
Italia	41.557	28,8%	-7,2%	-15,4%
Francia	40.609	28,1%	-20,5%	-13,1%
<b>España</b>	<b>33.500</b>	<b>23,2%</b>	<b>-9,9%</b>	<b>-16,6%</b>
Alemania	8.903	6,2%	-2,5%	-2,6%
Portugal	6.140	4,2%	+9,4%	+1,4%
Resto UE	13.791	9,5%	-12,2%	-20,6%
<b>TOTAL UE</b>	<b>144.500</b>	<b>100,0%</b>	<b>-11,6%</b>	<b>-14,3%</b>

Aunque todavía es pronto para ninguna confirmación sobre la vendimia 2013, las estimaciones iniciales apuntan a una reducción importante en la producción europea de vino.

<sup>2</sup> Denominación de Origen Protegida.

<sup>3</sup> Indicación Geográfica Protegida.



### Consumo

Con unas estimaciones de consumo mundial de vino para 2012 estimadas por la OIV en alrededor de 245,3 millones de hectolitros, se aprecia un leve aumento respecto al año anterior de 1,4 millones de hl (+0,6%). Este crecimiento se observa analizando la previsión para los países externos a la Unión Europea: China, en primer lugar, subiría en 1,5 millones de hl hasta los 17,8 millones (+9,3%),

subida más elevada que para el conjunto mundial. Le seguiría Francia, con un aumento de alrededor de 1 millón de hl hasta superar los 30 millones (+3,2%). En menor medida, el consumo crecería en EE.UU. (+575.000 hl) Alemania (+293.000 hl), o Argentina (+242.000 hl), entre otros. Por el contrario, el caería el consumo en España un 6% hasta los 9,3 millones de hl (-594.000 hl), así como en Italia (-419.000 hl) o Reino Unido (-327.000 hl).

Consumo Mundial de Vino (miles de hl)				
Fuente: Datos OIV; elaboración OeMv				
País	2011	2012	Var. 2011/12	% s/ total
Francia	29.322	30.269	3,2%	12,3%
Italia	23.052	22.633	-1,8%	9,2%
Alemania	19.707	20.000	1,5%	8,2%
Reino Unido	12.860	12.533	-2,5%	5,1%
<b>España</b>	<b>9.894</b>	<b>9.300</b>	<b>-6,0%</b>	<b>3,8%</b>
Resto UE-27*	29.298	29.118	-0,6%	11,9%
<b>Total UE-27</b>	<b>124.133</b>	<b>123.853</b>	<b>-0,2%</b>	<b>50,5%</b>
EEUU	28.425	29.000	2,0%	11,8%
China	16.339	17.837	9,2%	7,3%
Argentina	9.809	10.051	2,5%	4,1%
Australia	5.325	5.375	0,9%	2,2%
Resto No UE	59.769	59.134	-1,1%	24,1%
<b>Total No UE</b>	<b>119.667</b>	<b>121.397</b>	<b>1,4%</b>	<b>49,5%</b>
<b>TOTAL MUNDO</b>	<b>243.800</b>	<b>245.250</b>	<b>0,6%</b>	<b>100,0%</b>

\* UE-27: Alemania, Austria, Bélgica, Bulgaria, Chipre, Dinamarca, Eslovaquia, Eslovenia, España, Estonia, Finlandia, Francia, Grecia, Hungría, Irlanda, Italia, Letonia, Lituania, Luxemburgo, Malta, Países Bajos, Polonia, Portugal, Reino Unido, República Checa, Rumanía y Suecia.

En cuanto a la Unión Europea, el consumo bajaría en 280.000 hl respecto a 2011, con una leve caída del 0,2%, mientras que, en el resto del mundo, subiría en 1.730.000 hl, un 0,6% más que en el año anterior. Con 123,9 millones de hl, la Unión Europea seguiría liderando el consumo de vino a nivel internacional, aunque sólo un punto por encima (50,5%) del conjunto de países

La diferencia entre la producción y el consumo estaría, siempre según las estimaciones de la OIV para 2012, en una horquilla entre los -2,9 y los +14,3 millones de hectolitros, de la que se obtiene una media de 5,7 millones de hl, cifra que estaría muy lejos de las registradas en años anteriores, mucho más favorable para la producción.

## 2. SITUACIÓN DEL SECTOR EN ESPAÑA

*El sector vitivinícola español tiene gran importancia, tanto por el valor económico que genera, como por la población que ocupa y por el papel que desempeña en la conservación del medioambiente.*

### Viñedo

Siempre según datos de la OIV, España, con 1,018 millones de hectáreas destinadas al cultivo de la vid (97,4% destinadas a vinificación, un 2% a uva de mesa, un 0,3 % a la elaboración de pasas y un 0,3 % restante a viveros), sigue siendo, con diferencia, el país con mayor extensión de viñedo de la Unión Europea y del mundo, a pesar de estimarse una caída de 18.000 hectáreas respecto a 2011. Sin embargo, las estimaciones oficiales del MAGRAMA, más recientes, apuntan a que esta superficie haya bajado hasta las 954.020 has en 2012. En todo caso, representa casi el 30% de la superficie total de la UE (seguido por Francia con el 23%, y de Italia con el 22%) y un 13,4 % del total mundial. Su tradición elaboradora de vinos se remonta a la época de los romanos, aunque no ha sido hasta más recientemente cuando la exportación se ha convertido en un hecho masivo y generalizado en el sector.

### Producción española

Tras siete campañas de relativa estabilidad, rondando un volumen de producción de vino y mosto de en torno a los 40 millones de hectolitros, en la campaña 2012/2013 y según los datos del Fondo Español de Garantía Agraria (FEGA) a noviembre de 2012, la producción bajaría levemente de los 34 millones de hl, frente a los 38,6 millones de 2011/12, lo que supone un caída del 12% (-4,6 millones de hl), y la cifra más baja desde la campaña 2001/02.

- **Avance producción española 2011/12**

Para la campaña actual, 2012/13, el propio MAGRAMA estima una producción de 33,97 millones de hectolitros, lo que supone una caída respecto a la campaña anterior del 12%, en 4,6 millones de hl. En cuanto al reparto geográfico, y según la estimación para esa campaña, **Castilla-La Mancha** sigue siendo la principal región productora con más de la mitad de la producción total española (53,2% y 18,06 millones de hl), reduciendo un 3% las cifras de producción de la campaña anterior, que fueron de 18,6 millones de hectolitros (-567.400 hl).

**Extremadura**, segunda comunidad productora, pasaría de 4,3 millones de hectolitros en la campaña 2011/2012, a bajar de los 3 millones en la 2012/13 (-1,33 millones, -31%), mientras que **Cataluña**, en el tercer puesto, cae en 913.300 hectolitros hasta los 2,4 millones (-27,7%). La suma de Castilla – La Mancha, Extremadura y Cataluña ascendería a 23,4 millones de hectolitros, el 69% de la producción total española de vino y mosto para la actual campaña.

Por otra parte, también destaca la bajada de la producción en la **Comunidad Valenciana**, que caería casi un 24% hasta los 1,8 millones de hl (-552.800 hl) en **Galicia**, que pasa de 1,5 millones de hl a bajar del millón de hl (-36%).

Respecto a otras CC.AA., La Rioja, Castilla y León, Andalucía y Aragón estarían por encima del millón de hectolitros, aunque todas ellas con cifras más bajas que en la campaña anterior. Canarias sería la única comunidad autónoma española que aumenta su producción (+19,3%), mientras que se mantendría estable en Murcia, Baleares y Cantabria. Por su parte, Navarra, País Vasco, Madrid y Asturias siguen la tendencia negativa de la producción española.

### Superficie de viñedo

La situación geográfica, las diferencias climáticas y la variedad de suelos, hace de la Península Ibérica y nuestras islas un lugar privilegiado para la producción de vinos de características muy distintas. Se cultiva viñedo en la totalidad de las 17 Comunidades Autónomas en las que se divide el país, si bien cerca de la mitad de la extensión total se encuentra en **Castilla-La Mancha** (465.358 has y el 48,8 % del viñedo plantado), la zona geográfica con mayor extensión del mundo dedicada a su cultivo, seguida de **Extremadura** (cerca de 82.331 has, 8,6 %), **Valencia** (68.392), **Castilla y León** (64.364 has), Cataluña, La Rioja, Aragón, Murcia y Andalucía.

En todo caso, se trata de superficies de viñedo en España que siguen en descenso. La superficie total de viñedo en nuestro país en 2012 se sitúa, según la "Encuesta sobre Superficies y Rendimientos de Cultivos ESYRCE" del MAGRAMA, en las 954.000 hectáreas, frente a las 972.085 has del año anterior. Por tanto, se observa una caída de 18.065 hectáreas (-1,9%). Las mayores caídas porcentuales las ofrecen Andalucía (-7,4%), Murcia (-6,1%) y Madrid (-5,1%), siendo La Rioja (+1,1%) y Canarias (+3,3%) las únicas comunidades autónomas con mayor superficie de viñedo en 2012, mientras que Cantabria la mantuvo estable.

España cuenta con 85 zonas de producción de vinos de calidad con Denominación de Origen Protegida (DOP), de ellas 67 son con Denominación de Origen, 2 con Denominación de Origen Calificada, 6 son Vinos de Calidad con Indicación Geográfica y 10 son Vinos de Pago, las cuales siguiendo el modelo europeo de producción, mantienen un estricto control sobre la cantidad producida, las prácticas enológicas, y la calidad de los vinos que se producen en cada zona. Las primeras Denominaciones autorizadas se aprobaron en 1932, y se trata de Jerez-Xères-Sherry, Manzanilla de Sanlúcar de Barrameda, Málaga, Montilla-Moriles, Rioja, Tarragona, Priorato, Alella, Utiel Requena, Valencia, Alicante, Ribeiro, Cariñena, Penedés, Condado de Huelva, Valdepeñas, La Mancha, Navarra y Rueda.

Según los últimos datos publicados, el 51,1% producirá vinos tintos y rosados y el 48,9%, vinos blancos. Las variedades de uva más comunes en España son la Airén (23,5%), Tempranillo (20,9%), Bobal (7,5%), Garnacha Tinta, Monastrell, Pardina, Macabeo y Palomino, por orden de importancia en cuanto a su cultivo. De estas variedades, son tintas, la Tempranillo, Bobal, Garnacha tinta y Monastrell y blancas las restantes.

Mientras tanto, el consumo interno de vino en España sigue ofreciendo unos datos preocupantes, situándose a día de hoy en una estimación por debajo de los 20 litros por persona y año, lo que supone estar a la cola de Europa.

### 3. ESTRUCTURA EMPRESARIAL

El sector vitivinícola español se encuentra inmerso en un importante proceso de actualización y renovación. Así, desde el año 2000, la superficie sujeta a reconversión y reestructuración ha superado las 130.000 hectáreas, lo que representa una inversión cercana a los 800 millones de euros. Se estima que algo más de 4.000 bodegas elaboran en España vinos tranquilos, espumosos y de licor. Son, por lo general, de pequeño tamaño y su capital es mayoritariamente de origen español, de tipo familiar, mientras que un gran número están constituidas como cooperativas agrarias.

Entre las principales empresas del sector, con más de 100 millones de euros de facturación, se encuentran las siguientes: Freixenet, J. García Carrión, Codorníu, Arco Wine Invest Group.; Grupo Domecq Bodegas; Grupo Miguel Torres, S.A.; Félix Solís Avantis y Grupo Faustino.

Las pequeñas bodegas y las cooperativas coexisten con estas grandes empresas, que poseen centros de producción en distintas zonas, con objeto de diversificar su oferta. Con objeto de controlar la calidad a lo largo de todo el proceso productivo, algunas bodegas han comprado o ampliado la extensión de sus viñedos, si bien la mayor parte del suministro de las bodegas en España procede de otros viticultores o directamente de las cooperativas en forma de vino. También es importante el nivel de inversión que se ha destinado a la edificación de nuevas bodegas, a la mejora de las instalaciones y equipamientos y a la utilización de técnicas de envejecimiento distintas para ofrecer una gama mucho más amplia de vinos de calidad, si bien tal nivel de inversión se ha visto muy reducido en los años recientes de crisis económica. En este contexto es interesante resaltar la actividad y la innovación de muchas bodegas que experimentan con nuevas variedades de uva y la utilización de las uvas autóctonas para producir vinos más adaptados al gusto del nuevo consumidor.

La DOCa Rioja tiene registradas el mayor número de bodegas de vino de calidad (826), seguida de DO Cava (419), DO Ribera del Duero (286), DO La Mancha (256), DO Cataluña (203), DO Penedés (187) y DO Rías Baixas (181).

Este proceso de modernización se extiende, incluso, a la construcción de las nuevas bodegas encargadas a arquitectos mundialmente famosos, que han emprendido algunas bodegas, entre las que destacan, en Rioja, la nueva bodega de Domecq, Bodegas Ysios (encargada a Santiago Calatrava), o la de CVNE (diseñada por Philippe Mazières), la de Marqués de Riscal que ha proyectado Frank O. Gehry, o la tienda de R. López Heredia por Zaha Hadid o Señorío de Arínzano proyectada por Rafael Moneo para Bodegas Chivite en Navarra.

El sector muestra un enorme dinamismo. El grado de concentración es relativamente elevado, estimándose que los cinco primeros grupos acaparan una cuota conjunta de casi un 28% del mercado. La penetración de capitales extranjeros entre los primeros operadores no es muy importante, aunque sí se van extendiendo los acuerdos con empresas del sector en otros países para mejorar la capacidad de comercialización mundial, como también aumentan las alianzas entre comercializadores para afrontar conjuntamente el fuerte proceso de internacionalización en que está metido el sector español del vino.

#### 4. EXPORTACIÓN

##### Exportaciones Mundiales

Los intercambios mundiales en el sector del vino adquieren cada vez más importancia. De un total de 72,2 millones de hectolitros de media en el quinquenio 2001-05, se ha pasado a 99,1 millones de hectolitros en el año 2012 según estimaciones de la OIV. En términos de valor y tomando como fuente GTA, que toma los datos de las aduanas de los diferentes países, el importe global de las exportaciones de vino y mosto habría alcanzado en 2012 la cifra de 25.283 millones de euros. Este mercado mundial, considerado por la OIV como la suma de las exportaciones de todos los países, ha crecido significativamente en el último año en términos de valor, suponiendo un 8,3% más que el año anterior. No obstante, el volumen se ha reducido un leve 1,9% respecto a 2011, cuando se superaron entonces los 100 millones de hectolitros en el total mundial de exportación vitivinícola.

En el mismo 2012, las exportaciones mundiales de vino representaron aproximadamente el 40,4% del consumo mundial (contra un 34,6% en 2006). De donde se deduce que una tendencia estable a lo largo de los últimos años es el crecimiento constante de lo que los intercambios internacionales representan dentro del consumo mundial, señal de que las caídas del consumo en los países tradicionalmente productores se está viendo compensada por el incremento en países cuyas necesidades de vino superan a su propia producción y se ven obligados, por lo tanto, importarlo.

En los últimos meses, observamos un muy buen desarrollo de las exportaciones vitivinícolas de países pertenecientes al conocido como Nuevo Mundo, en detrimento de los proveedores tradicionales europeos, los cuales aún dominan de forma clara el comercio exportador a nivel internacional. Así, países como Chile, Argentina, Sudáfrica o Nueva Zelanda están ganando cuota progresivamente, sobre todo por un impulso especialmente positivo para las ventas de vinos más económicos.

Siguiendo con los datos de GTA para el cierre de 2012, España es el segundo proveedor mundial de vino y mosto en términos de volumen y el tercero en valor, con 19,5 millones de hectolitros y 2.360 millones de euros respectivamente. El precio medio del vino español en el exterior se fijó en los 1,21 euros por litro, y sigue siendo muy inferior al del resto de principales países proveedores pese a que, en los últimos meses, está subiendo notablemente.

Actualmente, la tendencia del vino español en el mercado exterior parece clara: fuerte encarecimiento de precios, fuerte descenso del volumen de venta, y buenos datos de facturación. El vino a granel sin DOP protagoniza este comportamiento, al ser el motor de las exportaciones con cerca del 50% del volumen de vino exportado por España en 2012. Por tanto, nuestras exportaciones se están enfocando cada vez más a los vinos con mayor valor añadido, vinos con mucha mejor evolución que el granel. Esta tendencia explica el porqué de la fuerte subida de precios del vino español en los últimos meses: buen comportamiento de los vinos con precios más elevados, y fortísimo encarecimiento de los vinos con escaso valor unitario.

Las exportaciones mundiales de vino en términos de volumen están lideradas por Italia, primer proveedor con 21,2 millones de hectolitros vendidos en 2012. Sin embargo, Francia vuelve a ser el principal exportador en valor de forma clara, con casi 7.840 millones de euros de facturación, seguido de lejos por los 4.691 millones ingresados por Italia. Francia aún se encuentra, con 15 millones de hectolitros, muy lejos de Italia y España en volumen, lo que indica un precio medio de venta muy superior para el país galo. El pasado año, se situó en los 5,23 euros por litro, y fue claramente el más elevado entre los doce principales proveedores mundiales. La diferencia es aún mayor si lo comparamos con los precios medios de sus principales competidores, Italia (2,21 €/l.) y España (1,21 €/l.).

La suma de Italia, España y Francia representó en 2012 aproximadamente el 56,4% del volumen y el 59% del valor total de vino y mosto exportado a nivel mundial. Pero, ¿cómo evolucionaron respecto a 2011? España e Italia están viviendo en la actualidad una tendencia muy parecida, con descenso del volumen exportado, pero buenos datos en valor (+6,5% para ambos países, según GTA). Además, la causa de esta disparidad entre valor y volumen es similar: un flete encarecimiento de los vinos más económicos, como es el caso de los graneles, y más concretamente, de los vinos a granel sin ningún tipo de indicación ni variedad. Rusia, entre otros, protagonizó la caída del volumen de venta en ambos proveedores, ya que el estado ruso están sustituyendo sus importaciones de graneles procedentes de estos dos países por las del conocido como Nuevo Mundo, con países como Argentina, Chile, Sudáfrica o Uruguay multiplicando sus ventas. Por su parte, Francia centra más sus ventas en los vinos con mayor valor añadido, mostrando un crecimiento respecto a 2011 del 5,6% en volumen y del 8,8% en valor. 2012 fue un año especialmente positivo para los vinos franceses en el mercado asiático, principalmente en China y Japón, así como en Estados Unidos.

España llegó a sustituir a Italia como primer proveedor mundial de vino en términos de volumen en el interanual a algunos meses de 2012, aunque los malos datos de los últimos meses han impedido que cerremos el año con dicho privilegio.

Respecto a otros proveedores<sup>4</sup>, Chile sustituye a Australia como cuarto exportador mundial de vino en volumen con 7,5 millones de hectolitros (+12,8%), mientras que refuerza su quinto puesto en valor con una subida del 14,7% hasta alcanzar los 1.400 millones de euros en 2012.

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<sup>4</sup> Tomamos como referencia el euro como moneda común para todos los países incluidos en el análisis.

En este aspecto, Australia sí conserva su cuarto puesto con 1.524 millones de euros (+6,8%), mientras que sólo elevó un 2% el volumen exportado, hasta los 735 millones de litros. En 2012, Estados Unidos se suma a la lista de 6 países cuyas exportaciones de vino superaron los 1.000 millones de euros de facturación. El país norteamericano sustituye en el sexto puesto a Alemania, gracias a una subida del 11,5% hasta sobrepasar los 1.077 millones de euros, mientras que el país germano redujo sus ingresos hasta los 972 millones (-2%). De hecho, Alemania fue el único de los once principales proveedores mundiales que registró una caída en valor en 2012 pese a que sólo redujo los ingresos procedentes de las ventas exteriores de vino envasado. En términos de volumen, a las ya comentadas caídas de Italia y España, se suman la de Alemania y Estados Unidos, para ambos países en torno al -5%.

Nueva Zelanda (+18,8%) y Argentina (+16,6%) muestran las mejores tasas de variación en términos de valor entre los países analizados, superando ambos a Portugal (+6,5%) en el ranking económico. En volumen, el proveedor argentino muestra, con un +15%, la mayor subida porcentual, ganando fuerza como noveno exportador mundial, mientras que Nueva Zelanda lo hizo en un +4,6%. Por su parte, 2012 también fue un año positivo para Sudáfrica, más en volumen (+10%) que en valor (+4,5%), ya que fue el único país junto a Portugal que vendió más barato en 2012, con el país luso con un comportamiento parecido al del país africano (+10,3% en volumen y +7,5% en valor). Sudáfrica tiene mucho mayor peso en litros (ha pasado de la séptima a la quinta plaza como proveedor mundial) que en euros (sigue en el undécimo puesto), ya que muestra un precio medio muy inferior al resto (1,37 €/l.), sólo por encima del de España. La explicación la encontramos tanto en el extraordinario desarrollo de las ventas de Bag-In-Box como en el fuerte descenso del vino envasado, este último con un precio mucho más elevado.

La cuota de mercado de los 5 primeros exportadores de la UE (Italia, Francia, España, Alemania y Portugal), según estas estimaciones, ronda el 63,6% del total mundial, siendo algo menor que para el quinquenio 2001-2005, cuando era del 65,2%, mientras que en el periodo 1986-90 era del 78,8%.

El grupo de los 6 países nuevos exportadores (Argentina, Chile, Sudáfrica, EEUU, Australia y Nueva Zelanda) participa con un 28,7% del mercado en 2011, comparado con el 23,4% de media en el quinquenio 2001-2005 y apenas el 3% del total mundial en el periodo 1986-90. La previsión es que esta cuota aumente durante los próximos años.

Estas cifras, que reflejan un descenso de las cuotas de exportación de los países del “Viejo Mundo”, junto con la subida de las cuotas de los países del “Nuevo Mundo”, arrojan luz sobre la fuerte entrada en el mercado de éstos últimos. La buena marcha, principalmente, de las exportaciones de vino a granel y en envases de más de 2 litros en estos países, partida en la que se incluye el vino en formato bag-in-box, muy importante en la mayoría de ellos, les está permitiendo crecer de forma muy positiva.

## Exportaciones españolas de vino – Año 2012

Durante el año 2012, y tomando como fuente AEAT (Aduanas), España exportó 2.062,8 millones de litros de vino, por valor de 2.499,3 millones de euros, lo que supone ya una caída del 8% en términos de volumen, aunque un crecimiento del 11,8% en valor. El progresivo y notable encarecimiento del precio medio de venta en los últimos meses está provocando un desplome de nuestras ventas en volumen, que nos hizo cerrar el año con datos negativos, aunque aún conservamos los buenos datos de la facturación, no obstante cada vez más moderados.

Los datos muestran un rápido cambio de la tendencia exportadora, ya que el primer semestre de 2012 se saldó con un aumento del 3,4% en el volumen de vino exportado, si bien el valor creció entonces un 13,5%, aspecto en la caída es mucho más suave.

Las cifras de 2012 frenan notablemente los datos registrados al cierre de 2011 (sobre todo en litros), cuando se creció entonces un 26,3% en volumen y un 16,7% en valor. Como podemos comprobar, la situación ha dado un giro de 180 grados: en los últimos años, de ha producido un extraordinario de las exportaciones de vino a granel y en envases superiores a 2 litros, a precios muy bajos, lo que nos hacía

crecer mucho más en volumen que en valor. Sin embargo, este vino ha venido subiendo de precio progresivamente durante 2012, con subidas superiores al 40% en algunos meses, lo cual repercute negativamente en el volumen exportado a nivel global puesto que alrededor del 50% del total vendido por España correspondió a este vino.

Esta subida de precios conlleva crecimientos bastante positivos en valor, aunque hay que tener cuidado, ya que puede ser pasajero: salvo contadas excepciones, los mercados están reduciendo el volumen comprado de vino español, algunos de ellos con durísimas caídas como es el caso de Rusia, lo que nos puede llevar no sólo a un estancamiento de nuestra facturación, sino a que ésta posiblemente llegue a ser negativa, en función tanto de las necesidades de compra de nuestros clientes como de las alternativas de oferta. No obstante, el buen comportamiento en valor de los vinos envasados con DOP está contribuyendo a retrasar esta posible caída.

Del total de nuestras exportaciones en términos de valor, los vinos con denominación de origen envasados representaron en 2012 el 40,6% del valor total de venta, creciendo un 9,8%

## Exportaciones españolas de vino

Fuente: datos: AEAT; Elaboración: OeMv

	1995	2000	2005	2011	2012	% var. 12/11
<b>Milli €</b>						
DO envasado	261,6	586,8	735,7	923,3	1.013,6	9,8%
DO granel	55,0	47,3	39,2	43,6	45,2	3,8%
Sin DO envasado	43,5	125,6	170,8	370,8	440,6	18,8%
Sin DO granel	69,7	144,4	217,0	387,0	420,1	8,6%
Espumoso	120,5	228,3	289,7	384,9	436,3	13,4%
Aromatizado	28,2	29,3	39,9	57,0	68,9	20,7%
De licor	176,4	91,8	83,3	58,7	56,8	-3,2%
De aguja	5,6	2,4	5,0	10,1	17,9	77,4%
<b>TOTAL VINOS</b>	<b>760,6</b>	<b>1.255,9</b>	<b>1.580,6</b>	<b>2.235,3</b>	<b>2.499,3</b>	<b>11,8%</b>
<b>Milli l.</b>						
DO envasado	132,8	202,8	257,0	312,5	343,5	10,0%
DO granel	105,8	66,4	74,7	68,4	62,6	-8,4%
Sin DO envasado	69,5	139,6	219,5	429,4	456,9	6,4%
Sin DO granel	175,2	330,8	696,2	1.172,0	934,0	-20,3%
Espumoso	48,1	71,6	108,7	155,1	162,6	4,8%
Aromatizado	39,8	45,5	61,4	68,7	63,0	-8,3%
De licor	90,8	39,3	30,2	25,4	22,3	-12,1%
De aguja	13,0	6,4	2,1	11,4	17,9	56,1%
<b>TOTAL VINOS</b>	<b>675,0</b>	<b>902,4</b>	<b>1.450,0</b>	<b>2.243,0</b>	<b>2.062,8</b>	<b>-8,0%</b>
<b>€/l</b>						
Do envasado	1,97	2,89	2,86	2,96	2,95	-0,2%
DO granel	0,52	0,71	0,52	0,64	0,72	13,3%
Sin DO envasado	0,63	0,90	0,78	0,86	0,96	11,7%
Sin DO granel	0,40	0,44	0,31	0,33	0,45	36,3%
Espumoso	2,50	3,19	2,66	2,48	2,68	8,2%
Aromatizado	0,71	0,64	0,65	0,83	1,09	31,7%
De licor	1,94	2,34	2,75	2,31	2,55	10,1%
De aguja	0,43	0,38	2,32	0,88	1,00	13,7%
<b>TOTAL VINOS</b>	<b>1,13</b>	<b>1,39</b>	<b>1,09</b>	<b>1,00</b>	<b>1,21</b>	<b>21,6%</b>



hasta superar, por primera vez, los 1.000 millones de euros de facturación. Por su parte, un excelente año para los vinos sin DO envasados (+18,8%) les sitúa como segundo vino exportado con 440,6 millones de euros, superando al vino espumoso (463,3 millones, +13,4%) y al vino sin DOP a granel (420,1 millones, +8,6%), este último pasando de la segunda a la cuarta posición.

En términos de volumen, los vinos sin DOP a granel siguen un año más como primer vino exportado por España con 934 millones de litros, el 45,3 % del total. Sin embargo, muestran la pero tasa de variación entre el conjunto de vinos (-20,3%). De hecho, se dejaron de vender 238 millones de litros de este vino, de una pérdida total de 180,2 millones, lo que implica una pérdida de 7 puntos porcentuales: con 1.172 millones de litros exportados en 2011, el vino sin DOP a granel representaba entonces el 52,3% del volumen total de venta. Y es que el precio medio de este vino subió más que el de ningún otro (+36,3%), lo que explica los buenos datos en valor y una progresiva recuperación tras varios años a niveles muy bajos. Aunque con mucha menor cuota, el granel con DOP también cayó en volumen, al contrario que los vinos envasados, cuyas ventas subieron tanto para el vino sin DOP (+6,4%) como, sobre todo, para el vino con denominación de origen (+10%).

El fuerte descenso de las ventas de vinos más económicos, unido a la mejor marcha de los vinos con mayor valor añadido (vinos envasados con DO, cavas y espumosos...), explican la fuerte subida del precio medio de venta del vino español, el cual sobrepasa con creces el euro por litro, nivel que apenas se alcanzaba hace un año.

Por mercados de destino, y siguiendo con los datos de AEAT para 2012, sólo Rusia redujo su inversión en vino español entre los 19 principales mercados para nuestro país, perdiendo varias posiciones en el ranking de valor con una notable caída del 45,6%. En este aspecto, Alemania (+11,2%), Reino Unido (+7,8%), EE.UU. (+13,8%) y Francia (+17,8%) siguen como primeros clientes, estos dos últimos incrementando su inversión por encima de la media. No obstante, es en el mercado asiático donde el vino español gana más peso, con Japón (+37,6%) y China (+25,8%) mostrando las mejores tasas de variación en valor, sólo superadas por Italia (+45,4%), aunque con caída en volumen hacia China, como analizaremos más adelante.

En términos de volumen, la situación no es tan positiva: al desplome de las ventas hacia Rusia (-67,6%), se unen las caídas hacia otros mercados como Portugal (-17,4%), Francia (-13,7%), Holanda (-10,2%), Suiza (-9,7%) o China (-5,7%), muchos de ellos importantes compradores de vino a granel, lo que explica que muestren mejores datos en valor al importar a un precio medio muy bajo, pero mucho mayor que en 2011. De hecho, entre los 19 principales mercados para el vino español, sólo Reino Unido (-5,8%) y Japón (-2,5%) compraron a un precio más barato el pasado año. En este sentido, Rusia registra la mayor subida de precios entre los países analizados (+68%), seguido Italia (+37,5%), Francia (+36,5%), Portugal (+35,9%) y China (+33,5%). En estos cinco mercados se observa claramente cómo los vinos más económicos son los que más están subiendo de precio, ya que pese a ofrecer una mayor subida porcentual que

el resto de mercados, siguen siendo, junto a Alemania, los que compran vino español a precios más bajos.

Por el contrario, los vinos con mayor valor añadido tienen más peso en países como México, Suiza, o Irlanda, únicos tres mercados que compraron por encima de los 3 euros por litro, así como en Noruega, EE.UU., Finlandia, Suecia o Japón, todos ellos con un precio medio mayor a 2 euros. No obstante, y pese a la tónica negativa en términos de volumen, no todo son malas noticias: importantes clientes para los vinos españoles aumentaron sus compras, como Alemania (+6,4%), Italia (+5,8%), o Reino Unido (+14,6%), segundo, tercer y cuarto mercado respectivamente, en litros, por detrás de Francia. También destaca la buena marcha de nuestras exportaciones hacia otros como EE.UU. (+11,4%), Bélgica (+4,8%), Dinamarca (+3,1%), Suecia (+5,6%) y, especialmente, Japón, con una subida del 41% hasta situarse como duodécimo país de destino.

Ranking exportaciones por países 2012				
Valor €	Vino con DOP EN-VASADO	TOTAL	% 12/11	% TOTAL
Alemania	154.487.390,21	376.528.195,77	11,20%	15,10%
Reino Unido	184.118.556,98	334.419.884,93	7,80%	13,40%
EE.UU.	139.952.146,57	252.355.870,33	13,80%	10,10%
Francia	31.144.028,72	212.633.175,61	17,80%	8,50%
Suiza	81.979.376,82	108.095.800,77	6,70%	4,30%
Bélgica	25.428.967,62	103.922.356,70	19,30%	4,20%
Italia	2.116.620,68	93.421.823,18	45,40%	3,70%
Países Bajos	56.770.095,08	92.838.682,37	4,00%	3,70%
China	46.253.159,78	89.197.676,34	25,80%	3,60%
Japón	28.687.814,32	83.210.677,76	37,60%	3,30%
Canadá	47.632.203,23	73.592.580,25	9,30%	2,90%
Portugal	3.388.429,96	63.180.973,83	12,30%	2,50%
Suecia	32.788.871,00	56.771.221,85	11,40%	2,30%
México	33.114.295,47	45.182.036,92	7,50%	1,80%
Dinamarca	23.265.436,37	43.530.481,97	10,00%	1,70%
Rusia	3.776.989,70	33.398.852,81	-45,60%	1,30%
Noruega	18.104.371,19	24.457.046,06	1,80%	1,00%
Finlandia	9.863.261,04	24.419.794,96	12,40%	1,00%
Irlanda	16.273.223,45	19.476.568,81	1,20%	0,80%
Resto países	119.597.877,56	368.705.764,95	12,20%	14,80%
<b>TOTALES</b>	<b>1.058.743.115,75</b>	<b>2.499.339.466,17</b>	<b>11,80%</b>	<b>100,00%</b>

Fuente: Datos OIV; elaborado por OeMv

Volumen en litros	Vino con DOP EN-VASADO	TOTAL	% 12/11	% TOTAL
Francia	19.117.093	390.358.665	-13,70%	18,90%
Alemania	77.606.869	329.096.913	6,20%	16,00%
Italia	1.028.004	193.172.867	5,80%	9,40%
Reino Unido	86.206.037	166.539.398	14,50%	8,10%
Portugal	6.025.196	121.902.696	-17,40%	5,90%
EE.UU.	33.595.379	90.793.764	11,40%	4,40%
China	17.046.205	69.197.373	-5,70%	3,40%
Rusia	1.469.401	53.679.602	-67,60%	2,60%
Bélgica	8.533.032	51.151.061	4,80%	2,50%
Países Bajos	29.291.116	47.781.988	-10,20%	2,30%
Canadá	11.790.859	39.254.650	-2,70%	1,90%
Japón	13.566.896	38.813.569	41,20%	1,90%
Suiza	20.359.221	34.261.068	-9,70%	1,70%
Dinamarca	10.371.471	32.594.815	3,10%	1,60%
Suecia	9.474.084	25.596.270	5,60%	1,20%
México	6.904.236	13.232.950	-8,20%	0,60%
Finlandia	3.552.089	9.660.548	-2,10%	0,50%
Noruega	6.016.796	8.489.207	-3,10%	0,40%
Irlanda	4.685.081	6.424.616	-1,10%	0,30%
Resto países	39.542.216	340.812.627	-10,60%	16,50%
<b>TOTALES</b>	<b>406.181.281,00</b>	<b>2.062.814.647,00</b>	<b>-8,00%</b>	<b>100,00%</b>

Fuente: Datos OIV; elaborado por OeMv



**EUROPEAN COMMISSION**

Directorate-General for Communications Networks, Content and Technology

**Cooperation  
The Director**Brussels, 29 July 2013  
D1/CM

Subject: Follow-up to the **47<sup>th</sup> ICANN meeting (Durban, South Africa, 14-18 July 2013) – GEOGRAPHIC INDICATIONS: “.wine” and “.vin”**

Dear GAC Members;

This note aims at giving an overview of the main elements of the debate taking place within the Governmental Advisory Committee (GAC) of ICANN (since its 46<sup>th</sup> meeting in Beijing until the recently held ICANN Durban meeting) **on the protection of Geographical Indications**, which also beg the question of protection of **Designations of Origin**, and in particular on the new gTLDs **“.vin”** and **“.wine”**.

The note provides the **integrated position of all the European Commission services competent on the matter**, as well as the political and legal argumentation of the EU as regards why the two strings would warrant stronger safeguards and particular precaution when being delegated. The note also proposes a **way forward to conclude on GAC advice, within the 30 days agreed** after long negotiations **in Durban**.

Three firms unrelated to the wine sector, have applied to manage the new Internet domain **“.wine”**: June Station LLC – Donuts.co (USA); Afiliias Limited (Ireland); dot Wine Limited (Gibraltar). For **“.vin”**: Holly Shadow LLC – Donuts.co (USA) has filed an application. Applications provoked concerns amongst EU wine industry and Member States, which did file early warnings before the 46<sup>th</sup> ICANN Beijing meeting. However, at that time it was impossible to achieve GAC consensus on a number of strings including **“.vin”** and **“.wine”**. The EU's attempt to include specific safeguards for both strings under Category 1 was rejected, and as a result, it was agreed that **those strings would be put on hold (not to proceed beyond the initial evaluation) until the GAC could provide further advice**. The EU felt that the **general safeguards<sup>1</sup> applicable to**

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<sup>1</sup> Safeguard 2 - Mitigating abusive activity: terms of use for registrants to include prohibitions against distribution of malware, operation of bonnets, phishing piracy, IPR infringement, counterfeiting, fraudulent practices or any activity contrary to applicable law.

Safeguard 5 - Making and handling complaints: registries to implement mechanism for making complaints to registries for inaccurate WHOIS information or domain name used in connection with cybercrime or any activity contrary to applicable law.

Safeguard 6 - Consequences: consistent with applicable law and any related procedures, registries shall ensure immediate consequences for provision of false WHOIS data or the use of domain in breach of applicable law, including suspension of the domain name.

Contact Information Redacted

**all new gTLDs were not enough to meet EU public policy concerns and to fully respect EU legislation on Geographical Indications** (which are recognised IPRs within the EU).

The EU also pointed out in Beijing that at least, **the registration of second level domain names for ".vin", ".wine" which consists, contains or unduly evokes Geographical Indications must be authorised by the relevant GI Governing Body**, which should also be granted sufficient representation in the registries' policy drafting committees.

Allowing the interested parties (in this case the GI right-holders' organisations and the applicants) to work on a suitable solution is much in line ICANN's multi-stakeholder approach to decision making and would also avoid Governments deliberating on the sensitive issue relating to the status of GIs in International law.

Since Beijing, the European Federation of Origin Wines (EFOW) and associated European wine organisations have been working on a possible solution. A draft of the solution proposed by the legal representation of such associations was shared with the Commission on **5 July 2013**. The text of the letters sent on 11 July to the applicants by the legal representation of such organisations was shared with the Commission on **12 July 2013**, and a second round of letters sent to applicants on 30 July were shared on 1 August 2013. The solution in in the course of being proposed to the applicants, who are expected to provide feedback on the two rounds of letters mentioned above. The European Commission has been informed that the solutions to be presented to the applicants once they reply to the letters are not meant to protect EU interests only, but accommodate the interests of GIs right holders in the wine sector **worldwide**.

**The letters sent to applicants can be consulted in Annex 3.**

In Durban, the European Commission reported on the state of play of the negotiations with applicants but in a limited manner as these were (and are) at a very embryony stage. **We therefore drew the GAC's attention to the importance of allowing enough time to public authorities and applicants to achieve an appropriate solution in those cases whereby strong public interests are at stake.** Lengthy argumentations at Durban only resulted in the consensus of continuing discussions for another month (coinciding with the summer break).

However, it must be stressed that the understanding of the European Union, its Member States and EU GI's right-holders was that the *status quo of the Beijing Communiqué as regards the ".wine" and ".vin" strings would be maintained until a satisfactory solution would be found, as "further GAC consideration may be warranted including at the GAC meetings to be held in Durban"*<sup>2</sup>; Hence, the Beijing Communiqué does not

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<sup>2</sup> *"In addition to this safeguard advice, the GAC has identified certain strings where further GAC consideration may be warranted including at the GAC meetings to be held in Durban. Consequently, the GAC advises the ICANN Board not to proceed beyond the initial evaluation with the following strings: .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .date, .spa, .yun, .thai, .zulu, .wine, .vin"*

set forth any deadline or need to conclude on the matter in Durban (or one month after), nor that after Durban the GAC would withdraw its advice that .vin and .wine should not proceed beyond the initial evaluation. **We are of the opinion that changing the Beijing position requires consensus in the GAC.**

Secondly, it is also important to stress the **economic and political significance** of the issue in the EU and the potential damage a failure would have on the support of the EU to the GAC and multi-stakeholder approach of managing ICANN. To date, besides the EU Member States' authorities and the European Commission's own services, various concerns over the negative impact of the delegation of the “.wine” and “.vin” strings without adequate safeguards have been voiced within the EU.

The European Commission has received **several letters (some of them also addressed to ICANN by EFOW and oriGIn)** from a large number of right-holders, EU Geographical Indication Governing Bodies and producers addressing this issue and demanding that the level of protection to Geographical Indications with regard to the attribution of new gTLDs be in compliance with EU law. Given the value of the GIs as identifiers and the importance of the Internet as a **commercial communication and marketing channel**, some rights owners are understandably worried that their identifiers fall victim to **deceptive and abusive practices** on the Internet. Undermining the status of such identifiers also compromises the credibility of the DNS (Domain Names System) and **consumers'** trust in the Internet as a medium for commercial exchange.

Furthermore, a number of prominent European politicians, including members of the **European Parliament** have stressed the economic and political importance for their constituencies to uphold the protection of GIs when delegating the new gTLDs. **See also Annex I.**

The EU, the European Commission and concerned Member States, have consulted other GAC members and are in regular contact with the Governing Bodies and their legal representation to keep track of the discussions with the applicants.

Despite the evolution of the negotiations with the applicants and the discussions within the GAC, the European Commission would like to highlight that Section 9.3 of the Affirmation of Commitments reads as follows: "*ICANN will ensure that as it contemplates expanding the top level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns and rights protection) will be adequately addressed prior to implementation*"(emphasis added).

It is therefore essential that both the GAC and ICANN take into due consideration all the principles it has set out for itself to adhere to and which are listed above. Among these, the protection of IP rights of legitimate titleholders is of utmost importance; moreover **there is a clear basis in existing international law which should be applied to protect the reputation and business interests of GI holders** and by extension to protection consumers from the risk of fraudulent practices.

**A more detailed legal analysis on GIs is provided in Annex 2.**

## Way forward

Bearing in mind the above considerations, we would like to propose the following way forward. Our assessment is that this solution does not alter any international agreements on GIs nor it creates additional standards or represents a risk to national trade interests and jurisdictional competences:

- A) The European Union requests that the GAC advises the Board to further **put on hold** these applications so that ICANN **does not proceed** beyond their initial evaluation, pending an agreement between the applicant and the party with a public interest in GIs. To this end, the additional period of **one month is deemed not sufficient** and not proportionate to the complexity of the issue. As mentioned before, since Beijing, the EU wine Governing Bodies and specialized legal support have been working on a **global solution, pending applicant's feedback**, and therefore additional time is required.
- B) As regards safeguards, it is proposed to include GI's **in the Annex I (Beijing Communiqué) of the Safeguards on New gTLDs under the category of Intellectual Property Rights, with explicit mention to "Geographical Indications"**; only by means of this inclusion, and **enabling the possibility to protect GIs**, the GAC deliberations would be in compliance with the WTO TRIPS agreement and guarantee consumer protection. Please note that the protection displayed for GIs does not need to be stronger than the one displayed for trademarks, which is at the core of international talks.
- C) In order to avoid any inaccuracies, it is proposed that in the case of general safeguards 2 and 5; the Applicant Guidebook; and the ICANN contractual framework, **a mention to GIs is added in the part of the text which refers to the protection/infringement of trade marks, e.g.: ([...] trade mark, geographical indication or copyright infringement [...]).**
- D) In the registration policies and terms of use, **registries should be required to explicitly inform registrants of legal issues associated with the use of Geographical Names and Geographical Indicators.** This could include reference to the Arts 22-24 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and associated national legislation.
- E) **ICANN should develop procedures that ensure that GI names at the second-level cannot be reserved by third parties** and enable organisations responsible for the protection of GIs to **oppose the reservation of a domain name that consists of, or contains, (or otherwise unduly evokes) the name of a GI<sup>3</sup>.** It should be clear that all wine GIs protected under national legislation (including EU legislation) should be covered by the Trade Mark Clearing House and make

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<sup>3</sup> Please note that the wording "contains" or "consists" often does not cover all possible situations where a GI is not appropriately protected: "contains" or "consists" covers "bordeaux.wine" or "bordeauxcalifornia.wine", but it does not cover "burdeos.wine": the latter does not contain or consist of a GI as such, it is however a translation thereof and, accordingly, **an undue clear evocation covered by Article 23 TRIPS and Article 118m of the EU wine Regulation**; likewise, "kava.wine"/"cavva.vin" are misuses/evocations but do not "consist on" or "contain" the GI "cava", and they should nevertheless be tackled.



sure that GI representative bodies can have access to the Sunrise periods (running for at least, 30 days).

- F) **GIs should be excluded from auctions.** There are two kinds of auctions envisaged in .vin application and in .wine application by Afilias: Auctions in case there are more than one application for a given name during the Sunrise period. Auctions for premium names, which are likely to take place before the Sunrise period.
- G) GI Right holders' associations should be granted sufficient **representation** in the **registries' policy drafting committees and should maintain close cooperation with them in the implementation** of the registration policies.
- H) The European Commission is sensitive to the need of **having clear guidelines** for applicants in this regard. The European Commission would like to propose that the **GAC engages with the Board and the ICANN community to develop better methodologies and criteria for handling applications affecting Geographical Indications** and to ensure the openness, inclusiveness and transparency of the process also with other constituencies. It is proposed to address the issue within the GAC Working Group on new gTLDs.

We believe that these extra safeguards are necessary to conclude on a final GAC advice to the Board in order to allow the safe delegation of the two strings and that the reasons why the general safeguard are not enough have been duly explained.

We therefore request your consideration of the concerns expressed, the legal basis and the proposed solutions in the light of the sensitivity of this issue in Europe, and kindly ask you to reply by **Monday 12 August 2013**, enabling the GAC to discuss how to conclude on the matter.

Linda Corugedo Steneberg

Enclosed:     Annex 1 – Concerns expressed by EU right holders  
                  Annex 2 - Geographical Indications in EU law and International law. EU  
                  bilateral agreements  
                  Annex 3 – First letter sent to the applicants of ".wine" and ".vin"

Contact Information Redacted

## ANNEX 1 – Concerns expressed by EU Right holders

To date, various **concerns over the negative impact of the delegation of the “.wine” and “.vin” strings without adequate safeguards** have been voiced by EU Geographical Indication Governing Bodies; EU organisations, EU producers; other right-holders.

The European Commission has received letters from the following organisations and Governing Bodies addressing this issue and demanding that the level of protection to Geographical Indications with regard to the attribution of new gTLDs be in compliance with EU law:

- ✓ **The European Federation of Origin of Wines (EFOW)**
- ✓ **Vignerons d 'Appellation d'Origine (CNAOC)**
- ✓ **Organization for an International Geographical Indications Network (oriGIn)**
- ✓ **Comité Interprofessionnel du vin de Champagne (CIVC)**
- ✓ **Bureau National Interprofessionnel du Cognac (BNIC)**
- ✓ **Comité National des Interprofessions des Vins a Appellation d'Origine (CNIV)**

Furthermore a number of **Members of the European Parliament** have stressed the economic and political importance for their constituencies to uphold the protection of GIs on when delegating the new gTLDs. (**“Wine; Fruits and Vegetables; Tradition and Quality foodstuffs Intergroup”**). The problem has also been highlighted in European press stressing the needs for EU to safeguard European and national legalisation on and off line.

The main comments received are as follows:

1. The “.wine” and “.vin” gTLDs are supposed to allow **right-holders in the wine sector to register a distinctive web address on the basis of their activity, brand name, Protected Geographical Indication or Protected Designation of Origin**. At the moment, the private firms which have applied for those strings have **no relationship with the wine sector**. The use of those strings should be allowed, but ensuring that they are delegated with adequate safeguards once commercialisation begins.
2. If GIs are not adequately protected as part of the “.wine” and “.vin” TLD and the string is **used by unauthorised parties, this may have adverse consequences for the EU wine market (responsible for close to 65% of the world wine production) and for its consumers**. To the contrary, if both TLDs re seen as and proven to be **sound and secure**, they will become **attractive** for the producers, Governing Bodies, traders, retailers and other right-holders in the wine sector. If the strings are delegated without adequate safeguards,

Governing Bodies and analogous right-holders **will most likely voluntarily refrain from using a TLD that allows inappropriate use of their GIs.**

3. So far applicants only have to abide by **Specification 5** of the Registry Agreement according to which operators shall prohibit the registration of country and territory names recognized by the UN or of their ISO codes in front of the extensions “.wine” and “.vin”. Hence the registration of “france.wine” would be protected, but “bordeaux.wine” could be registered by any entity, for any purpose.
4. Protection is necessary at the **second-level**, since registrars can commercialise the strings therefore allowing individuals and organizations to combine both gTLDs with a second-level domain name and create web addresses like “chianti.wine”; “champagne.vin”; “rioja.wine”; “port.vin”, “bordeaux.vin” and many other combinations.
5. The Delegation could lead to abuses of Geographical Indication wines Intellectual Property Rights (IPRs). Contrary to trade marks, the **lack of precise rules or objection procedure** that would safeguard GIs, which are recognized IPRs under EU law, could lead to infringements of such GI names, especially in the wine sector.
6. It is foreseen to allow registrations of second-level domain names attributed by **public auction** to the highest bidders, without any further specifications. It is also of concern the creation of list of “**premium**” names which will be also sold via auctions. Whereas objections by trade mark owners are foreseen, no similar process of objection is mentioned for entities which have intellectual property rights on geographical indications.
7. GIs are understood by consumers to **denote the origin and the quality of products produced in a special geographical area**. Many of them have acquired valuable reputations which, if not adequately protected, may be misrepresented by dishonest commercial operators.
8. In the field of **e-Commerce**, on the rise in the wine sector, the consequences for consumers can be the purchase of wines under the **false belief they benefit from a Geographical Indication**. Consumers would be deceived into believing that they are buying a genuine product with specific qualities and characteristics when they are in fact purchasing **counterfeited goods**.
9. **Legitimate producers** would also be deprived from valuable business; they will face cases of **cybersquatting; misappropriation of brand and subsequent loss of brand value; reputation damage; deceptive practices; or lack of consumer trust.**
10. The protection displayed by ICANN rules on its **agreements and Applicant Guidebook** is too general and does not make reference to Geographical Indications. There are only generic mentions to trade marks and IPRs.
11. A proper system of **dispute resolution** based on the **legitimate rights of the GI holders and beneficiaries** should be established by ICANN.

12. As GIs is mainly a system of **small and medium sized enterprises**, in the vast majority of cases small rural producers that play a crucial role in the **sustainable development of their communities** – as the large experience and success stories within the European Union clearly show – it is crucial that such system takes into account the limited financial means of local producers and **does not put unnecessary financial burdens to them.**

## ANNEX 2 - Geographical Indications in EU law and International law. EU bilateral agreements

The European Commission would like to bring to the attention of GAC members the following legal basis in the field of Geographical Indications:

**The Paris Convention for the Protection of Industrial Property** (1883) which included "indications of source or appellations of origin" as objects of protection;

**The Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods** (1891), allows to secure protection on important markets not covered by the Lisbon Agreement (below), in particular in the USA and Member States not contracting parties to the Lisbon Agreement;

**The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration** (1958), administrated by WIPO (first specific international treaty providing for the protection of Appellations of Origin, free of charge);

**The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**, of which the vast majority of GAC Members are signatories, including the EU, USA, China etc.) – this agreement deals with protection of GIs related to all kinds of products. It's a **minimum standard agreement**, which allows Members to provide more extensive protection. WTO Members are free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system.

GIs are defined under TRIPS as “*indications which identify a good as originating in the territory of a Member, or a region or locally in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*”. TRIPS recognizes GIs as an independent category of intellectual property, along with copyright, trademarks, patents and industry designs.

The TRIPS Agreement specifically protects GIs in Articles 22 to 24, establishing those international minimum standards of protection that WTO members must provide for GIs. Although Article 23 provides additional protection for GIs for wines and spirits and sets forth the conditions of this enhanced protection in relation to the registration of trademarks, **the goal of the European Union is not to grant GIs a more favourable treatment than to trade marks, but to afford them equal opportunities. GIs should be defended against cybersquatting and other infringements in the same way as trademarks. However**, the level of protection for GIs considered by certain GAC members as acceptable must in fact be considered "**TRIPS-minus**".

In addition, the EU concluded the following **bilateral agreements** in the field of wines and/or spirits:

- **Australia** (Council decision 2009/49 /EC of 28 November 2008),
- **Canada** (Council decision 2004/91/EC of 30 July 2003). In Annex III a) and b) of the Agreement there is a list of wines deserving protection in the parties' territories),
- **Chile** (Council decision 2002/979/EC of 18 November 2002),

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- **Mexico** (Council decision 97/361/EC of 27 May 1997),
- **South Africa** (Council decision 2002/53/EC of 21 January 2002),
- **Switzerland** (Agreement between the European Community and the Swiss Confederation on trade in agricultural products OJ L114/132),
- **United States** (Council Decision 2006/232/EC of 20 December 2006) In Annex IV and V of the Agreement with the US a list of names to be protected in each of the parties' territories is included;

At EU level - Protection of GIs in the agricultural field is currently governed by four EU Regulations namely:

- **Regulation (EU) No 1151/2012 of 21 November 2012** on quality schemes for agricultural products and foodstuffs,
- **Regulation (EC) No 1234/2007 of 22 October 2007** on the common organisation of agricultural markets and on specific provisions for certain agricultural products (amended by Council Regulation (EC) No 491/2009),
- **Regulation (EC) No 110/2008 of 15 January 2008** on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks,
- **Council Regulation (EC) 1601/91** laying down general rules on definition, description and presentation of aromatized wines, aromatized wine-based drinks and aromatized wine-product cocktails.

Article 118m of Regulation (EC) No 1234/2007 provides protection to protected designations of origin and geographical indications for wine against:

(a) any direct or indirect commercial use of a protected name by comparable products not complying with the product specification of the protected name or in so far as such use exploits the reputation of a designation of origin or a geographical indication;

(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated or accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation”, “flavour”, “like” or similar;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product.

Besides, according to Article 118m(4) of the aforesaid regulation and Article 19 of Regulation (EC) No 607/2009, EU Member States authorities shall, on their own initiative or at the request of a party, take the steps necessary to stop unlawful use of protected designation of origin and protected geographical indications and to prevent any marketing or export of products at issue.

In Europe, we have also developed the [E-Bacchus](#)<sup>4</sup> database which consists of the **register of designations of origin and geographical indications protected in the EU in accordance with Council Regulation (EC) No 1234/2007**. In particular, it lists non-EU countries' Geographical Indications and names of Origin protected in the EU in accordance with bilateral agreements on trade in wine concluded between the EU and the non-EU countries concerned, and lists the traditional terms protected in the EU in accordance with Council Regulation (EC) No 1234/2007.

Last not least, the International Organisation on Vine and Wine (OIV) – to which the majority of wine producing countries represented in GAC are members, with the exception of the USA, China and Canada - has also adopted definitions about geographical indication and appellation of origin<sup>5</sup> and publishes on its website [www.oiv.int](http://www.oiv.int) a list of geographical indications for wines<sup>6</sup> which could be used as a good reference.

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<sup>4</sup> <http://ec.europa.eu/agriculture/markets/wine/e-bacchus/index.cfm?&language=EN>

<sup>5</sup> <http://www.oiv.int/oiv/info/enindicationgeo>

<sup>6</sup> <http://www.oiv.int/oiv/info/enlisteindication>







## EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

Cooperation  
Director

Brussels, 19 SEP. 2013  
CNECT D1/LEF/ps

**Subject: European Commission and EU member states strong concerns as regards the deliberations of GAC advice on the two strings .vin and .wine**

Dear Ms Dryden,

*Dear Heather,*

I am writing to you to express the European Commission and EU member states strong concerns as regards the deliberations of GAC advice on the two strings .vin and .wine and in particular the attempt to conclude on the matter in the letter to Dr Crocker. For me, the letter contains mistakes both in terms of procedure and substance, which in turn discloses serious problem in terms of the proper functioning of the GAC.

In this context, I think it is important to recall GAC Operating Principle 47. It says; "*The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.*"

With this Principle in mind, I would like to recall that the European Commission and EU Member States have, repeatedly, stressed that the Beijing Communiqué<sup>1</sup> contains the only substantial GAC consensus advice on the two strings so far, and that the advice in Durban, i.e. "*the GAC agreed to take thirty days additional time with a view to conclude on this matter*", neither changes this fact, nor implies that the GAC necessarily has to conclude on the matter at all, but to make the necessary efforts, and here I like to stress informed discussions, which have not taken place to find a suitable solution via consensus. I therefore conclude that it does not seem reasonable that the letter to Mr Crocker states that "*the GAC agreed in Durban to set a firm deadline*". Again, my understanding is that such a deadline lacks operational value as there has not been a

<sup>1</sup> Beijing Communiqué IV.1.c: Strings for Further GAC Consideration

In addition to this safeguard advice, that GAC has identified certain gTLD strings where further GAC consideration may be warranted, including at the GAC meetings to be held in Durban.

i. Consequently, **the GAC advises the ICANN Board** to: not proceed beyond Initial Evaluation with the following strings : .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .date, .spa, .yun, .thai, .zulu, .wine, .vin

Contact Information Redacted

proper discussion among GAC members. The EU and Latin America have provided material enough to discuss, and all we have seen in exchange is a re-statement of previous positions without any substantial discussions on the matter.

The letter, on behalf of GAC as a whole, seems to aim at overruling the Beijing consensus by concluding that there is "*no consensus*" and that "*the GAC has finalised its consideration of the strings .wine and .vin and further advises that the applications should proceed through the normal evaluation process*". Besides the fact that we do not agree with the statement that the consideration has been finalised, when there are different views among GAC members, the normal procedure would have been that "*the GAC should advise ICANN that there are concerns about a particular application*"<sup>2</sup>, not that the relevant applications or strings should "*proceed through the normal evaluation process*". The latter statement is exactly the contrary to the position of several GAC members, including the European Commission and EU Member States.

Furthermore, even if we overlook the fact that there is already consensus in Beijing, the GAC Operating Principle 47 stipulates that the "*Chair shall convey **the full range of views expressed by members to the ICANN***". Although I have clearly stated our position in a letter on 29 July, followed by a range of further explanatory e-mails to GAC, there is no reference to it in the letter. It merely states that there is a "*range of views*" and that "*the GAC or its members may communicate further details to the Board as to the nature of their difference in views*". In line with GAC's mandate, it should have been more correct to mention that it is the responsibility of the ICANN Board to enter into dialogue with the GAC and affected members to understand the scope of concerns. For me, it is obvious that individual GAC members can and will surely communicate to the ICANN Board their own concerns, as the vice President of the European Commission, Ms Neelie Kroes has now done in a letter to Dr Crocker and Mr Chehadé.

Finally, it is worth noting that despite our thorough explanation of the status of Geographical Indications in European and international law (TRIPS Agreement, Paris Convention, bilateral agreements EU-USA, EU-Canada, EU-Australia, etc.), the letter simply discards this status by noting that "*there is no international agreement among governments about how to treat geographical indications*". Indeed, there might not be a global understanding on the status of GIs in relation to other IPRs, but there are plenty of international instruments which seem to have been forgotten in the letter.

Ms Dryden, although I perfectly understand that you, as chair of the Committee, have been under strong pressure from a group of GAC members and lobby organisations, the EU would expect that you take an impartial position and that you follow the rules set forth in the GAC Operational Principles. I am of the view that the majority of GAC members would share the same opinion. I feel strongly that the way that this issue has been handled, further puts at stake our confidence in the GAC as a reliable body for public policy advice to the ICANN board, and as such needs to be swiftly addressed.

I hope the Board will take its responsibility and disregard the letter as it does not reflect the views of the GAC members. This would allow us to continue our considerations on the issue and hopefully come to a more considered advice. I also strongly feel that some of the issues that were planned for discussion in Durban, but were in the end not discussed, should now have priority in Buenos Aires. I refer to issues such as the GAC working methods and the operational mandate for the GAC secretariat.

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<sup>2</sup> as per the new gTLD Applicant Guidebook, module 3.1 to which letter refers

I remain at your disposal for any further explanations that you may have on the matter.

Sincerely yours, *best regards*  
*Linda who Kelly*  
Linda CORUGEDO STENEGERG

Cc: Ms Eilers Jeannie, Mr Battesti Anton, Mr Nettlefold Peter, Mr  
Schneider Thomas, Ms Hackshaw Tracy

# Attachment C

## El Vino en Cifras – Año 2012

*España es uno de los grandes productores mundiales de vino: primero en el ranking por superficie plantada, tercero por producción (debido a un rendimiento menor que el de Francia e Italia) y segundo exportador mundial en términos de volumen, aunque tercero en términos de valor. Por su importancia en términos económicos, pero también sociales y medioambientales, así como por la importancia del vino como imagen del país en el exterior, el sector es de extraordinaria relevancia en España.*

### 1. SITUACIÓN DEL MERCADO MUNDIAL

#### Viñedo

Según datos de la OIV<sup>1</sup>, en 2012 la superficie vitícola mundial disminuyó en 17.000 hectáreas respecto a 2011, estimándose el total mundial en 7.575.000 ha. El viñedo comunitario total (UE-27) está reduciendo progresivamente su superficie plantada, pasando de las 3.792.000 has en el año 2008 a las 3.492.000 has en el año 2012. Este proceso es consecuencia de la combinación de factores como la reestructuración

<b>El viñedo en el mundo</b>						
Fuente: Datos OIV; elaboración OeMv						
Datos						
(miles Ha)	2008	2009	2010	2011	Prev. 2012	% s/ total
España	1.165	1.113	1.082	1.032	1.018	13,44%
Francia	858	836	818	806	800	10,56%
Italia	825	812	795	776	769	10,15%
Portugal	246	244	243	240	239	3,16%
Rumania	207	206	204	204	205	2,71%
Otros UE	491	479	474	461	461	6,09%
<b>Total UE</b>	<b>3.792</b>	<b>3.692</b>	<b>3.619</b>	<b>3.521</b>	<b>3.492</b>	<b>46,10%</b>
EEUU	402	403	404	407	407	5,37%
Turquía	518	515	513	515	517	6,83%
China	480	518	539	560	570	7,52%
Argentina	226	229	228	218	221	2,92%
Chile	198	199	200	200	205	2,71%
Sudáfrica	132	132	132	131	131	1,73%
Australia	173	176	170	174	169	2,23%
<b>Total no UE</b>	<b>3.945</b>	<b>4.009</b>	<b>4.053</b>	<b>4.071</b>	<b>4.083</b>	<b>53,90%</b>
<b>TOTAL MUNDO</b>	<b>7.737</b>	<b>7.702</b>	<b>7.672</b>	<b>7.592</b>	<b>7.575</b>	<b>100,00%</b>

del viñedo y el impacto de la crisis vitícola, que por otra parte, se ha dejado sentir de forma distinta por zonas y tipos de vino y a la que se ha añadido el programa europeo de ayuda a los arranques. La disminución del viñedo comunitario queda compensada por el mantenimiento de las superficies plantadas del resto del mundo. Mientras disminuyen las plantaciones en Australia, éstas crecen en Chile, Argentina, China y, en menor medida, en Turquía, manteniéndose invariables en EE.UU. y Sudáfrica.

#### Producción Mundial

Según la estimación de la OIV, la producción mundial de vino de 2012 (sin contar zumo y mosto) puede situarse en 251 millones de hectolitros, 15,8 millones menos que en 2011. El primer país productor de vino es Francia, con 42,2 millones de hl (16,8% mundial), seguido por Italia, con 40,1 millones de hl (16% mundial), y España, con 29,7 millones de hl (11,8% mundial y 21% de la UE). Ya con menor volumen, la producción crece en Portugal (+500.000 hl), Grecia (+400.000 hl) y Alemania (+368.000 hl), y cae en Hungría (-876.000 hl), Austria (-703.000 hl) y, en menor medida, Bulgaria (-197.000 hl).

<sup>1</sup> Organización Internacional de la Viña y del Vino.

Fuera de la UE, el nivel de producción en 2012 es ligerísimamente inferior, con 109,59 millones de hl, a 2011 (109,63 millones de hl). EE.UU. es el país no europeo de mayor producción de vino con 20,5 millones de hl, lo que supone un crecimiento de 1,3 millones de hl respecto a 2011. En segundo lugar, se encuentra Chile, país que supera a Australia y a Argentina con 12,6 millones de hl el pasado año, 2,1 millones más que en 2011. Por el contrario, con 11,8 millones de hl, Argentina disminuye sus cifras en 3,7 millones de hl con respecto a la producción del año anterior, cuando se redujo igualmente, aunque de forma mucho más suave. En el cuarto puesto aparece Australia con una producción de vino de 11,6 millones de hl (+500.000 hl).

Respecto a otros países de fuera de la UE, Sudáfrica pasa de producir 9,3 millones de hl en 2011 a superar levemente los 10 millones en 2012. Brasil pasa de los de 3,4 millones de hl producidos en 2011 a 2,9 millones en 2012, volviendo a registrar datos negativos. Nueva Zelanda vuelve a bajar de los 2 millones de hl tras superarlos con creces en 2011. Suiza, por su parte, redujo ligeramente la producción, en 115.000 hl.

Según las estimaciones, de los 15,8 millones de hectolitros que se dejaron de producir en 2012 a nivel mundial, 15 millones de pierden en los tres primeros productores mundiales: Francia, España e Italia, mientras que fuera del Viejo Continente, destaca la caída de Argentina. Por el contrario, países como Chile, EEUU. y, en menor medida, Sudáfrica o Portugal, rompieron con el descenso mundial.

<b>Producción Mundial de Vino</b>					
Fuente: Datos OIV; elaboración OeMv					
<b>Datos (miles hl)</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>Prev. 2012</b>	<b>% s/ total</b>
Francia	46.361	45.704	50.764	42.243	16,8%
Italia	47.450	48.525	42.772	40.060	16,0%
<b>España</b>	<b>35.166</b>	<b>35.235</b>	<b>33.397</b>	<b>29.665</b>	<b>11,8%</b>
Otros UE	33.921	26.912	31.371	29.447	11,7%
<b>Total UE</b>	<b>162.898</b>	<b>156.376</b>	<b>157.171</b>	<b>141.415</b>	<b>56,3%</b>
EEUU	21.690	20.887	19.187	20.510	8,2%
Argentina	12.135	16.250	15.473	11.778	4,7%
Chile	10.093	9.152	10.464	12.554	5,0%
Australia	11.710	11.240	11.090	11.554	4,6%
<b>Total No UE</b>	<b>108.302</b>	<b>108.724</b>	<b>109.629</b>	<b>109.585</b>	<b>43,7%</b>
<b>TOTAL MUNDO</b>	<b>271.200</b>	<b>265.100</b>	<b>266.800</b>	<b>251.000</b>	<b>100,0%</b>

### Producción Unión Europea

De acuerdo con los últimos datos publicados por la OIV y siendo estos aún estimaciones sujetas a modificación, la producción de vino de la Unión Europea en 2012 se sitúa en 141,4 millones de hl, bastante inferior a la de 2011, que fue de 157,2 millones (-10%). Por el contrario, la producción del conjunto de países externos a la UE se sitúa en 2102 en los 109,59 millones de

hl, sólo un 0,04% menor que en 2011, que fue de 109,63 millones. Siguiendo estas estimaciones, la Unión Europea representaría el 56,3% de la producción vinícola mundial en 2012.

Según las cifras de la Comisión Europea, actualizadas a enero de 2013, la producción de vino y mosto de uva en la Unión Europea alcanzaría los 144,5 millones de hectolitros en la campaña 2012/2013, lo que supondría un descenso del 11,6% con respecto a la campaña 2011/12, y una caída algo mayor (-14,3%) en relación a la media de las cinco últimas campañas. La producción destinada a vinificación se estima en los 138,8 millones de hectolitros, el 96% del volumen total. De ellos, 61,6 millones de hectolitros habrían sido destinados para vinos con DOP<sup>2</sup> (44,4%), 29 millones para vinos con IGP<sup>3</sup> (20,9%), 3,5 millones para vinos varietales sin DOP ni IGP (2,5%) y 44,7 millones para los demás vinos (32,2%).

Por tipo de vino, Francia ocupa la primera posición como productor de vinos con DOP, con 19,4 millones de hectolitros, frente a los 13,2 de Italia y los 12,5 de España. En lo que respecta a los vinos con IGP, la producción francesa asciende a 11,4 millones de hectolitros, la italiana a 11,2 y la española a 2,4 millones. En cuanto a vinos varietales, sin DOP ni IGP, España se sitúa en cabeza con 2,5 millones de hectolitros, seguida de Italia (0,4 millones de hl) y Bulgaria (0,29 millones de hl). Por último, en lo que respecta a la categoría de otros vinos, Italia es la principal productora con 15,2 millones de hl, por delante de España con 12 millones, y de Francia con algo menos de 10 millones.

<b>Producción Europea de Vino (campaña 2012/13)</b>				
Fuente: Datos UE; elaboración OeMv				
País (datos en miles de hl)	<u>2012/13</u>	<u>% s/ total</u>	<u>Var. % con</u>	<u>Var. % con</u>
			<u>2011/12</u>	<u>media 5 camp. 07/12</u>
Italia	41.557	28,8%	-7,2%	-15,4%
Francia	40.609	28,1%	-20,5%	-13,1%
<b>España</b>	<b>33.500</b>	<b>23,2%</b>	<b>-9,9%</b>	<b>-16,6%</b>
Alemania	8.903	6,2%	-2,5%	-2,6%
Portugal	6.140	4,2%	+9,4%	+1,4%
Resto UE	13.791	9,5%	-12,2%	-20,6%
<b>TOTAL UE</b>	<b>144.500</b>	<b>100,0%</b>	<b>-11,6%</b>	<b>-14,3%</b>

Aunque todavía es pronto para ninguna confirmación sobre la vendimia 2013, las estimaciones iniciales apuntan a una reducción importante en la producción europea de vino.

<sup>2</sup> Denominación de Origen Protegida.

<sup>3</sup> Indicación Geográfica Protegida.

### Consumo

Con unas estimaciones de consumo mundial de vino para 2012 estimadas por la OIV en alrededor de 245,3 millones de hectolitros, se aprecia un leve aumento respecto al año anterior de 1,4 millones de hl (+0,6%). Este crecimiento se observa analizando la previsión para los países externos a la Unión Europea: China, en primer lugar, subiría en 1,5 millones de hl hasta los 17,8 millones (+9,3%),

subida más elevada que para el conjunto mundial. Le seguiría Francia, con un aumento de alrededor de 1 millón de hl hasta superar los 30 millones (+3,2%). En menor medida, el consumo crecería en EE.UU. (+575.000 hl) Alemania (+293.000 hl), o Argentina (+242.000 hl), entre otros. Por el contrario, el caería el consumo en España un 6% hasta los 9,3 millones de hl (-594.000 hl), así como en Italia (-419.000 hl) o Reino Unido (-327.000 hl).

Consumo Mundial de Vino (miles de hl)				
Fuente: Datos OIV; elaboración OeMv				
País	2011	2012	Var. 2011/12	% s/ total
Francia	29.322	30.269	3,2%	12,3%
Italia	23.052	22.633	-1,8%	9,2%
Alemania	19.707	20.000	1,5%	8,2%
Reino Unido	12.860	12.533	-2,5%	5,1%
<b>España</b>	<b>9.894</b>	<b>9.300</b>	<b>-6,0%</b>	<b>3,8%</b>
Resto UE-27*	29.298	29.118	-0,6%	11,9%
<b>Total UE-27</b>	<b>124.133</b>	<b>123.853</b>	<b>-0,2%</b>	<b>50,5%</b>
EEUU	28.425	29.000	2,0%	11,8%
China	16.339	17.837	9,2%	7,3%
Argentina	9.809	10.051	2,5%	4,1%
Australia	5.325	5.375	0,9%	2,2%
Resto No UE	59.769	59.134	-1,1%	24,1%
<b>Total No UE</b>	<b>119.667</b>	<b>121.397</b>	<b>1,4%</b>	<b>49,5%</b>
<b>TOTAL MUNDO</b>	<b>243.800</b>	<b>245.250</b>	<b>0,6%</b>	<b>100,0%</b>

\* UE-27: Alemania, Austria, Bélgica, Bulgaria, Chipre, Dinamarca, Eslovaquia, Eslovenia, España, Estonia, Finlandia, Francia, Grecia, Hungría, Irlanda, Italia, Letonia, Lituania, Luxemburgo, Malta, Países Bajos, Polonia, Portugal, Reino Unido, República Checa, Rumanía y Suecia.

En cuanto a la Unión Europea, el consumo bajaría en 280.000 hl respecto a 2011, con una leve caída del 0,2%, mientras que, en el resto del mundo, subiría en 1.730.000 hl, un 0,6% más que en el año anterior. Con 123,9 millones de hl, la Unión Europea seguiría liderando el consumo de vino a nivel internacional, aunque sólo un punto por encima (50,5%) del conjunto de países

La diferencia entre la producción y el consumo estaría, siempre según las estimaciones de la OIV para 2012, en una horquilla entre los -2,9 y los +14,3 millones de hectolitros, de la que se obtiene una media de 5,7 millones de hl, cifra que estaría muy lejos de las registradas en años anteriores, mucho más favorable para la producción.



## 2. SITUACIÓN DEL SECTOR EN ESPAÑA

*El sector vitivinícola español tiene gran importancia, tanto por el valor económico que genera, como por la población que ocupa y por el papel que desempeña en la conservación del medioambiente.*

### Viñedo

Siempre según datos de la OIV, España, con 1,018 millones de hectáreas destinadas al cultivo de la vid (97,4% destinadas a vinificación, un 2% a uva de mesa, un 0,3 % a la elaboración de pasas y un 0,3 % restante a viveros), sigue siendo, con diferencia, el país con mayor extensión de viñedo de la Unión Europea y del mundo, a pesar de estimarse una caída de 18.000 hectáreas respecto a 2011. Sin embargo, las estimaciones oficiales del MAGRAMA, más recientes, apuntan a que esta superficie haya bajado hasta las 954.020 has en 2012. En todo caso, representa casi el 30% de la superficie total de la UE (seguido por Francia con el 23%, y de Italia con el 22%) y un 13,4 % del total mundial. Su tradición elaboradora de vinos se remonta a la época de los romanos, aunque no ha sido hasta más recientemente cuando la exportación se ha convertido en un hecho masivo y generalizado en el sector.

### Producción española

Tras siete campañas de relativa estabilidad, rondando un volumen de producción de vino y mosto de en torno a los 40 millones de hectolitros, en la campaña 2012/2013 y según los datos del Fondo Español de Garantía Agraria (FEGA) a noviembre de 2012, la producción bajaría levemente de los 34 millones de hl, frente a los 38,6 millones de 2011/12, lo que supone un caída del 12% (-4,6 millones de hl), y la cifra más baja desde la campaña 2001/02.

- **Avance producción española 2011/12**

Para la campaña actual, 2012/13, el propio MAGRAMA estima una producción de 33,97 millones de hectolitros, lo que supone una caída respecto a la campaña anterior del 12%, en 4,6 millones de hl. En cuanto al reparto geográfico, y según la estimación para esa campaña, **Castilla-La Mancha** sigue siendo la principal región productora con más de la mitad de la producción total española (53,2% y 18,06 millones de hl), reduciendo un 3% las cifras de producción de la campaña anterior, que fueron de 18,6 millones de hectolitros (-567.400 hl).

**Extremadura**, segunda comunidad productora, pasaría de 4,3 millones de hectolitros en la campaña 2011/2012, a bajar de los 3 millones en la 2012/13 (-1,33 millones, -31%), mientras que **Cataluña**, en el tercer puesto, cae en 913.300 hectolitros hasta los 2,4 millones (-27,7%). La suma de Castilla – La Mancha, Extremadura y Cataluña ascendería a 23,4 millones de hectolitros, el 69% de la producción total española de vino y mosto para la actual campaña.

Por otra parte, también destaca la bajada de la producción en la **Comunidad Valenciana**, que caería casi un 24% hasta los 1,8 millones de hl (-552.800 hl) en **Galicia**, que pasa de 1,5 millones de hl a bajar del millón de hl (-36%).

Respecto a otras CC.AA., La Rioja, Castilla y León, Andalucía y Aragón estarían por encima del millón de hectolitros, aunque todas ellas con cifras más bajas que en la campaña anterior. Canarias sería la única comunidad autónoma española que aumenta su producción (+19,3%), mientras que se mantendría estable en Murcia, Baleares y Cantabria. Por su parte, Navarra, País Vasco, Madrid y Asturias siguen la tendencia negativa de la producción española.

### Superficie de viñedo

La situación geográfica, las diferencias climáticas y la variedad de suelos, hace de la Península Ibérica y nuestras islas un lugar privilegiado para la producción de vinos de características muy distintas. Se cultiva viñedo en la totalidad de las 17 Comunidades Autónomas en las que se divide el país, si bien cerca de la mitad de la extensión total se encuentra en **Castilla-La Mancha** (465.358 has y el 48,8 % del viñedo plantado), la zona geográfica con mayor extensión del mundo dedicada a su cultivo, seguida de **Extremadura** (cerca de 82.331 has, 8,6 %), **Valencia** (68.392), **Castilla y León** (64.364 has), Cataluña, La Rioja, Aragón, Murcia y Andalucía.

En todo caso, se trata de superficies de viñedo en España que siguen en descenso. La superficie total de viñedo en nuestro país en 2012 se sitúa, según la "Encuesta sobre Superficies y Rendimientos de Cultivos ESYRCE" del MAGRAMA, en las 954.000 hectáreas, frente a las 972.085 has del año anterior. Por tanto, se observa una caída de 18.065 hectáreas (-1,9%). Las mayores caídas porcentuales las ofrecen Andalucía (-7,4%), Murcia (-6,1%) y Madrid (-5,1%), siendo La Rioja (+1,1%) y Canarias (+3,3%) las únicas comunidades autónomas con mayor superficie de viñedo en 2012, mientras que Cantabria la mantuvo estable.

España cuenta con 85 zonas de producción de vinos de calidad con Denominación de Origen Protegida (DOP), de ellas 67 son con Denominación de Origen, 2 con Denominación de Origen Calificada, 6 son Vinos de Calidad con Indicación Geográfica y 10 son Vinos de Pago, las cuales siguiendo el modelo europeo de producción, mantienen un estricto control sobre la cantidad producida, las prácticas enológicas, y la calidad de los vinos que se producen en cada zona. Las primeras Denominaciones autorizadas se aprobaron en 1932, y se trata de Jerez-Xères-Sherry, Manzanilla de Sanlúcar de Barrameda, Málaga, Montilla-Moriles, Rioja, Tarragona, Priorato, Alella, Utiel Requena, Valencia, Alicante, Ribeiro, Cariñena, Penedés, Condado de Huelva, Valdepeñas, La Mancha, Navarra y Rueda.

Según los últimos datos publicados, el 51,1% producirá vinos tintos y rosados y el 48,9%, vinos blancos. Las variedades de uva más comunes en España son la Airén (23,5%), Tempranillo (20,9%), Bobal (7,5%), Garnacha Tinta, Monastrell, Pardina, Macabeo y Palomino, por orden de importancia en cuanto a su cultivo. De estas variedades, son tintas, la Tempranillo, Bobal, Garnacha tinta y Monastrell y blancas las restantes.

Mientras tanto, el consumo interno de vino en España sigue ofreciendo unos datos preocupantes, situándose a día de hoy en una estimación por debajo de los 20 litros por persona y año, lo que supone estar a la cola de Europa.

### 3. ESTRUCTURA EMPRESARIAL

El sector vitivinícola español se encuentra inmerso en un importante proceso de actualización y renovación. Así, desde el año 2000, la superficie sujeta a reconversión y reestructuración ha superado las 130.000 hectáreas, lo que representa una inversión cercana a los 800 millones de euros. Se estima que algo más de 4.000 bodegas elaboran en España vinos tranquilos, espumosos y de licor. Son, por lo general, de pequeño tamaño y su capital es mayoritariamente de origen español, de tipo familiar, mientras que un gran número están constituidas como cooperativas agrarias.

Entre las principales empresas del sector, con más de 100 millones de euros de facturación, se encuentran las siguientes: Freixenet, J. García Carrión, Codorníu, Arco Wine Invest Group.; Grupo Domecq Bodegas; Grupo Miguel Torres, S.A.; Félix Solís Avantis y Grupo Faustino.

Las pequeñas bodegas y las cooperativas coexisten con estas grandes empresas, que poseen centros de producción en distintas zonas, con objeto de diversificar su oferta. Con objeto de controlar la calidad a lo largo de todo el proceso productivo, algunas bodegas han comprado o ampliado la extensión de sus viñedos, si bien la mayor parte del suministro de las bodegas en España procede de otros viticultores o directamente de las cooperativas en forma de vino. También es importante el nivel de inversión que se ha destinado a la edificación de nuevas bodegas, a la mejora de las instalaciones y equipamientos y a la utilización de técnicas de envejecimiento distintas para ofrecer una gama mucho más amplia de vinos de calidad, si bien tal nivel de inversión se ha visto muy reducido en los años recientes de crisis económica. En este contexto es interesante resaltar la actividad y la innovación de muchas bodegas que experimentan con nuevas variedades de uva y la utilización de las uvas autóctonas para producir vinos más adaptados al gusto del nuevo consumidor.

La DOCa Rioja tiene registradas el mayor número de bodegas de vino de calidad (826), seguida de DO Cava (419), DO Ribera del Duero (286), DO La Mancha (256), DO Cataluña (203), DO Penedés (187) y DO Rías Baixas (181).

Este proceso de modernización se extiende, incluso, a la construcción de las nuevas bodegas encargadas a arquitectos mundialmente famosos, que han emprendido algunas bodegas, entre las que destacan, en Rioja, la nueva bodega de Domecq, Bodegas Ysios (encargada a Santiago Calatrava), o la de CVNE (diseñada por Philippe Mazières), la de Marqués de Riscal que ha proyectado Frank O. Gehry, o la tienda de R. López Heredia por Zaha Hadid o Señorío de Arínzano proyectada por Rafael Moneo para Bodegas Chivite en Navarra.

El sector muestra un enorme dinamismo. El grado de concentración es relativamente elevado, estimándose que los cinco primeros grupos acaparan una cuota conjunta de casi un 28% del mercado. La penetración de capitales extranjeros entre los primeros operadores no es muy importante, aunque sí se van extendiendo los acuerdos con empresas del sector en otros países para mejorar la capacidad de comercialización mundial, como también aumentan las alianzas entre comercializadores para afrontar conjuntamente el fuerte proceso de internacionalización en que está metido el sector español del vino.

#### 4. EXPORTACIÓN

##### Exportaciones Mundiales

Los intercambios mundiales en el sector del vino adquieren cada vez más importancia. De un total de 72,2 millones de hectolitros de media en el quinquenio 2001-05, se ha pasado a 99,1 millones de hectolitros en el año 2012 según estimaciones de la OIV. En términos de valor y tomando como fuente GTA, que toma los datos de las aduanas de los diferentes países, el importe global de las exportaciones de vino y mosto habría alcanzado en 2012 la cifra de 25.283 millones de euros. Este mercado mundial, considerado por la OIV como la suma de las exportaciones de todos los países, ha crecido significativamente en el último año en términos de valor, suponiendo un 8,3% más que el año anterior. No obstante, el volumen se ha reducido un leve 1,9% respecto a 2011, cuando se superaron entonces los 100 millones de hectolitros en el total mundial de exportación vitivinícola.

En el mismo 2012, las exportaciones mundiales de vino representaron aproximadamente el 40,4% del consumo mundial (contra un 34,6% en 2006). De donde se deduce que una tendencia estable a lo largo de los últimos años es el crecimiento constante de lo que los intercambios internacionales representan dentro del consumo mundial, señal de que las caídas del consumo en los países tradicionalmente productores se está viendo compensada por el incremento en países cuyas necesidades de vino superan a su propia producción y se ven obligados, por lo tanto, importarlo.

En los últimos meses, observamos un muy buen desarrollo de las exportaciones vitivinícolas de países pertenecientes al conocido como Nuevo Mundo, en detrimento de los proveedores tradicionales europeos, los cuales aún dominan de forma clara el comercio exportador a nivel internacional. Así, países como Chile, Argentina, Sudáfrica o Nueva Zelanda están ganando cuota progresivamente, sobre todo por un impulso especialmente positivo para las ventas de vinos más económicos.

Siguiendo con los datos de GTA para el cierre de 2012, España es el segundo proveedor mundial de vino y mosto en términos de volumen y el tercero en valor, con 19,5 millones de hectolitros y 2.360 millones de euros respectivamente. El precio medio del vino español en el exterior se fijó en los 1,21 euros por litro, y sigue siendo muy inferior al del resto de principales países proveedores pese a que, en los últimos meses, está subiendo notablemente.

Actualmente, la tendencia del vino español en el mercado exterior parece clara: fuerte encarecimiento de precios, fuerte descenso del volumen de venta, y buenos datos de facturación. El vino a granel sin DOP protagoniza este comportamiento, al ser el motor de las exportaciones con cerca del 50% del volumen de vino exportado por España en 2012. Por tanto, nuestras exportaciones se están enfocando cada vez más a los vinos con mayor valor añadido, vinos con mucha mejor evolución que el granel. Esta tendencia explica el porqué de la fuerte subida de precios del vino español en los últimos meses: buen comportamiento de los vinos con precios más elevados, y fortísimo encarecimiento de los vinos con escaso valor unitario.

Las exportaciones mundiales de vino en términos de volumen están lideradas por Italia, primer proveedor con 21,2 millones de hectolitros vendidos en 2012. Sin embargo, Francia vuelve a ser el principal exportador en valor de forma clara, con casi 7.840 millones de euros de facturación, seguido de lejos por los 4.691 millones ingresados por Italia. Francia aún se encuentra, con 15 millones de hectolitros, muy lejos de Italia y España en volumen, lo que indica un precio medio de venta muy superior para el país galo. El pasado año, se situó en los 5,23 euros por litro, y fue claramente el más elevado entre los doce principales proveedores mundiales. La diferencia es aún mayor si lo comparamos con los precios medios de sus principales competidores, Italia (2,21 €/l.) y España (1,21 €/l.).

La suma de Italia, España y Francia representó en 2012 aproximadamente el 56,4% del volumen y el 59% del valor total de vino y mosto exportado a nivel mundial. Pero, ¿cómo evolucionaron respecto a 2011? España e Italia están viviendo en la actualidad una tendencia muy parecida, con descenso del volumen exportado, pero buenos datos en valor (+6,5% para ambos países, según GTA). Además, la causa de esta disparidad entre valor y volumen es similar: un flete encarecimiento de los vinos más económicos, como es el caso de los graneles, y más concretamente, de los vinos a granel sin ningún tipo de indicación ni variedad. Rusia, entre otros, protagonizó la caída del volumen de venta en ambos proveedores, ya que el estado ruso están sustituyendo sus importaciones de graneles procedentes de estos dos países por las del conocido como Nuevo Mundo, con países como Argentina, Chile, Sudáfrica o Uruguay multiplicando sus ventas. Por su parte, Francia centra más sus ventas en los vinos con mayor valor añadido, mostrando un crecimiento respecto a 2011 del 5,6% en volumen y del 8,8% en valor. 2012 fue un año especialmente positivo para los vinos franceses en el mercado asiático, principalmente en China y Japón, así como en Estados Unidos.

España llegó a sustituir a Italia como primer proveedor mundial de vino en términos de volumen en el interanual a algunos meses de 2012, aunque los malos datos de los últimos meses han impedido que cerremos el año con dicho privilegio.

Respecto a otros proveedores<sup>4</sup>, Chile sustituye a Australia como cuarto exportador mundial de vino en volumen con 7,5 millones de hectolitros (+12,8%), mientras que refuerza su quinto puesto en valor con una subida del 14,7% hasta alcanzar los 1.400 millones de euros en 2012.

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<sup>4</sup> Tomamos como referencia el euro como moneda común para todos los países incluidos en el análisis.

En este aspecto, Australia sí conserva su cuarto puesto con 1.524 millones de euros (+6,8%), mientras que sólo elevó un 2% el volumen exportado, hasta los 735 millones de litros. En 2012, Estados Unidos se suma a la lista de 6 países cuyas exportaciones de vino superaron los 1.000 millones de euros de facturación. El país norteamericano sustituye en el sexto puesto a Alemania, gracias a una subida del 11,5% hasta sobrepasar los 1.077 millones de euros, mientras que el país germano redujo sus ingresos hasta los 972 millones (-2%). De hecho, Alemania fue el único de los once principales proveedores mundiales que registró una caída en valor en 2012 pese a que sólo redujo los ingresos procedentes de las ventas exteriores de vino envasado. En términos de volumen, a las ya comentadas caídas de Italia y España, se suman la de Alemania y Estados Unidos, para ambos países en torno al -5%.

Nueva Zelanda (+18,8%) y Argentina (+16,6%) muestran las mejores tasas de variación en términos de valor entre los países analizados, superando ambos a Portugal (+6,5%) en el ranking económico. En volumen, el proveedor argentino muestra, con un +15%, la mayor subida porcentual, ganando fuerza como noveno exportador mundial, mientras que Nueva Zelanda lo hizo en un +4,6%. Por su parte, 2012 también fue un año positivo para Sudáfrica, más en volumen (+10%) que en valor (+4,5%), ya que fue el único país junto a Portugal que vendió más barato en 2012, con el país luso con un comportamiento parecido al del país africano (+10,3% en volumen y +7,5% en valor). Sudáfrica tiene mucho mayor peso en litros (ha pasado de la séptima a la quinta plaza como proveedor mundial) que en euros (sigue en el undécimo puesto), ya que muestra un precio medio muy inferior al resto (1,37 €/l.), sólo por encima del de España. La explicación la encontramos tanto en el extraordinario desarrollo de las ventas de Bag-In-Box como en el fuerte descenso del vino envasado, este último con un precio mucho más elevado.

La cuota de mercado de los 5 primeros exportadores de la UE (Italia, Francia, España, Alemania y Portugal), según estas estimaciones, ronda el 63,6% del total mundial, siendo algo menor que para el quinquenio 2001-2005, cuando era del 65,2%, mientras que en el periodo 1986-90 era del 78,8%.

El grupo de los 6 países nuevos exportadores (Argentina, Chile, Sudáfrica, EEUU, Australia y Nueva Zelanda) participa con un 28,7% del mercado en 2011, comparado con el 23,4% de media en el quinquenio 2001-2005 y apenas el 3% del total mundial en el periodo 1986-90. La previsión es que esta cuota aumente durante los próximos años.

Estas cifras, que reflejan un descenso de las cuotas de exportación de los países del “Viejo Mundo”, junto con la subida de las cuotas de los países del “Nuevo Mundo”, arrojan luz sobre la fuerte entrada en el mercado de éstos últimos. La buena marcha, principalmente, de las exportaciones de vino a granel y en envases de más de 2 litros en estos países, partida en la que se incluye el vino en formato bag-in-box, muy importante en la mayoría de ellos, les está permitiendo crecer de forma muy positiva.

## Exportaciones españolas de vino – Año 2012

Durante el año 2012, y tomando como fuente AEAT (Aduanas), España exportó 2.062,8 millones de litros de vino, por valor de 2.499,3 millones de euros, lo que supone ya una caída del 8% en términos de volumen, aunque un crecimiento del 11,8% en valor. El progresivo y notable encarecimiento del precio medio de venta en los últimos meses está provocando un desplome de nuestras ventas en volumen, que nos hizo cerrar el año con datos negativos, aunque aún conservamos los buenos datos de la facturación, no obstante cada vez más moderados.

Los datos muestran un rápido cambio de la tendencia exportadora, ya que el primer semestre de 2012 se saldó con un aumento del 3,4% en el volumen de vino exportado, si bien el valor creció entonces un 13,5%, aspecto en la caída es mucho más suave.

Las cifras de 2012 frenan notablemente los datos registrados al cierre de 2011 (sobre todo en litros), cuando se creció entonces un 26,3% en volumen y un 16,7% en valor. Como podemos comprobar, la situación ha dado un giro de 180 grados: en los últimos años, de ha producido un extraordinario de las exportaciones de vino a granel y en envases superiores a 2 litros, a precios muy bajos, lo que nos hacía

crecer mucho más en volumen que en valor. Sin embargo, este vino ha venido subiendo de precio progresivamente durante 2012, con subidas superiores al 40% en algunos meses, lo cual repercute negativamente en el volumen exportado a nivel global puesto que alrededor del 50% del total vendido por España correspondió a este vino.

Esta subida de precios conlleva crecimientos bastante positivos en valor, aunque hay que tener cuidado, ya que puede ser pasajero: salvo contadas excepciones, los mercados están reduciendo el volumen comprado de vino español, algunos de ellos con durísimas caídas como es el caso de Rusia, lo que nos puede llevar no sólo a un estancamiento de nuestra facturación, sino a que ésta posiblemente llegue a ser negativa, en función tanto de las necesidades de compra de nuestros clientes como de las alternativas de oferta. No obstante, el buen comportamiento en valor de los vinos envasados con DOP está contribuyendo a retrasar esta posible caída.

Del total de nuestras exportaciones en términos de valor, los vinos con denominación de origen envasados representaron en 2012 el 40,6% del valor total de venta, creciendo un 9,8%

## Exportaciones españolas de vino

Fuente: datos: AEAT; Elaboración: OeMv

	1995	2000	2005	2011	2012	% var. 12/11
<b>Milli €</b>						
DO envasado	261,6	586,8	735,7	923,3	1.013,6	9,8%
DO granel	55,0	47,3	39,2	43,6	45,2	3,8%
Sin DO envasado	43,5	125,6	170,8	370,8	440,6	18,8%
Sin DO granel	69,7	144,4	217,0	387,0	420,1	8,6%
Espumoso	120,5	228,3	289,7	384,9	436,3	13,4%
Aromatizado	28,2	29,3	39,9	57,0	68,9	20,7%
De licor	176,4	91,8	83,3	58,7	56,8	-3,2%
De aguja	5,6	2,4	5,0	10,1	17,9	77,4%
<b>TOTAL VINOS</b>	<b>760,6</b>	<b>1.255,9</b>	<b>1.580,6</b>	<b>2.235,3</b>	<b>2.499,3</b>	<b>11,8%</b>
<b>Milli l.</b>						
DO envasado	132,8	202,8	257,0	312,5	343,5	10,0%
DO granel	105,8	66,4	74,7	68,4	62,6	-8,4%
Sin DO envasado	69,5	139,6	219,5	429,4	456,9	6,4%
Sin DO granel	175,2	330,8	696,2	1.172,0	934,0	-20,3%
Espumoso	48,1	71,6	108,7	155,1	162,6	4,8%
Aromatizado	39,8	45,5	61,4	68,7	63,0	-8,3%
De licor	90,8	39,3	30,2	25,4	22,3	-12,1%
De aguja	13,0	6,4	2,1	11,4	17,9	56,1%
<b>TOTAL VINOS</b>	<b>675,0</b>	<b>902,4</b>	<b>1.450,0</b>	<b>2.243,0</b>	<b>2.062,8</b>	<b>-8,0%</b>
<b>€/l</b>						
Do envasado	1,97	2,89	2,86	2,96	2,95	-0,2%
DO granel	0,52	0,71	0,52	0,64	0,72	13,3%
Sin DO envasado	0,63	0,90	0,78	0,86	0,96	11,7%
Sin DO granel	0,40	0,44	0,31	0,33	0,45	36,3%
Espumoso	2,50	3,19	2,66	2,48	2,68	8,2%
Aromatizado	0,71	0,64	0,65	0,83	1,09	31,7%
De licor	1,94	2,34	2,75	2,31	2,55	10,1%
De aguja	0,43	0,38	2,32	0,88	1,00	13,7%
<b>TOTAL VINOS</b>	<b>1,13</b>	<b>1,39</b>	<b>1,09</b>	<b>1,00</b>	<b>1,21</b>	<b>21,6%</b>

hasta superar, por primera vez, los 1.000 millones de euros de facturación. Por su parte, un excelente año para los vinos sin DO envasados (+18,8%) les sitúa como segundo vino exportado con 440,6 millones de euros, superando al vino espumoso (463,3 millones, +13,4%) y al vino sin DOP a granel (420,1 millones, +8,6%), este último pasando de la segunda a la cuarta posición.

En términos de volumen, los vinos sin DOP a granel siguen un año más como primer vino exportado por España con 934 millones de litros, el 45,3 % del total. Sin embargo, muestran la pero tasa de variación entre el conjunto de vinos (-20,3%). De hecho, se dejaron de vender 238 millones de litros de este vino, de una pérdida total de 180,2 millones, lo que implica una pérdida de 7 puntos porcentuales: con 1.172 millones de litros exportados en 2011, el vino sin DOP a granel representaba entonces el 52,3% del volumen total de venta. Y es que el precio medio de este vino subió más que el de ningún otro (+36,3%), lo que explica los buenos datos en valor y una progresiva recuperación tras varios años a niveles muy bajos. Aunque con mucha menor cuota, el granel con DOP también cayó en volumen, al contrario que los vinos envasados, cuyas ventas subieron tanto para el vino sin DOP (+6,4%) como, sobre todo, para el vino con denominación de origen (+10%).

El fuerte descenso de las ventas de vinos más económicos, unido a la mejor marcha de los vinos con mayor valor añadido (vinos envasados con DO, cavas y espumosos...), explican la fuerte subida del precio medio de venta del vino español, el cual sobrepasa con creces el euro por litro, nivel que apenas se alcanzaba hace un año.

Por mercados de destino, y siguiendo con los datos de AEAT para 2012, sólo Rusia redujo su inversión en vino español entre los 19 principales mercados para nuestro país, perdiendo varias posiciones en el ranking de valor con una notable caída del 45,6%. En este aspecto, Alemania (+11,2%), Reino Unido (+7,8%), EE.UU. (+13,8%) y Francia (+17,8%) siguen como primeros clientes, estos dos últimos incrementando su inversión por encima de la media. No obstante, es en el mercado asiático donde el vino español gana más peso, con Japón (+37,6%) y China (+25,8%) mostrando las mejores tasas de variación en valor, sólo superadas por Italia (+45,4%), aunque con caída en volumen hacia China, como analizaremos más adelante.

En términos de volumen, la situación no es tan positiva: al desplome de las ventas hacia Rusia (-67,6%), se unen las caídas hacia otros mercados como Portugal (-17,4%), Francia (-13,7%), Holanda (-10,2%), Suiza (-9,7%) o China (-5,7%), muchos de ellos importantes compradores de vino a granel, lo que explica que muestren mejores datos en valor al importar a un precio medio muy bajo, pero mucho mayor que en 2011. De hecho, entre los 19 principales mercados para el vino español, sólo Reino Unido (-5,8%) y Japón (-2,5%) compraron a un precio más barato el pasado año. En este sentido, Rusia registra la mayor subida de precios entre los países analizados (+68%), seguido Italia (+37,5%), Francia (+36,5%), Portugal (+35,9%) y China (+33,5%). En estos cinco mercados se observa claramente cómo los vinos más económicos son los que más están subiendo de precio, ya que pese a ofrecer una mayor subida porcentual que



el resto de mercados, siguen siendo, junto a Alemania, los que compran vino español a precios más bajos.

Por el contrario, los vinos con mayor valor añadido tienen más peso en países como México, Suiza, o Irlanda, únicos tres mercados que compraron por encima de los 3 euros por litro, así como en Noruega, EE.UU., Finlandia, Suecia o Japón, todos ellos con un precio medio mayor a 2 euros. No obstante, y pese a la tónica negativa en términos de volumen, no todo son malas noticias: importantes clientes para los vinos españoles aumentaron sus compras, como Alemania (+6,4%), Italia (+5,8%), o Reino Unido (+14,6%), segundo, tercer y cuarto mercado respectivamente, en litros, por detrás de Francia. También destaca la buena marcha de nuestras exportaciones hacia otros como EE.UU. (+11,4%), Bélgica (+4,8%), Dinamarca (+3,1%), Suecia (+5,6%) y, especialmente, Japón, con una subida del 41% hasta situarse como duodécimo país de destino.

Ranking exportaciones por países 2012				
Valor €	Vino con DOP EN-VASADO	TOTAL	% 12/11	% TOTAL
Alemania	154.487.390,21	376.528.195,77	11,20%	15,10%
Reino Unido	184.118.556,98	334.419.884,93	7,80%	13,40%
EE.UU.	139.952.146,57	252.355.870,33	13,80%	10,10%
Francia	31.144.028,72	212.633.175,61	17,80%	8,50%
Suiza	81.979.376,82	108.095.800,77	6,70%	4,30%
Bélgica	25.428.967,62	103.922.356,70	19,30%	4,20%
Italia	2.116.620,68	93.421.823,18	45,40%	3,70%
Países Bajos	56.770.095,08	92.838.682,37	4,00%	3,70%
China	46.253.159,78	89.197.676,34	25,80%	3,60%
Japón	28.687.814,32	83.210.677,76	37,60%	3,30%
Canadá	47.632.203,23	73.592.580,25	9,30%	2,90%
Portugal	3.388.429,96	63.180.973,83	12,30%	2,50%
Suecia	32.788.871,00	56.771.221,85	11,40%	2,30%
México	33.114.295,47	45.182.036,92	7,50%	1,80%
Dinamarca	23.265.436,37	43.530.481,97	10,00%	1,70%
Rusia	3.776.989,70	33.398.852,81	-45,60%	1,30%
Noruega	18.104.371,19	24.457.046,06	1,80%	1,00%
Finlandia	9.863.261,04	24.419.794,96	12,40%	1,00%
Irlanda	16.273.223,45	19.476.568,81	1,20%	0,80%
Resto países	119.597.877,56	368.705.764,95	12,20%	14,80%
<b>TOTALES</b>	<b>1.058.743.115,75</b>	<b>2.499.339.466,17</b>	<b>11,80%</b>	<b>100,00%</b>

Fuente: Datos OIV; elaborado por OeMv

Volumen en litros	Vino con DOP EN-VASADO	TOTAL	% 12/11	% TOTAL
Francia	19.117.093	390.358.665	-13,70%	18,90%
Alemania	77.606.869	329.096.913	6,20%	16,00%
Italia	1.028.004	193.172.867	5,80%	9,40%
Reino Unido	86.206.037	166.539.398	14,50%	8,10%
Portugal	6.025.196	121.902.696	-17,40%	5,90%
EE.UU.	33.595.379	90.793.764	11,40%	4,40%
China	17.046.205	69.197.373	-5,70%	3,40%
Rusia	1.469.401	53.679.602	-67,60%	2,60%
Bélgica	8.533.032	51.151.061	4,80%	2,50%
Países Bajos	29.291.116	47.781.988	-10,20%	2,30%
Canadá	11.790.859	39.254.650	-2,70%	1,90%
Japón	13.566.896	38.813.569	41,20%	1,90%
Suiza	20.359.221	34.261.068	-9,70%	1,70%
Dinamarca	10.371.471	32.594.815	3,10%	1,60%
Suecia	9.474.084	25.596.270	5,60%	1,20%
México	6.904.236	13.232.950	-8,20%	0,60%
Finlandia	3.552.089	9.660.548	-2,10%	0,50%
Noruega	6.016.796	8.489.207	-3,10%	0,40%
Irlanda	4.685.081	6.424.616	-1,10%	0,30%
Resto países	39.542.216	340.812.627	-10,60%	16,50%
<b>TOTALES</b>	<b>406.181.281,00</b>	<b>2.062.814.647,00</b>	<b>-8,00%</b>	<b>100,00%</b>

Fuente: Datos OIV; elaborado por OeMv



**EUROPEAN COMMISSION**

Directorate-General for Communications Networks, Content and Technology

**Cooperation  
The Director**Brussels, 29 July 2013  
D1/CM

Subject: Follow-up to the **47<sup>th</sup> ICANN meeting (Durban, South Africa, 14-18 July 2013) – GEOGRAPHIC INDICATIONS: “.wine” and “.vin”**

Dear GAC Members;

This note aims at giving an overview of the main elements of the debate taking place within the Governmental Advisory Committee (GAC) of ICANN (since its 46<sup>th</sup> meeting in Beijing until the recently held ICANN Durban meeting) **on the protection of Geographical Indications**, which also beg the question of protection of **Designations of Origin**, and in particular on the new gTLDs **“.vin”** and **“.wine”**.

The note provides the **integrated position of all the European Commission services competent on the matter**, as well as the political and legal argumentation of the EU as regards why the two strings would warrant stronger safeguards and particular precaution when being delegated. The note also proposes a **way forward to conclude on GAC advice, within the 30 days agreed** after long negotiations **in Durban**.

Three firms unrelated to the wine sector, have applied to manage the new Internet domain **“.wine”**: June Station LLC – Donuts.co (USA); Afiliias Limited (Ireland); dot Wine Limited (Gibraltar). For **“.vin”**: Holly Shadow LLC – Donuts.co (USA) has filed an application. Applications provoked concerns amongst EU wine industry and Member States, which did file early warnings before the 46<sup>th</sup> ICANN Beijing meeting. However, at that time it was impossible to achieve GAC consensus on a number of strings including **“.vin”** and **“.wine”**. The EU's attempt to include specific safeguards for both strings under Category 1 was rejected, and as a result, it was agreed that **those strings would be put on hold (not to proceed beyond the initial evaluation) until the GAC could provide further advice**. The EU felt that the **general safeguards<sup>1</sup> applicable to**

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<sup>1</sup> Safeguard 2 - Mitigating abusive activity: terms of use for registrants to include prohibitions against distribution of malware, operation of bonnets, phishing piracy, IPR infringement, counterfeiting, fraudulent practices or any activity contrary to applicable law.

Safeguard 5 - Making and handling complaints: registries to implement mechanism for making complaints to registries for inaccurate WHOIS information or domain name used in connection with cybercrime or any activity contrary to applicable law.

Safeguard 6 - Consequences: consistent with applicable law and any related procedures, registries shall ensure immediate consequences for provision of false WHOIS data or the use of domain in breach of applicable law, including suspension of the domain name.

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**all new gTLDs were not enough to meet EU public policy concerns and to fully respect EU legislation on Geographical Indications** (which are recognised IPRs within the EU).

The EU also pointed out in Beijing that at least, **the registration of second level domain names for ".vin", ".wine" which consists, contains or unduly evokes Geographical Indications must be authorised by the relevant GI Governing Body**, which should also be granted sufficient representation in the registries' policy drafting committees.

Allowing the interested parties (in this case the GI right-holders' organisations and the applicants) to work on a suitable solution is much in line ICANN's multi-stakeholder approach to decision making and would also avoid Governments deliberating on the sensitive issue relating to the status of GIs in International law.

Since Beijing, the European Federation of Origin Wines (EFOW) and associated European wine organisations have been working on a possible solution. A draft of the solution proposed by the legal representation of such associations was shared with the Commission on **5 July 2013**. The text of the letters sent on 11 July to the applicants by the legal representation of such organisations was shared with the Commission on **12 July 2013**, and a second round of letters sent to applicants on 30 July were shared on 1 August 2013. The solution in in the course of being proposed to the applicants, who are expected to provide feedback on the two rounds of letters mentioned above. The European Commission has been informed that the solutions to be presented to the applicants once they reply to the letters are not meant to protect EU interests only, but accommodate the interests of GIs right holders in the wine sector **worldwide**.

**The letters sent to applicants can be consulted in Annex 3.**

In Durban, the European Commission reported on the state of play of the negotiations with applicants but in a limited manner as these were (and are) at a very embryony stage. **We therefore drew the GAC's attention to the importance of allowing enough time to public authorities and applicants to achieve an appropriate solution in those cases whereby strong public interests are at stake.** Lengthy argumentations at Durban only resulted in the consensus of continuing discussions for another month (coinciding with the summer break).

However, it must be stressed that the understanding of the European Union, its Member States and EU GI's right-holders was that the *status quo of the Beijing Communiqué as regards the ".wine" and ".vin" strings would be maintained until a satisfactory solution would be found, as "further GAC consideration may be warranted including at the GAC meetings to be held in Durban"*<sup>2</sup>; Hence, the Beijing Communiqué does not

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<sup>2</sup> *"In addition to this safeguard advice, the GAC has identified certain strings where further GAC consideration may be warranted including at the GAC meetings to be held in Durban. Consequently, the GAC advises the ICANN Board not to proceed beyond the initial evaluation with the following strings: .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .date, .spa, .yun, .thai, .zulu, .wine, .vin"*

set forth any deadline or need to conclude on the matter in Durban (or one month after), nor that after Durban the GAC would withdraw its advice that .vin and .wine should not proceed beyond the initial evaluation. **We are of the opinion that changing the Beijing position requires consensus in the GAC.**

Secondly, it is also important to stress the **economic and political significance** of the issue in the EU and the potential damage a failure would have on the support of the EU to the GAC and multi-stakeholder approach of managing ICANN. To date, besides the EU Member States' authorities and the European Commission's own services, various concerns over the negative impact of the delegation of the “.wine” and “.vin” strings without adequate safeguards have been voiced within the EU.

The European Commission has received **several letters (some of them also addressed to ICANN by EFOW and oriGIn)** from a large number of right-holders, EU Geographical Indication Governing Bodies and producers addressing this issue and demanding that the level of protection to Geographical Indications with regard to the attribution of new gTLDs be in compliance with EU law. Given the value of the GIs as identifiers and the importance of the Internet as a **commercial communication and marketing channel**, some rights owners are understandably worried that their identifiers fall victim to **deceptive and abusive practices** on the Internet. Undermining the status of such identifiers also compromises the credibility of the DNS (Domain Names System) and **consumers'** trust in the Internet as a medium for commercial exchange.

Furthermore, a number of prominent European politicians, including members of the **European Parliament** have stressed the economic and political importance for their constituencies to uphold the protection of GIs when delegating the new gTLDs. **See also Annex I.**

The EU, the European Commission and concerned Member States, have consulted other GAC members and are in regular contact with the Governing Bodies and their legal representation to keep track of the discussions with the applicants.

Despite the evolution of the negotiations with the applicants and the discussions within the GAC, the European Commission would like to highlight that Section 9.3 of the Affirmation of Commitments reads as follows: "*ICANN will ensure that as it contemplates expanding the top level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns and rights protection) will be adequately addressed prior to implementation*"(emphasis added).

It is therefore essential that both the GAC and ICANN take into due consideration all the principles it has set out for itself to adhere to and which are listed above. Among these, the protection of IP rights of legitimate titleholders is of utmost importance; moreover **there is a clear basis in existing international law which should be applied to protect the reputation and business interests of GI holders** and by extension to protection consumers from the risk of fraudulent practices.

**A more detailed legal analysis on GIs is provided in Annex 2.**

## Way forward

Bearing in mind the above considerations, we would like to propose the following way forward. Our assessment is that this solution does not alter any international agreements on GIs nor it creates additional standards or represents a risk to national trade interests and jurisdictional competences:

- A) The European Union requests that the GAC advises the Board to further **put on hold** these applications so that ICANN **does not proceed** beyond their initial evaluation, pending an agreement between the applicant and the party with a public interest in GIs. To this end, the additional period of **one month is deemed not sufficient** and not proportionate to the complexity of the issue. As mentioned before, since Beijing, the EU wine Governing Bodies and specialized legal support have been working on a **global solution, pending applicant's feedback**, and therefore additional time is required.
- B) As regards safeguards, it is proposed to include GI's **in the Annex I (Beijing Communiqué) of the Safeguards on New gTLDs under the category of Intellectual Property Rights, with explicit mention to "Geographical Indications"**; only by means of this inclusion, and **enabling the possibility to protect GIs**, the GAC deliberations would be in compliance with the WTO TRIPS agreement and guarantee consumer protection. Please note that the protection displayed for GIs does not need to be stronger than the one displayed for trademarks, which is at the core of international talks.
- C) In order to avoid any inaccuracies, it is proposed that in the case of general safeguards 2 and 5; the Applicant Guidebook; and the ICANN contractual framework, **a mention to GIs is added in the part of the text which refers to the protection/infringement of trade marks, e.g.: ([...] trade mark, geographical indication or copyright infringement [...]).**
- D) In the registration policies and terms of use, **registries should be required to explicitly inform registrants of legal issues associated with the use of Geographical Names and Geographical Indicators.** This could include reference to the Arts 22-24 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and associated national legislation.
- E) **ICANN should develop procedures that ensure that GI names at the second-level cannot be reserved by third parties** and enable organisations responsible for the protection of GIs to **oppose the reservation of a domain name that consists of, or contains, (or otherwise unduly evokes) the name of a GI<sup>3</sup>.** It should be clear that all wine GIs protected under national legislation (including EU legislation) should be covered by the Trade Mark Clearing House and make

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<sup>3</sup> Please note that the wording "contains" or "consists" often does not cover all possible situations where a GI is not appropriately protected: "contains" or "consists" covers "bordeaux.wine" or "bordeauxcalifornia.wine", but it does not cover "burdeos.wine": the latter does not contain or consist of a GI as such, it is however a translation thereof and, accordingly, **an undue clear evocation covered by Article 23 TRIPS and Article 118m of the EU wine Regulation**; likewise, "kava.wine"/"cavva.vin" are misuses/evocations but do not "consist on" or "contain" the GI "cava", and they should nevertheless be tackled.

sure that GI representative bodies can have access to the Sunrise periods (running for at least, 30 days).

- F) **GIs should be excluded from auctions.** There are two kinds of auctions envisaged in .vin application and in .wine application by Afiliás: Auctions in case there are more than one application for a given name during the Sunrise period. Auctions for premium names, which are likely to take place before the Sunrise period.
- G) GI Right holders' associations should be granted sufficient **representation** in the **registries' policy drafting committees and should maintain close cooperation with them in the implementation** of the registration policies.
- H) The European Commission is sensitive to the need of **having clear guidelines** for applicants in this regard. The European Commission would like to propose that the **GAC engages with the Board and the ICANN community to develop better methodologies and criteria for handling applications affecting Geographical Indications** and to ensure the openness, inclusiveness and transparency of the process also with other constituencies. It is proposed to address the issue within the GAC Working Group on new gTLDs.

We believe that these extra safeguards are necessary to conclude on a final GAC advice to the Board in order to allow the safe delegation of the two strings and that the reasons why the general safeguard are not enough have been duly explained.

We therefore request your consideration of the concerns expressed, the legal basis and the proposed solutions in the light of the sensitivity of this issue in Europe, and kindly ask you to reply by **Monday 12 August 2013**, enabling the GAC to discuss how to conclude on the matter.

Linda Corugedo Steneberg

Enclosed:     Annex 1 – Concerns expressed by EU right holders  
                  Annex 2 - Geographical Indications in EU law and International law. EU  
                  bilateral agreements  
                  Annex 3 – First letter sent to the applicants of ".wine" and ".vin"

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## ANNEX 1 – Concerns expressed by EU Right holders

To date, various **concerns over the negative impact of the delegation of the “.wine” and “.vin” strings without adequate safeguards** have been voiced by EU Geographical Indication Governing Bodies; EU organisations, EU producers; other right-holders.

The European Commission has received letters from the following organisations and Governing Bodies addressing this issue and demanding that the level of protection to Geographical Indications with regard to the attribution of new gTLDs be in compliance with EU law:

- ✓ **The European Federation of Origin of Wines (EFOW)**
- ✓ **Vignerons d 'Appellation d'Origine (CNAOC)**
- ✓ **Organization for an International Geographical Indications Network (oriGIn)**
- ✓ **Comité Interprofessionnel du vin de Champagne (CIVC)**
- ✓ **Bureau National Interprofessionnel du Cognac (BNIC)**
- ✓ **Comité National des Interprofessions des Vins a Appellation d'Origine (CNIV)**

Furthermore a number of **Members of the European Parliament** have stressed the economic and political importance for their constituencies to uphold the protection of GIs on when delegating the new gTLDs. (**“Wine; Fruits and Vegetables; Tradition and Quality foodstuffs Intergroup”**). The problem has also been highlighted in European press stressing the needs for EU to safeguard European and national legalisation on and off line.

The main comments received are as follows:

1. The “.wine” and “.vin” gTLDs are supposed to allow **right-holders in the wine sector to register a distinctive web address on the basis of their activity, brand name, Protected Geographical Indication or Protected Designation of Origin**. At the moment, the private firms which have applied for those strings have **no relationship with the wine sector**. The use of those strings should be allowed, but ensuring that they are delegated with adequate safeguards once commercialisation begins.
2. If GIs are not adequately protected as part of the “.wine” and “.vin” TLD and the string is **used by unauthorised parties, this may have adverse consequences for the EU wine market (responsible for close to 65% of the world wine production) and for its consumers**. To the contrary, if both TLDs re seen as and proven to be **sound and secure**, they will become **attractive** for the producers, Governing Bodies, traders, retailers and other right-holders in the wine sector. If the strings are delegated without adequate safeguards,

Governing Bodies and analogous right-holders **will most likely voluntarily refrain from using a TLD that allows inappropriate use of their GIs.**

3. So far applicants only have to abide by **Specification 5** of the Registry Agreement according to which operators shall prohibit the registration of country and territory names recognized by the UN or of their ISO codes in front of the extensions “.wine” and “.vin”. Hence the registration of “france.wine” would be protected, but “bordeaux.wine” could be registered by any entity, for any purpose.
4. Protection is necessary at the **second-level**, since registrars can commercialise the strings therefore allowing individuals and organizations to combine both gTLDs with a second-level domain name and create web addresses like “chianti.wine”; “champagne.vin”; “rioja.wine”; “port.vin”, “bordeaux.vin” and many other combinations.
5. The Delegation could lead to abuses of Geographical Indication wines Intellectual Property Rights (IPRs). Contrary to trade marks, the **lack of precise rules or objection procedure** that would safeguard GIs, which are recognized IPRs under EU law, could lead to infringements of such GI names, especially in the wine sector.
6. It is foreseen to allow registrations of second-level domain names attributed by **public auction** to the highest bidders, without any further specifications. It is also of concern the creation of list of “**premium**” names which will be also sold via auctions. Whereas objections by trade mark owners are foreseen, no similar process of objection is mentioned for entities which have intellectual property rights on geographical indications.
7. GIs are understood by consumers to **denote the origin and the quality of products produced in a special geographical area**. Many of them have acquired valuable reputations which, if not adequately protected, may be misrepresented by dishonest commercial operators.
8. In the field of **e-Commerce**, on the rise in the wine sector, the consequences for consumers can be the purchase of wines under the **false belief they benefit from a Geographical Indication**. Consumers would be deceived into believing that they are buying a genuine product with specific qualities and characteristics when they are in fact purchasing **counterfeited goods**.
9. **Legitimate producers** would also be deprived from valuable business; they will face cases of **cybersquatting; misappropriation of brand and subsequent loss of brand value; reputation damage; deceptive practices; or lack of consumer trust.**
10. The protection displayed by ICANN rules on its **agreements and Applicant Guidebook** is too general and does not make reference to Geographical Indications. There are only generic mentions to trade marks and IPRs.
11. A proper system of **dispute resolution** based on the **legitimate rights of the GI holders and beneficiaries** should be established by ICANN.

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12. As GIs is mainly a system of **small and medium sized enterprises**, in the vast majority of cases small rural producers that play a crucial role in the **sustainable development of their communities** – as the large experience and success stories within the European Union clearly show – it is crucial that such system takes into account the limited financial means of local producers and **does not put unnecessary financial burdens to them.**

## ANNEX 2 - Geographical Indications in EU law and International law. EU bilateral agreements

The European Commission would like to bring to the attention of GAC members the following legal basis in the field of Geographical Indications:

**The Paris Convention for the Protection of Industrial Property** (1883) which included "indications of source or appellations of origin" as objects of protection;

**The Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods** (1891), allows to secure protection on important markets not covered by the Lisbon Agreement (below), in particular in the USA and Member States not contracting parties to the Lisbon Agreement;

**The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration** (1958), administrated by WIPO (first specific international treaty providing for the protection of Appellations of Origin, free of charge);

**The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**, of which the vast majority of GAC Members are signatories, including the EU, USA, China etc.) – this agreement deals with protection of GIs related to all kinds of products. It's a **minimum standard agreement**, which allows Members to provide more extensive protection. WTO Members are free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system.

GIs are defined under TRIPS as “*indications which identify a good as originating in the territory of a Member, or a region or locally in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*”. TRIPS recognizes GIs as an independent category of intellectual property, along with copyright, trademarks, patents and industry designs.

The TRIPS Agreement specifically protects GIs in Articles 22 to 24, establishing those international minimum standards of protection that WTO members must provide for GIs. Although Article 23 provides additional protection for GIs for wines and spirits and sets forth the conditions of this enhanced protection in relation to the registration of trademarks, **the goal of the European Union is not to grant GIs a more favourable treatment than to trade marks, but to afford them equal opportunities. GIs should be defended against cybersquatting and other infringements in the same way as trademarks. However**, the level of protection for GIs considered by certain GAC members as acceptable must in fact be considered "**TRIPS-minus**".

In addition, the EU concluded the following **bilateral agreements** in the field of wines and/or spirits:

- **Australia** (Council decision 2009/49 /EC of 28 November 2008),
- **Canada** (Council decision 2004/91/EC of 30 July 2003). In Annex III a) and b) of the Agreement there is a list of wines deserving protection in the parties' territories),
- **Chile** (Council decision 2002/979/EC of 18 November 2002),  
Contact Information Redacted

- **Mexico** (Council decision 97/361/EC of 27 May 1997),
- **South Africa** (Council decision 2002/53/EC of 21 January 2002),
- **Switzerland** (Agreement between the European Community and the Swiss Confederation on trade in agricultural products OJ L114/132),
- **United States** (Council Decision 2006/232/EC of 20 December 2006) In Annex IV and V of the Agreement with the US a list of names to be protected in each of the parties' territories is included;

At EU level - Protection of GIs in the agricultural field is currently governed by four EU Regulations namely:

- **Regulation (EU) No 1151/2012 of 21 November 2012** on quality schemes for agricultural products and foodstuffs,
- **Regulation (EC) No 1234/2007 of 22 October 2007** on the common organisation of agricultural markets and on specific provisions for certain agricultural products (amended by Council Regulation (EC) No 491/2009),
- **Regulation (EC) No 110/2008 of 15 January 2008** on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks,
- **Council Regulation (EC) 1601/91** laying down general rules on definition, description and presentation of aromatized wines, aromatized wine-based drinks and aromatized wine-product cocktails.

Article 118m of Regulation (EC) No 1234/2007 provides protection to protected designations of origin and geographical indications for wine against:

(a) any direct or indirect commercial use of a protected name by comparable products not complying with the product specification of the protected name or in so far as such use exploits the reputation of a designation of origin or a geographical indication;

(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated or accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation”, “flavour”, “like” or similar;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product.

Besides, according to Article 118m(4) of the aforesaid regulation and Article 19 of Regulation (EC) No 607/2009, EU Member States authorities shall, on their own initiative or at the request of a party, take the steps necessary to stop unlawful use of protected designation of origin and protected geographical indications and to prevent any marketing or export of products at issue.

In Europe, we have also developed the [E-Bacchus](#)<sup>4</sup> database which consists of the **register of designations of origin and geographical indications protected in the EU in accordance with Council Regulation (EC) No 1234/2007**. In particular, it lists non-EU countries' Geographical Indications and names of Origin protected in the EU in accordance with bilateral agreements on trade in wine concluded between the EU and the non-EU countries concerned, and lists the traditional terms protected in the EU in accordance with Council Regulation (EC) No 1234/2007.

Last not least, the International Organisation on Vine and Wine (OIV) – to which the majority of wine producing countries represented in GAC are members, with the exception of the USA, China and Canada - has also adopted definitions about geographical indication and appellation of origin<sup>5</sup> and publishes on its website [www.oiv.int](http://www.oiv.int) a list of geographical indications for wines<sup>6</sup> which could be used as a good reference.

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<sup>4</sup> <http://ec.europa.eu/agriculture/markets/wine/e-bacchus/index.cfm?&language=EN>

<sup>5</sup> <http://www.oiv.int/oiv/info/enindicationgeo>

<sup>6</sup> <http://www.oiv.int/oiv/info/enlisteindication>





## EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

Cooperation  
Director

Brussels, 19 SEP. 2013  
CNECT D1/LEF/ps

**Subject: European Commission and EU member states strong concerns as regards the deliberations of GAC advice on the two strings .vin and .wine**

Dear Ms Dryden,

*Dear Heather,*

I am writing to you to express the European Commission and EU member states strong concerns as regards the deliberations of GAC advice on the two strings .vin and .wine and in particular the attempt to conclude on the matter in the letter to Dr Crocker. For me, the letter contains mistakes both in terms of procedure and substance, which in turn discloses serious problem in terms of the proper functioning of the GAC.

In this context, I think it is important to recall GAC Operating Principle 47. It says; "*The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.*"

With this Principle in mind, I would like to recall that the European Commission and EU Member States have, repeatedly, stressed that the Beijing Communiqué<sup>1</sup> contains the only substantial GAC consensus advice on the two strings so far, and that the advice in Durban, i.e. "*the GAC agreed to take thirty days additional time with a view to conclude on this matter*", neither changes this fact, nor implies that the GAC necessarily has to conclude on the matter at all, but to make the necessary efforts, and here I like to stress informed discussions, which have not taken place to find a suitable solution via consensus. I therefore conclude that it does not seem reasonable that the letter to Mr Crocker states that "*the GAC agreed in Durban to set a firm deadline*". Again, my understanding is that such a deadline lacks operational value as there has not been a

<sup>1</sup> Beijing Communiqué IV.1.c: Strings for Further GAC Consideration

In addition to this safeguard advice, that GAC has identified certain gTLD strings where further GAC consideration may be warranted, including at the GAC meetings to be held in Durban.

i. Consequently, **the GAC advises the ICANN Board** to: not proceed beyond Initial Evaluation with the following strings : .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .date, .spa, .yun, .thai, .zulu, .wine, .vin

Contact Information Redacted



proper discussion among GAC members. The EU and Latin America have provided material enough to discuss, and all we have seen in exchange is a re-statement of previous positions without any substantial discussions on the matter.

The letter, on behalf of GAC as a whole, seems to aim at overruling the Beijing consensus by concluding that there is "*no consensus*" and that "*the GAC has finalised its consideration of the strings .wine and .vin and further advises that the applications should proceed through the normal evaluation process*". Besides the fact that we do not agree with the statement that the consideration has been finalised, when there are different views among GAC members, the normal procedure would have been that "*the GAC should advise ICANN that there are concerns about a particular application*"<sup>2</sup>, not that the relevant applications or strings should "*proceed through the normal evaluation process*". The latter statement is exactly the contrary to the position of several GAC members, including the European Commission and EU Member States.

Furthermore, even if we overlook the fact that there is already consensus in Beijing, the GAC Operating Principle 47 stipulates that the "*Chair shall convey **the full range of views expressed by members to the ICANN***". Although I have clearly stated our position in a letter on 29 July, followed by a range of further explanatory e-mails to GAC, there is no reference to it in the letter. It merely states that there is a "*range of views*" and that "*the GAC or its members may communicate further details to the Board as to the nature of their difference in views*". In line with GAC's mandate, it should have been more correct to mention that it is the responsibility of the ICANN Board to enter into dialogue with the GAC and affected members to understand the scope of concerns. For me, it is obvious that individual GAC members can and will surely communicate to the ICANN Board their own concerns, as the vice President of the European Commission, Ms Neelie Kroes has now done in a letter to Dr Crocker and Mr Chehadé.

Finally, it is worth noting that despite our thorough explanation of the status of Geographical Indications in European and international law (TRIPS Agreement, Paris Convention, bilateral agreements EU-USA, EU-Canada, EU-Australia, etc.), the letter simply discards this status by noting that "*there is no international agreement among governments about how to treat geographical indications*". Indeed, there might not be a global understanding on the status of GIs in relation to other IPRs, but there are plenty of international instruments which seem to have been forgotten in the letter.

Ms Dryden, although I perfectly understand that you, as chair of the Committee, have been under strong pressure from a group of GAC members and lobby organisations, the EU would expect that you take an impartial position and that you follow the rules set forth in the GAC Operational Principles. I am of the view that the majority of GAC members would share the same opinion. I feel strongly that the way that this issue has been handled, further puts at stake our confidence in the GAC as a reliable body for public policy advice to the ICANN board, and as such needs to be swiftly addressed.

I hope the Board will take its responsibility and disregard the letter as it does not reflect the views of the GAC members. This would allow us to continue our considerations on the issue and hopefully come to a more considered advice. I also strongly feel that some of the issues that were planned for discussion in Durban, but were in the end not discussed, should now have priority in Buenos Aires. I refer to issues such as the GAC working methods and the operational mandate for the GAC secretariat.

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<sup>2</sup> as per the new gTLD Applicant Guidebook, module 3.1 to which letter refers

I remain at your disposal for any further explanations that you may have on the matter.

Sincerely yours, *best regards*  
*Linda who Kelly*  
Linda CORUGEDO STENEGERG

Cc: Ms Eilers Jeannie, Mr Battesti Anton, Mr Nettlefold Peter, Mr  
Schneider Thomas, Ms Hackshaw Tracy





April, 2<sup>nd</sup> 2014

Consejo Regulador de la Denominación  
de Origen Calificada **Rioja**  
C/ Estambarrera, 52  
Logroño. 26006 (La Rioja)  
España

By email

ICANN New gTLD Program Committee  
ICANN Board Members  
ICANN's Governmental Advisory Committee  
Country representatives of the ICANN's Governmental Advisory Committee

**POSITION OF CONSEJO REGULADOR DE LA DENOMINACIÓN DE ORIGEN CALIFICADA RIOJA (HEREINAFTER C.R.D.O.CA. RIOJA)  
REGARDING THE .WINE AND .VIN NEW GTLD APPLICATIONS**

Dear ICANN new gTLD Program Committee Members  
Dear ICANN Board Members  
Dear Members of ICANN's Governmental Advisory Committee  
Dear Country representatives of the ICANN's Governmental Advisory Committee

Our organization officially represents the grape growers and wine producers based in Rioja. In addition our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

**1. THE C.R.D.O.CA. RIOJA'S CONCERNS**

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.



In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. THE NECESSARY MEASURES TO BE TAKEN

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.


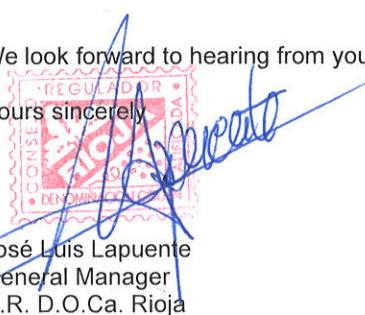
or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely,



José Luis Lapuente  
General Manager  
C.R. D.O.Ca. Rioja

# Attachment D

# ANNEX I



April 3, 2014

LONG ISLAND WINE COUNCIL  
P.O. Box 600  
RIVERHEAD, NY 11901  
USA

BY E-MAIL

ICANN NEW gTLD PROGRAM COMMITTEE MEMBERS,  
ICANN BOARD MEMBERS  
ICANN GOVERNMENT ADVISORY COMMITTEE  
COUNTRY REPRESENTATIVES OF THE ICANN  
GOVERNMENT ADVISORY COMMITTEE

**POSITION OF THE LONG ISLAND WINE COUNCIL, REGARDING THE .WINE AND .VIN NEW gTLD APPLICATIONS**

Dear ICANN New gTLD Program Committee Members,  
Dear ICANN Board Members  
Dear Members of the ICANN Government Advisory Committee  
Dear Country Representatives of the ICANN Government Advisory Committee

Our organization officially represents wine producers based in Long Island, New York. In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

**1. THE LONG ISLAND WINE COUNCIL'S CONCERNS**

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.



In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. All signatories to the WTO TRIPS Agreement recognize that GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

2. **THE NECESSARY MEASURES TO BE TAKEN**

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

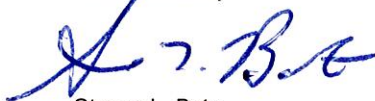
or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely



Steven L. Bate  
Executive Director





napa valley vintners

April 3, 2014

Dr. Stephen Crocker  
Chairman, ICANN Board of Directors  
12025 Waterfront Drive  
Suite 300  
Los Angeles, CA 90094

**Re: Position of Napa Valley Vintners regarding .WINE and .VIN new gTLD applications**

Dear Dr. Crocker:

The Napa Valley Vintners is the non-profit trade association representing the interests of the Napa Valley wine industry. The crown jewel of American agriculture, the Napa Valley wine industry has an annual economic impact of \$50 billion on the U.S. economy. In 2013 the Napa Valley Vintners communicated to you our concerns on matters related to .WINE and .VIN as it relates to product of place such as ours.

The Napa Valley is a proud signatory of the Joint Declaration to Protect Wine Place & Origin. ([www.protectplace.com](http://www.protectplace.com)) This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort. The importance of protecting winegrowing place names is critical to all winegrowing regions of quality; it is not solely a European issue.

**1. The Napa Valley Vintners concerns:**

On 22 March 2014, the ICANN New gTLD Program Committee ("**NGPC**") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("**GAC**") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical

**Contact Information Redacted**

Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVAs perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. The necessary measures to be taken:

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

(a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

(b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely,



Linda Reiff  
President & CEO

Cc: Congressman Mike Thompson  
Suzanne Radell, GAC Representative  
Larry Strickling, State Secretary, Department of Commerce

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<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPS"





## SANTA BARBARA VINTNERS

April 7, 2014

Dear ICANN New gTLD Program Committee Members

Dear ICANN Board Members

Dear Members of the ICANN's Governmental Advisory Committee

Dear Country Representatives of the ICANN's Governmental Advisory Committee:

The Santa Barbara Vintners represents the grape growers and wine producers based in Santa Barbara County, California. The mission of the Santa Barbara Vintners is to promote and protect the Santa Barbara County wine region and its five associated American Viticulture Areas (AVA.) In addition, we are a proud signatory, along with eighteen other wine regions, of the Joint Declaration to Protect Wine Place & Origin.

The Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from around the world that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort. The Declaration information can be found at [www.protectplace.com](http://www.protectplace.com).

We are concerned that the new .WINE and .VIN gTLDs may negatively impact our organizations ability to protect against fraudulent use of wine region names and the wineries we represent. When it comes to wine, location matters. Our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area.

Following the applications of .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide

Contact Information Redacted

expect. The protection of wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users would indeed be deceived into believing they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of wine growing place names. We request the ICANN and the GAC grant adequate protection to all wine growing regions. It is indeed necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for all wine growing places names at the second level.

Thank you for considering our request.

Regards,

A handwritten signature in black ink, appearing to read 'Morgen McLaughlin', with a long horizontal stroke extending to the right.

Morgen McLaughlin  
Executive Director







April, 2<sup>nd</sup> 2014

Comité Interprofessionnel du Vin de Champagne

Contact information Redacted

By e-mail

ICANN New gTLD Program Committee  
ICANN Board Members  
ICANN's Governmental Advisory Committee  
Country representatives of the ICANN's  
Governmental Advisory Committee

**POSITION OF CIVC, REGARDING THE .WINE AND .VIN NEW GTLD APPLICATIONS**

Dear ICANN New gTLD Program Committee Members,

Dear ICANN Board Members

Dear Members of the ICANN's Governmental Advisory Committee

Dear country representatives of the ICANN's Governmental Advisory Committee,

Our organization officially represents the grape growers and wine producers based in Champagne. In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.



## 1. THE CIVC'S CONCERNS

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

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<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPS"



2. THE NECESSARY MEASURES TO BE TAKEN

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

(a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

(b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely,

Jean-Luc BARBIER  
General Director





April, 2<sup>nd</sup> 2014

Consejo Regulador de la Denominación

Contact Information Redacted

cc

By email

ICANN New gTLD Program Committee  
ICANN Board Members  
ICANN's Governmental Advisory Committee  
Country representatives of the ICANN's Governmental Advisory Committee

**POSITION OF CONSEJO REGULADOR DE LA DENOMINACIÓN DE ORIGEN CALIFICADA RIOJA (HEREINAFTER C.R.D.O.CA. RIOJA)  
REGARDING THE .WINE AND .VIN NEW GTLD APPLICATIONS**

Dear ICANN new gTLD Program Committee Members  
Dear ICANN Board Members  
Dear Members of ICANN's Governmental Advisory Committee  
Dear Country representatives of the ICANN's Governmental Advisory Committee

Our organization officially represents the grape growers and wine producers based in Rioja. In addition our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

**1. THE C.R.D.O.CA. RIOJA'S CONCERNS**

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On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

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In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. THE NECESSARY MEASURES TO BE TAKEN

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely,



José Luis Lapuente  
General Manager  
C.R. D.O.Ca. Rioja





## CONSEJO REGULADOR

ICANN New gTLD program committee  
ICANN Board Members  
ICANN's Governmental Advisory Committee  
Country representatives of the ICANN's Governmental Advisory Committee

Jerez, April 3, 2014

### POSITION OF CONSEJO REGULADOR OF THE "JEREZ-XÉRÈS-SHERRY" DENOMINATION OF ORIGIN, REGARDING THE .WINE AND .VIN NEW GTLD APPLICATIONS

Dear Sirs,

Our organization officially represents the grape growers and wine producers based in the región of "Jerez-Xérès-Sherry". In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

#### 1. THE CONSEJO REGULADOR'S CONCERNS

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an*



*opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin" . GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. THE NECESSARY MEASURES TO BE TAKEN

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

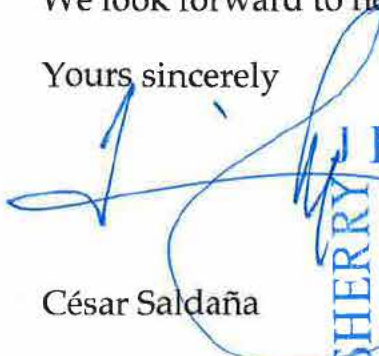
or


(b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, a minima, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely

  
César Saldaña







GOVERNO DE  
PORTUGAL

MINISTÉRIO DA AGRICULTURA  
E DO MAR



IVDP  
Instituto dos Vinhos  
do Douro e do Porto, I.P.

ICANN New gTLD Program Committee  
ICANN Board Members  
ICANN's Governmental Advisory  
Committee  
Country representatives of the ICANN's  
Governmental Advisory Committee

April, 3th 2014

By e-mail

**POSITION OF INSTITUTO DOS VINHOS DO DOURO E DO PORTO, REGARDING THE  
.WINE AND .VIN NEW GTLD APPLICATIONS**

Our organization officially represents the grape growers and wine producers based in the Douro demarcated origin (PDO Porto). In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

**1. The Porto's concerns**

On 22 March 2014, the ICANN New gTLD Program Committee ("**NGPC**") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("**GAC**") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("**GI**")s and

AC/SJ

**Contact Information Redacted**



GOVERNO DE  
PORTUGAL

MINISTÉRIO DA AGRICULTURA  
E DO MAR



IVDP  
Instituto dos Vinhos  
do Douro e do Porto, I.P.

the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. **The necessary measures to be taken**

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely

Manuel de Novaes Cabral  
Presidente

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<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPS"  
AC/SJ

# Contact Information Redacted





## CHIANTI CLASSICO

April 1, 2014

[  
.....]

By email

ICANN  
GAC  
EC]

### POSITION OF **CONSORZIO VINO CHIANTI CLASSICO**, REGARDING THE **.WINE** AND **.VIN** NEW gTLD APPLICATIONS

Dear Sir;

Our organization officially represents [the grape growers and wine producers based in *Champagne, Jerez-Xérès-Sherry, Napa Valley, Oregon, Porto, Washington State, Walla Walla Valley, Willamette Valley, Chianti Classico, Paso Robles, Sonoma County, Tokaj, Victoria, Western Australia, Long Island, Rioja, Bourgogne/Chablis, Santa Barbara, Bordeaux*]. In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

#### 1. **THE [CHIANTI CLASSICO'S CONCERNS**

On 22 March 2014, the ICANN New gTLD Program Committee ("**NGPC**") directed that the applications for **.WINE** and **.VIN** should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("**GAC**") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the **.WINE** and **.VIN** strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new **.WINE** and **.VIN** gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("**GI**'s) and the wine regions we represent. When it comes to wine, location

matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

2. **THE NECESSARY MEASURES TO BE TAKEN**

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely

  
SERGIO ZINGARELLI  
PRESIDENT



# Attachment E

# ANNEX I



April 3, 2014

LONG ISLAND WINE COUNCIL  
Contact information Redacted

BY E-MAIL

ICANN NEW gTLD PROGRAM COMMITTEE MEMBERS,  
ICANN BOARD MEMBERS  
ICANN GOVERNMENT ADVISORY COMMITTEE  
COUNTRY REPRESENTATIVES OF THE ICANN  
GOVERNMENT ADVISORY COMMITTEE

**POSITION OF THE LONG ISLAND WINE COUNCIL, REGARDING THE .WINE AND .VIN NEW gTLD APPLICATIONS**

Dear ICANN New gTLD Program Committee Members,  
Dear ICANN Board Members  
Dear Members of the ICANN Government Advisory Committee  
Dear Country Representatives of the ICANN Government Advisory Committee

Our organization officially represents wine producers based in Long Island, New York. In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

**1. THE LONG ISLAND WINE COUNCIL'S CONCERNS**

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. All signatories to the WTO TRIPS Agreement recognize that GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

2. **THE NECESSARY MEASURES TO BE TAKEN**

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

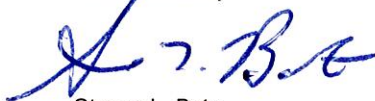
or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely



Steven L. Bate  
Executive Director





napa valley vintners

April 3, 2014

Dr. Stephen Crocker  
Chairman, ICANN Board of Directors  
12025 Waterfront Drive  
Suite 300  
Los Angeles, CA 90094

**Re: Position of Napa Valley Vintners regarding .WINE and .VIN new gTLD applications**

Dear Dr. Crocker:

The Napa Valley Vintners is the non-profit trade association representing the interests of the Napa Valley wine industry. The crown jewel of American agriculture, the Napa Valley wine industry has an annual economic impact of \$50 billion on the U.S. economy. In 2013 the Napa Valley Vintners communicated to you our concerns on matters related to .WINE and .VIN as it relates to product of place such as ours.

The Napa Valley is a proud signatory of the Joint Declaration to Protect Wine Place & Origin. ([www.protectplace.com](http://www.protectplace.com)) This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort. The importance of protecting winegrowing place names is critical to all winegrowing regions of quality; it is not solely a European issue.

**1. The Napa Valley Vintners concerns:**

On 22 March 2014, the ICANN New gTLD Program Committee ("**NGPC**") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("**GAC**") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical

**Contact Information Redacted**

Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVAs perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. The necessary measures to be taken:

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

(a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

(b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely,



Linda Reiff  
President & CEO

Cc: Congressman Mike Thompson  
Suzanne Radell, GAC Representative  
Larry Strickling, State Secretary, Department of Commerce

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<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPS"







## SANTA BARBARA VINTNERS

April 7, 2014

Dear ICANN New gTLD Program Committee Members

Dear ICANN Board Members

Dear Members of the ICANN's Governmental Advisory Committee

Dear Country Representatives of the ICANN's Governmental Advisory Committee:

The Santa Barbara Vintners represents the grape growers and wine producers based in Santa Barbara County, California. The mission of the Santa Barbara Vintners is to promote and protect the Santa Barbara County wine region and its five associated American Viticulture Areas (AVA.) In addition, we are a proud signatory, along with eighteen other wine regions, of the Joint Declaration to Protect Wine Place & Origin.

The Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from around the world that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort. The Declaration information can be found at [www.protectplace.com](http://www.protectplace.com).

We are concerned that the new .WINE and .VIN gTLDs may negatively impact our organizations ability to protect against fraudulent use of wine region names and the wineries we represent. When it comes to wine, location matters. Our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area.

Following the applications of .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide

Contact Information Redacted

expect. The protection of wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users would indeed be deceived into believing they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of wine growing place names. We request the ICANN and the GAC grant adequate protection to all wine growing regions. It is indeed necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for all wine growing places names at the second level.

Thank you for considering our request.

Regards,

A handwritten signature in black ink, appearing to read 'Morgen McLaughlin', with a long horizontal stroke extending to the right.

Morgen McLaughlin  
Executive Director





April, 2<sup>nd</sup> 2014

Comité Interprofessionnel du Vin de Champagne

Contact information Redacted

By e-mail

ICANN New gTLD Program Committee  
ICANN Board Members  
ICANN's Governmental Advisory Committee  
Country representatives of the ICANN's  
Governmental Advisory Committee

**POSITION OF CIVC, REGARDING THE .WINE AND .VIN NEW GTLD APPLICATIONS**

Dear ICANN New gTLD Program Committee Members,

Dear ICANN Board Members

Dear Members of the ICANN's Governmental Advisory Committee

Dear country representatives of the ICANN's Governmental Advisory Committee,

Our organization officially represents the grape growers and wine producers based in Champagne. In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.



## 1. THE CIVC'S CONCERNS

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPS"



2. THE NECESSARY MEASURES TO BE TAKEN

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

(a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

(b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely,

Jean-Luc BARBIER  
General Director





April, 2<sup>nd</sup> 2014

Consejo Regulador de la Denominación  
Contact Information Redacted

cc

By email

ICANN New gTLD Program Committee  
ICANN Board Members  
ICANN's Governmental Advisory Committee  
Country representatives of the ICANN's Governmental Advisory Committee

**POSITION OF CONSEJO REGULADOR DE LA DENOMINACIÓN DE ORIGEN CALIFICADA RIOJA (HEREINAFTER C.R.D.O.CA. RIOJA)  
REGARDING THE .WINE AND .VIN NEW GTLD APPLICATIONS**

Dear ICANN new gTLD Program Committee Members  
Dear ICANN Board Members  
Dear Members of ICANN's Governmental Advisory Committee  
Dear Country representatives of the ICANN's Governmental Advisory Committee

Our organization officially represents the grape growers and wine producers based in Rioja. In addition our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

**1. THE C.R.D.O.CA. RIOJA'S CONCERNS**

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.





In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. THE NECESSARY MEASURES TO BE TAKEN

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely,



José Luis Lapuente  
General Manager  
C.R. D.O.Ca. Rioja





## CONSEJO REGULADOR

ICANN New gTLD program committee  
ICANN Board Members  
ICANN's Governmental Advisory Committee  
Country representatives of the ICANN's Governmental Advisory Committee

Jerez, April 3, 2014

### POSITION OF CONSEJO REGULADOR OF THE "JEREZ-XÉRÈS-SHERRY" DENOMINATION OF ORIGIN, REGARDING THE .WINE AND .VIN NEW GTLD APPLICATIONS

Dear Sirs,

Our organization officially represents the grape growers and wine producers based in the región of "Jerez-Xérès-Sherry". In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

#### 1. THE CONSEJO REGULADOR'S CONCERNS

On 22 March 2014, the ICANN New gTLD Program Committee ("NGPC") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("GAC") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an*

*opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("GI"s) and the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin" . GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. THE NECESSARY MEASURES TO BE TAKEN

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

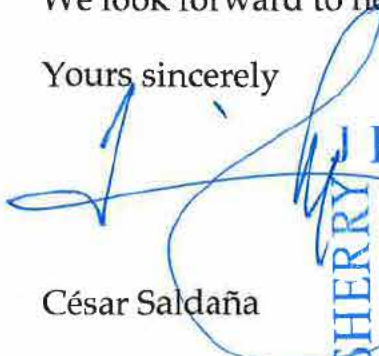
or


(b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, a minima, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely

  
César Saldaña



The logo consists of the words 'SHERRY', 'JEREZ', and 'XERES' stacked vertically in a serif font. Below them, the words 'VINO' and 'AMZANILLA' are written in a smaller, sans-serif font. A large, stylized 'S' is superimposed over the text.





GOVERNO DE  
PORTUGAL

MINISTÉRIO DA AGRICULTURA  
E DO MAR



IVDP  
Instituto dos Vinhos  
do Douro e do Porto, I.P.

ICANN New gTLD Program Committee  
ICANN Board Members  
ICANN's Governmental Advisory  
Committee  
Country representatives of the ICANN's  
Governmental Advisory Committee

April, 3th 2014

By e-mail

**POSITION OF INSTITUTO DOS VINHOS DO DOURO E DO PORTO, REGARDING THE  
.WINE AND .VIN NEW GTLD APPLICATIONS**

Our organization officially represents the grape growers and wine producers based in the Douro demarcated origin (PDO Porto). In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

**1. The Porto's concerns**

On 22 March 2014, the ICANN New gTLD Program Committee ("**NGPC**") directed that the applications for .WINE and .VIN should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("**GAC**") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the .WINE and .VIN strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new .WINE and .VIN gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("**GI**")s and

AC/SJ

**Contact Information Redacted**



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E DO MAR



IVDP  
Instituto dos Vinhos  
do Douro e do Porto, I.P.

the wine regions we represent. When it comes to wine, location matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

## 2. **The necessary measures to be taken**

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely

Manuel de Novaes Cabral  
Presidente

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<sup>1</sup> Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights - "TRIPS"  
AC/SJ

# Contact Information Redacted







## CHIANTI CLASSICO

April 1, 2014

[  
.....]

By email

ICANN  
GAC  
EC]

### POSITION OF **CONSORZIO VINO CHIANTI CLASSICO**, REGARDING THE **.WINE** AND **.VIN** NEW gTLD APPLICATIONS

Dear Sir;

Our organization officially represents [the grape growers and wine producers based in *Champagne, Jerez-Xérès-Sherry, Napa Valley, Oregon, Porto, Washington State, Walla Walla Valley, Willamette Valley, Chianti Classico, Paso Robles, Sonoma County, Tokaj, Victoria, Western Australia, Long Island, Rioja, Bourgogne/Chablis, Santa Barbara, Bordeaux*]. In addition, our region is a proud signatory of the Joint Declaration to Protect Wine Place & Origin (available at [www.protectplace.com](http://www.protectplace.com)).

This Declaration to Protect Wine Place & Origin is an alliance of quality wine growing regions from across the globe that seek to increase the protection of wine labels and the integrity of wine place names, which are fundamental tools for consumers to identify the special wines of great winegrowing regions. All wine regions that have signed the Declaration are committed to educating consumers about the importance of location and ensuring that wine growing place names are protected and easily identifiable is central to this effort.

#### 1. **THE [CHIANTI CLASSICO'S CONCERNS**

On 22 March 2014, the ICANN New gTLD Program Committee ("**NGPC**") directed that the applications for **.WINE** and **.VIN** should proceed through the normal evaluation process.

On 27 March 2014, the ICANN's Governmental Advisory Committee ("**GAC**") noted at least one process violation and procedural error with respect to the Board's decision, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board."*

The GAC therefore advised that the Board reconsidered the matter more fully before delegating the **.WINE** and **.VIN** strings.

In addition, the GAC indicated that the concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

In this context, we are writing to you to express our concern with regard to how the new **.WINE** and **.VIN** gTLDs may negatively impact our organisation's ability to protect against fraudulent use of Wine related Geographical Indications ("**GI**'s) and the wine regions we represent. When it comes to wine, location

matters. Whether we use the AVA system or the GI system, our wine growing places are unique and these terms are understood by consumers to denote the origin and the quality of products produced in a special geographical area. In Europe, GIs are generally defined as being "*indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*"<sup>1</sup>. GIs therefore guarantee that a product is from a certain region, and of a certain nature and quality. In the United States, AVA's perform a similar role in identifying for consumers where their wines come from.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards would seriously undermine the protection consumers worldwide expect and is granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs, AVAs and wine growing region names also serves the public interest because of the particular risks of fraudulent misuse of these terms which the Signatories regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine product with specific qualities and characteristics, when they are in fact getting an imitation.

2. **THE NECESSARY MEASURES TO BE TAKEN**

We note that, to date, none of the .WINE and .VIN applicants has unequivocally included in its application appropriate safeguards for the protection of GIs, AVAs or wine growing place names.

We therefore respectfully call for ICANN and the GAC to either:

- (a) Grant adequate protection to all wine growing regions including GIs. It is indeed absolutely necessary for the Signatories to ensure that, if the extensions are delegated, there are additional safeguards around the .WINE and .VIN domain names with protection for GIs and all wine growing place names at the second level.

or

- (b) Withdraw the .WINE and .VIN extensions.

Alternatively, we would, *a minima*, respectfully call for ICANN and the GAC to grant more time to the applicants and interested parties in order to reach proper agreement before issuing a final decision on the delegation of the .WINE and .VIN strings.

We look forward to hearing from you.

Yours sincerely

  
SERGIO ZINGARELLI  
PRESIDENT

# Attachment F

**RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**  
**RECONSIDERATION REQUESTS 14-13, 14-14, 14-15, 14-16, 14-17, 14-18, 14-19, 14-20,**  
**14-21, 14-22, 14-24, 14-25, 14-26**

**14 MAY 2014**

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The Requesters, which include representatives of the European Commission, the United Kingdom Government, the French Government, the Spanish Government, various GI Organizations,<sup>1</sup> the Italian Government, the Portuguese Government, the Luxembourg Government, and the Swiss Government,<sup>2</sup> seek reconsideration of one or more of the NGPC Resolutions 2014.03.22.NG01, 2014.04.04.NG01, 2014.04.04.NG02, 2014.04.04.NG03, and 2014.04.04.NG04, which relate to the applications for .WINE and .VIN.

**I. Brief Summary.**

Afilias Limited, dot Wine Limited, and June Station, LLC applied for .WINE and are in a contention set. Holly Shadow, LLC applied for .VIN. The Requesters, various national governments and entities asserting the interests of grape growers and wine and spirit drink producers, request reconsideration of one or more NGPC<sup>3</sup> resolutions: (1) 2014.03.22.NG01 (“22 March 2014 Resolution”); and (2) 2014.04.04.NG01, 2014.04.04.NG02, 2014.04.04.NG03,

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<sup>1</sup> The National Appellation of Origin Wines and Brandy Producers (“CNAOC”), the Comité Interprofessionnel du Vin de Champagne (“CIVC”), the European Federation of Origin Wines (“EFOW”), the Bureau National Interprofessionnel du Cognac (“BNIC”), and the Conseil Interprofessionnel du Vin de Bordeaux (“CIVB”) shall be collectively referred to herein as the “GI Organizations.”

<sup>2</sup> The Requesters separately filed the following thirteen Reconsideration Requests: European Commission (Request 14-13), United Kingdom Government (Request 14-14), French Government (Requests 14-15 and 14-25), Spanish Government (Requests 14-16 and 14-17), GI Organizations (Requests 14-18 and 14-24), Italian Government (Requests 14-19 and 14-26), Portuguese Government (Request 14-20), Luxembourg Government (Request 14-21), and Swiss Government (Request 14-22). The BGC may consolidate the consideration of reconsideration requests “if the issues stated within are sufficiently similar.” (Reconsideration Request Form, Terms and Conditions; Bylaws, Art. IV, § 2.8.) Because the Requests involve the same general Board action or inaction and raise sufficiently similar issues, the Requests will be addressed in the same proceeding.

<sup>3</sup> New gTLD Program Committee.

and 2014.04.04.NG04 (“4 April 2014 Resolutions”) (collectively, the “Resolutions”), which relate to the applications for .WINE and .VIN.

In the 22 March 2014 Resolution, the NGPC “accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin” and, consistent with that advice, directed “that the applications for .WINE and .VIN should proceed through the normal evaluation process.”<sup>4</sup> As part of its deliberations, the NGPC considered, among many other things, the independent analysis of French Law Professor Jérôme Passa (“Independent Legal Analysis”) on this legally complex and politically sensitive matter.

After the NGPC approved the 22 March 2014 Resolution, in its Singapore Communiqué ICANN’s Governmental Advisory Committee (“GAC”) advised the Board that it believed that the NGPC had violated ICANN’s Bylaws, including Article XI-A, Section 1, Subsection 6, by failing to provide the GAC with the opportunity to comment on the Independent Legal Analysis before the NGPC accepted the GAC’s advice on the .WINE and .VIN applications. The GAC further advised that the Board “reconsider the matter” and that “applicants [for .WINE and .VIN] and interested parties [] be encouraged to continue their negotiations” with regard to additional safeguards for the proposed strings.<sup>5</sup>

On 4 April 2014, in response to the GAC’s Singapore Communiqué, the NGPC adopted the 4 April 2014 Resolutions, which stated that the NGPC: (1) “conclude[d] that there ha[d] been no process violation or error under the Bylaws” with respect to the 22 March 2014 Resolution; (2) “direct[ed] the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of

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<sup>4</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.

<sup>5</sup> <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=1&modificationDate=1395925159241&api=v2>.

publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do;” and (3) “recommend[ed] that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members.”<sup>6</sup>

On 8 April 2014, 9 April 2014, and 18 April 2014, the Requesters filed their Requests, seeking reconsideration of the Resolutions. Specifically, one or more of the Requesters claim that: (i) the Resolutions were based on information transmitted in violation of internal GAC Operating Principles; (ii) the Board failed to consider material information in passing the Resolutions; (iii) the Board relied on false or misleading information in passing the Resolutions; and (iv) the Board breached ICANN’s Bylaws with respect to the commission and consideration of external expert legal advice.

The BGC concludes that there is no evidence that the Board’s actions in adopting the Resolutions support reconsideration. As is discussed in further detail below, the Board: (i) properly considered GAC advice provided to the Board in accordance with the procedures set forth in ICANN’s Bylaws and the gTLD Applicant Guidebook; (ii) did not fail to consider any material information in passing the Resolutions; (iii) did not rely on false or misleading information in passing the Resolutions; and (iv) did not breach ICANN’s Bylaws with respect to the commission and consideration of external legal advice.

Further, the BGC notes that although the Requesters are concerned that the delegation of .WINE and .VIN without the safeguards preferred by the Requesters will adversely impact the Requesters, at present this remains uncertain and is therefore insufficient to establish the necessary Bylaws-mandated criteria to support the Reconsideration Requests.

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<sup>6</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

## **II. Facts.**

### **A. Background Facts.**

Afilias Limited, dot Wine Limited, and June Station, LLC applied for .WINE and are in a contention set. Holly Shadow, LLC applied for .VIN (collectively, the “Applicants”).<sup>7</sup>

On 11 April 2013, in its Beijing Communiqué, the GAC advised the Board not to proceed beyond initial evaluation on the .WINE and .VIN applications, noting that “further GAC consideration [of those strings] may be warranted.”<sup>8</sup>

On 18 April 2013, ICANN posted the Beijing Communiqué and officially notified applicants of the advice,<sup>9</sup> triggering the 21-day applicant response period pursuant to the Applicant Guidebook (“Guidebook”) Module 3.1.

From 23 April 2013 to 4 June 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address GAC advice regarding safeguards applicable to broad categories of new gTLD strings.<sup>10</sup>

On 22 May 2013, ICANN published applicant responses to the GAC’s Beijing Communiqué, which included the Applicants’ responses to the GAC’s Advice regarding the .WINE and .VIN applications.<sup>11</sup>

On 4 June 2013, the NGPC accepted the advice in the Beijing Communiqué.<sup>12</sup>

The National Appellation of Origin Wines and Brandy Producers (“CNAOC”), European Federation of Origin Wines (“EFOW”), the Comité Interprofessionel du Vin de Champagne

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<sup>7</sup> June Station, LLC and Holly Shadow, LLC are both affiliated with Donuts, Inc.

<sup>8</sup>

[https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013\\_Final.pdf?version=1&modificationDate=1365666376000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2).

<sup>9</sup> <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>.

<sup>10</sup> <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>.

<sup>11</sup> <http://newgtlds.icann.org/en/applicants/gac-advice/beijing46> .

<sup>12</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm>.



(“CIVC”), the International Trade Policy Wine Institute, and the Organisation for an International Geographical Indications Network sent letters to the Board regarding their views on the delegation of .WINE and .VIN on 19 April 2013, 23 April 2013, 26 April 2013, 20 June 2013, and 9 July 2013, respectively.

On 18 July 2013, in its Durban Communiqué, the GAC advised the Board that it was continuing to consider the .WINE and .VIN applications, and that it needed an additional thirty days to conclude its consideration “due to the complexity of the matter.”<sup>13</sup>

The Napa Valley Vinters, the EFOW, and the Long Island Wine Council sent letters to the Board regarding their views on the delegation of .WINE and .VIN on 8 August 2013, 19 August 2013, and 29 August 2013, respectively.

On behalf of the GAC, the GAC Chair sent a letter dated 9 September 2013 (“9 September 2013 Letter”) to the Board advising that the GAC had “finalized its consideration of the strings .wine and .vin” and that “the applications should proceed through the normal evaluation process.”<sup>14</sup> The letter stated that “[w]hile there is no GAC consensus advice on specific safeguards, it deserves to be noted that the crux of the matter relates to the handling of geographic indications, for which there is a range of views among the GAC membership,” and that “[t]here is no international agreement among governments about how to treat geographical indications and, as a consequence, no basis for an agreement in the GAC on safeguards that would offer additional protections.”<sup>15</sup> Finally, the letter indicated that “[t]he GAC or its

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<sup>13</sup> <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.

<sup>14</sup> <https://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en.pdf>. The date on the GAC advice letter from the GAC Chair indicates 9 September 2013, but it was not received until 11 September 2013. Because the final letter was not available until 11 September, it was not considered as part of the NGPC’s action on 10 September 2013.

<sup>15</sup> *Id.*

members may communicate further details to the Board as to the nature of the differences in views.”<sup>16</sup>

On 10 September 2013, the NGPC accepted the advice in the Durban Communiqué concerning .WINE and .VIN (indicating that the GAC needed more time to consider the matters) and noted that it stood ready to hear the final advice from the GAC. Although the NGPC had not yet received the 9 September 2013 Letter, the NGPC did acknowledge that it had received an email from the GAC Chair on 10 September 2013 reiterating that the GAC had finalized its consideration of the strings. The NGPC stated that it would discuss both the 9 September 2013 Letter and 10 September 2013 email at a subsequent meeting.<sup>17</sup>

On 12 September 2013, the European Commission sent the Board a letter stating that, in its opinion, there had “not been any consensus decision overruling the advice given in Beijing [and] the advice provided at the GAC April meeting stands as long as there is no new consensus on the matter.” The European Commission also expressed its concern that “[t]he more general safeguards expressed in Annex 1 of the Beijing Communiqué are not specific enough to allow companies unrelated to the wine sector, and therefore not acquainted with the specificities of the global wine market and the importance of GIs, to run the two strings in a safe manner.”<sup>18</sup>

On 28 September 2013, the NGPC acknowledged receipt of the GAC advice in the 9 September 2013 Letter, and indicated that it “st[ood] ready to hear from GAC members as to the nature of the differences in views expressed in the advice while [it analyzed] the community

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<sup>16</sup> *Id.*

<sup>17</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10sep13-en.htm>. Although the letter from the GAC chair was dated 9 September 2013, it was not received by the Board until 11 September 2013. As a result, it was not considered as part of the NGPC’s action on 10 September 2013.

<sup>18</sup> <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en.pdf>.

input received on [the GAC's] advice.”<sup>19</sup> The NGPC directed staff to analyze the GAC advice and other community input, and to prepare an analysis and recommendation for the NGPC meeting in Buenos Aires, scheduled for November 2013.

On 7 November 2013, the European Commission again sent the Board a letter, stating that its concerns regarding the delegation of .WINE and .VIN would remain “until an agreement is reached between applicants and rights holders and a solution is commonly presented to ICANN by both parties as an example of good cooperation.”<sup>20</sup> On 15 November 2013, the Organization of American States sent the Board a letter regarding its concerns with respect to GI safeguards for .WINE and .VIN.<sup>21</sup>

On 19 November 2013, ICANN facilitated a dialogue between the applicant for .VIN and the affected non-governmental parties.

On 20 November 2013, in its Buenos Aires Communiqué, the GAC stated that:

Some members are of the view, after prolonged and careful consideration, that the existing safeguards outlined in the GAC's Beijing Communiqué and implemented by the ICANN Board are appropriate and sufficient to deal with the potential for misuse of the .wine and .vin new gTLDs . . . . Other members consider that delegation of .wine and .vin strings should remain on hold until either sufficient additional safeguards to protect GIs are put into place in these strings to protect the consumers and businesses that rely on such GIs; or common ground has been reached for the worldwide protection of GIs via international fora and wide array of major trade agreements.<sup>22</sup>

The GAC further advised that the Board “may wish to seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate

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<sup>19</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf>.

<sup>20</sup> <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en.pdf>.

<sup>21</sup> <http://www.icann.org/en/news/correspondence/baptista-to-crocker-15nov13-en.pdf>.

<sup>22</sup> <http://newgtlds.icann.org/en/applicants/gac-advice/buenosaires48>.

next steps in the process of delegating the two strings. GAC members may wish to write to the Board to further elaborate their views.”<sup>23</sup>

On 17 December 2013, the Australian Government sent a letter to the Board stating that it “consider[ed] that existing international and national arrangements concerning the appropriate use of GIs are sufficient to allow the delegation of .wine and .vin.”<sup>24</sup>

On 30 January 2014, the United States Government sent a letter to the Board stating that in its view, “the existing safeguards developed by the GAC and accepted by the ICANN Board provide sufficient protections to mitigate against possible abuses in domain name registrations at the second level of .wine and .vin.”<sup>25</sup>

On 3 February 2014, the European Union Member States, Norway, and Switzerland, sent the Board a letter recommending that the delegation of .WINE and .VIN be put on hold until “bilateral negotiations between GI right holders and applicants reach a successful outcome.”<sup>26</sup>

On 5 February 2014, the NGPC announced that it had “commissioned an analysis of the legally complex and politically sensitive background of the [.WINE and .VIN strings] in the context of the GAC advice in order to consider the appropriate next steps of delegating .WINE and .VIN.”<sup>27</sup> The analysis, which was to be performed by Jérôme Passa, a French law professor, was expected to be completed in time for consideration by the NGPC at ICANN’s March 2014 meeting in Singapore.

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<sup>23</sup> *Id.*

<sup>24</sup> <http://www.icann.org/en/news/correspondence/maurer-to-crocker-17dec13-en.pdf>.

<sup>25</sup> <http://www.icann.org/en/news/correspondence/strickling-to-crocker-30jan14-en>.

<sup>26</sup> <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>.

<sup>27</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>.

On 19 March 2014, the European Parliament sent the Board a letter supporting the views expressed in the EU Members States' letter of 3 February 2014.<sup>28</sup>

On 22 March 2014, at the Singapore meeting, the NGPC adopted Resolution 2014.03.22.NG01, accepting the GAC advice identified in the 9 September 2013 Letter from the GAC Chair and directing ICANN staff to proceed with the normal evaluation process for the .WINE and .VIN applications.<sup>29</sup>

On 26 March 2014, the European Commission, the European Union Member States, Norway, and Switzerland sent the Board a letter expressing the view that there had been a number of process violations and procedural errors with respect to the 22 March 2014 Resolution.<sup>30</sup>

On 27 March 2014, in its Singapore Communiqué, the GAC stated that:

The GAC notes the NGPC Resolution 2014.03.22.NG01 concerning .wine and .vin as well as its rationale. In the final deliberation of the Board there appears to be at least one process violation and procedural error, including in relation to Bylaws Article XI-A, Section 1 subsection 6 which states:

6. Opportunity to Comment. The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

The GAC therefore advises:

That the Board reconsider the matter before delegating these strings. The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.<sup>31</sup>

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<sup>28</sup> <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en.pdf>.

<sup>29</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.

<sup>30</sup> <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-26mar14-en.pdf>.

<sup>31</sup> <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=1&modificationDate=1395925159241&api=v2>.

On 1 April 2014, the Consorzio Vino Chianti Classico sent a letter to the Board expressing its concerns that the delegation of the .WINE and .VIN gTLDs “may negatively impact our organisation’s ability to protect against fraudulent use of Wine related Geographical Indications (“GI”s) and the wine regions we represent.”<sup>32</sup> The Consorzio Vino Chianti Classico asked ICANN and the GAC to either “grant adequate protection to all wine growing regions including GIs....or withdraw the .WINE and .VIN extensions.”<sup>33</sup>

On 2 April 2014, the Board received letters from the Rioja Governing Council,<sup>34</sup> the European Union and its Member States, Norway, and Switzerland,<sup>35</sup> and CIVC<sup>36</sup> regarding the delegation of the .WINE and .VIN gTLDs and the 22 March 2014 Resolution.

On 3 April 2014, the Board received letters from the Napa Valley Vintners,<sup>37</sup> the Long Island Wine Council,<sup>38</sup> and the Instituto dos Vinhos do Douro e Porto<sup>39</sup> regarding the delegation of the .WINE and .VIN gTLDs and the 22 March 2014 Resolution.

On 4 April 2014, the NGPC adopted Resolutions 2014.04.04.NG01, 2014.04.04.NG02, 2014.04.04.NG03, and 2014.04.04.NG04, wherein the NGPC: (1) “accept[ed] the GAC advice identified in the Singapore Communiqué as it relates to the applications for .WINE and .VIN;” (2) “conclude[d] that there has been no process violation or error under the Bylaws” with respect to the 22 March 2014 Resolution; (3) “direct[ed] the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the

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<sup>32</sup> <http://www.icann.org/en/news/correspondence/zingarelli-to-chalaby-et-al-01apr14-en.pdf>.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> <http://www.icann.org/en/news/correspondence/lapuate-to-icann-board-et-al-02apr14-en>.

<sup>35</sup> <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en>.

<sup>36</sup> <http://www.icann.org/en/news/correspondence/barbier-to-icann-board-02apr14-en.pdf>.

<sup>37</sup> <https://www.icann.org/en/news/correspondence/reiff-to-crocker-03apr14-en>.

<sup>38</sup> <https://www.icann.org/en/news/correspondence/bate-to-icann-board-03apr14-en>.

<sup>39</sup> <https://www.icann.org/en/news/correspondence/cabral-to-icann-board-03apr14-en>.

date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do;” and (4) “recommend[ed] that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.”<sup>40</sup>

Following the adoption of the 4 April 2014 Resolutions, the Chairman of the Board sent a letter to the GAC Chair explaining the actions taken by the NGPC.<sup>41</sup>

On 7 April 2014, the Santa Barbara Vintners sent a letter to the Board expressing their concerns regarding the delegation of the .WINE and .VIN gTLDs without additional safeguards.<sup>42</sup>

On 8 April 2014, the European Commission, the British Government, the French Government, the Spanish Government, and the GI organizations filed, respectively, Reconsideration Requests 14-13, 14-14, 14-15, 14-16, and 14-18, requesting reconsideration of the 22 March 2014 Resolution. That same day, the Spanish Government filed Reconsideration Request 14-17, requesting reconsideration of the 4 April 2014 Resolutions. On 9 April 2014, the Italian Government, the Portuguese Government, and the Luxembourg Government filed, respectively, Reconsideration Requests 14-19, 14-20, and 14-21, requesting reconsideration of the 22 March 2014 Resolution. On 18 April 2014, the Swiss Government, the GI Organizations, the French Government, and the Italian Government filed, respectively, Reconsideration

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<sup>40</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

<sup>41</sup> <https://www.icann.org/en/news/correspondence/crocker-to-dryden-04apr14-en.pdf>.

<sup>42</sup> <https://www.icann.org/en/news/correspondence/mclaughlin-to-icann-board-et-al-07apr14-en.pdf>.

Requests 14-22, 14-23, 14-24, and 14-25, requesting reconsideration of the 4 April 2014 Resolutions.

On 18 April 2014, the EFOW sent a letter to the Board stating that it had “invit[ed] the three [.WINE/.VIN] applicants to a meeting in Brussels under the auspices of the European Commission on 15 and 16 May,” that its “objective [was] to strike a deal before the end of the 60 day period” and that it “believe[d] that there is room for a mutually satisfactory agreement which would set out adequate safeguards.”<sup>43</sup>

On 30 April 2014, the New Zealand Government sent a letter to the Board expressing its position on the .WINE and .VIN applications, noting that it “has no problem with the recommendation from the New gTLD Program Committee (NGPC) that .wine and .vin be delegated without further restrictions.”<sup>44</sup>

On 5 May 2014, the EFOW sent a letter to the Board stating that it was “actively following up on the [4 April 2014 Resolutions] which invite[] ‘the relevant impacted parties to negotiate, which they are encouraged to do.’” The EFOW detailed the progress it had made in its attempts to schedule meetings with the Applicants. It concluded that it believed “that there is room for a mutually satisfactory agreement which would set out adequate safeguards” and that it invited the Board and other interested ICANN parties to “assist [] these multi-stakeholder[] negotiations in order to ensure a high level of transparency and accountability.”<sup>45</sup>

On 8 May 2014, the Australian Government sent a letter to the Board “reiterat[ing] [its] view that the existing safeguards that ICANN has agreed to for all new gTLDs are appropriate and sufficient to deal with the potential for misuse of terms relating to GIs in these domains.”

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<sup>43</sup> <https://www.icann.org/en/news/correspondence/curbastro-to-hickson-18apr14-en.pdf>.

<sup>44</sup> <https://www.icann.org/en/news/correspondence/parkes-to-crocker-30apr14-en>.

<sup>45</sup> <http://www.icann.org/en/news/correspondence/curbastro-to-sahel-beccalli-05may14-en.pdf>



**B. The Requesters' Claims.**

The Requesters seek reconsideration of one or more of the Resolutions. Specifically, in aggregate, the Requesters contend that the NGPC:

1. Improperly issued the Resolutions based on information submitted by the GAC Chair in violation of GAC Operating Principle 47. (Request 14-13, §§ 3, 6, 8, Pgs. 1-2, 6-7, 12-13; Request 14-15, § 8, 9-10; Request 14-16, § 8, Pgs. 9-10; Request 14-18, § 8, Pg. 11; Request 14-19, § 3, 6, 8, Pgs. 1-2, 7, 12; Request 14-20, § 8, Pgs. 5-6; Request 14-21, §§ 3, 6, 8, Pgs. 2, 7, 12-13; Request 14-22, § 8, Pgs. 4-5, Pgs. 5-6; Request 14-24, § 8, Pg. 13; Request 14-25, § 8, Pg. 11, Request 14-26, § 8, Pg. 6.)
2. Breached Article VI, Section 9 of ICANN's Bylaws because the GAC Chair, who is a non-voting liaison on the NGPC, failed to inform the GAC of the Board's pending vote on the 22 March 2014 Resolution. (Request 14-13, § 6, Pg. 10; Request 14-14, § 3, Pg. 2; Request 14-18, § 6, Pg. 9; Request 14-19, § 6, Pgs. 9-10; Request 14-21, § 6, Pg. 10.)
3. Failed to consider material correspondence, including letters sent by the European Union and various stakeholders, in passing one or more of the Resolutions. (Request 14-13, § 8, Pgs. 11-12; Request 14-14, § 3, Pg. 2; Request 14-15, § 8, Pgs. 6-8; Request 14-16, § 8, Pgs. 7-9; Request 14-17, § 8, Pgs. 7-8; Request 14-18, § 8, Pgs. 10-11; Request 14-19, § 8, Pg. 11; § , Pgs; Request 14-20, § 8, Pgs. 6-9; Request 14-21, § 8, Pgs. 11-12; Request 14-22, § 8, Pgs. 3-4, 8; Request 14-24, § 8, Pg. 12; Request 14-26, § 8, Pg. 5.)
4. With respect to Professor Jérôme Passa's Independent Legal Analysis:

- a. Violated Article XI-A of ICANN's Bylaws;
- b. Breached the Bylaws principles of fairness, transparency, and openness;
- c. Failed to consider material information contained in the Independent Legal Analysis; and
- d. Relied on false and inaccurate information.

(Request 14-13, § 6, Pgs. 8-10, 13-16; Request 14-14, § 3, Pg. 2; Request 14-15, § 8, Pgs. 11-16; Request 14-16, § 8, Pgs. 10-18; Request 14-17, § 8, Pgs. 8-11; Request 14-18, § 8, Pgs. 11-13; Request 14-19, § 6, Pgs. 8-9; Request 14-20, § 6, Pgs. 4-5; Request 14-21, § 6, Pgs. 8-10; Request 14-22, § 8, Pgs. 5-8; Request 14-24, § 8, Pgs. 13-16); Request 14-25, § 8, Pgs. 12-14; Request 14-26, § 8, Pgs. 6-9.)

- 5. Failed to consider material information, namely the GAC's Singapore Communiqué, in passing the 4 April 2014 Resolutions and imposing a 60-day deadline on negotiations between the Applicants and stakeholders regarding additional safeguards for .WINE and .VIN. (Request 14-17, §§ 6, 8, Pgs. 2-3, 7-8; Request 14-22, §§ 6, 8, Pgs. 2, 8; Request 14-24, § 8, Pgs. 8-10; Request 14-25, § 6, Pgs. 7-9; Request 14-26, § 8, Pg. 5.)

**C. Relief Requested.**

The Requesters ask that ICANN: (1) reverse and reconsider the Resolutions; and (2) grant sufficient time without a deadline for the Applicants and interested parties to negotiate appropriate safeguards. (Request 14-13, § 9, Pgs. 16-17; Request 14-14, § 9, Pg. 3; Request 14-15, § 9, Pg. 17; Request 14-16, § 9, Pgs. 18-19; Request 14-17, § 9, Pgs. 11-12; Request 14-18, § 9, Pg. 13; Request 14-19, § 9, Pgs. 15-16; Request 14-20, § 9, Pg. 10; Request 14-21, § 9, Pgs.

17-18; Request 14-22, § 9, Pg. 9; Request 14-24, § 9, Pgs. 16-17; Request 14-25, § 9, Pgs. 14-15; Request 14-26, § 9, Pgs. 14-15; Request 14-27, § 9, Pg. 8.)

### **III. Issues.**

In view of the claims set forth in the Requests, the issues are whether the Board:

1. Relied on false or misleading information in basing the 22 March 2014 Resolution on information submitted by the GAC Chair that the Requesters suggest was sent in violation of GAC Operating Principle 47.
2. Breached Article VI, Section 9 of ICANN's Bylaws because, the Requesters state that the GAC Chair, who is a non-voting liaison on the NGPC, failed to inform the GAC of the Board's 22 March 2014 Resolution.
3. Failed to consider material correspondence in passing the Resolutions.
4. Violated Article XI-A of ICANN's Bylaws with respect to the NGPC's solicitation of and reliance on the Independent Legal Analysis.
5. Breached the Bylaws principles of fairness, transparency, and openness with respect to the NGPC's solicitation of and reliance on the Independent Legal Analysis.
6. Failed to consider material information with respect to the Independent Legal Analysis.
7. Relied on false or misleading information with respect to the Independent Legal Analysis.
8. Failed to consider material information, namely the GAC's Singapore Communiqué, in passing the 4 April 2014 Resolutions and imposing a 60-

day deadline on negotiations between Applicants and stakeholders regarding additional safeguards for .WINE and .VIN.

#### **IV. The Relevant Standards for Evaluating Reconsideration Requests.**

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>46</sup> (Bylaws, Art. IV, § 2.) The Requesters are challenging a Board action or inaction. Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and in this case the NGPC agrees, that the requesting parties have not satisfied the reconsideration criteria set forth in the Bylaws.

#### **V. Analysis and Rationale.**

The Requesters have not demonstrated that the Board failed to consider material information or relied on false or inaccurate material information in passing the Resolutions so as to support reconsideration.

##### **1. The Requesters' Suggestion that the Resolutions Were Based on Information Transmitted in Violation of GAC Operating Principle 47 Does Not Support Reconsideration.**

The Requesters suggest that the Resolutions were “partly based on ... the GAC Chair letter to the ICANN Board dated 9 September 2013 as part of the GAC advice on .VIN and .WINE” and that “such materials are inaccurate, false and/or misleading.” (Request 14-24, § 8, Pgs. 12-13; Request 14-15, § 8, Pgs. 9-10; Request 14-20, § 8, Pgs. 5-6.) Specifically, the

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<sup>46</sup> Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by: (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

Requesters claim that the GAC Chair’s 9 September 2013 letter “was sent to the ICANN Board without being circulated to GAC members first,” and that the letter was not, in fact, supported by a consensus of the GAC. (Request 14-24, § 8, Pgs. 12-13; Request 14-13, § 6, Pg. 7.)

According to the Requesters, the GAC Chair’s action in sending the 9 September 2013 Letter violated GAC Operating Principle 47, which provides that “[t]he GAC works on the basis of seeking consensus among its membership. . . . Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.” The Requesters state that because the 9 September 2013 Letter was sent in violation of GAC’s Operating Principles and did not accurately reflect the GAC’s consensus advice, it was misleading and should not have been considered by the Board. (Request 14-13, § 8, Pg. 12-13.) The Requesters’ assertions relating to GAC Operating Principle 47 do not support reconsideration.

The GAC was formed to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.” (Bylaws, Art. XI, § 2.1.a.) Section 2.1.i. of Article XI of the Bylaws provides that the GAC “may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” (*Id.* at § 2.1.i.) Module 3.1 of the Guidebook sets forth the parameters in which GAC Advice was to be given under the New gTLD Program, and states in relevant part:

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

(Guidebook, § 3.1.) The GAC has specifically articulated what constitutes such GAC Advice:

GAC members have worked on the basis that any explicit advice, in any written form, constitutes the kind of advice foreseen in the [ICANN] Bylaws. In practice, the GAC produces various kinds of written advice for communication to the Board, including:

- 1) letters signed by the GAC Chair on behalf of the GAC;
- 2) communiqués and submissions endorsed by the GAC at face-to-face meetings and inter-sessionally;
- 3) overarching ‘principles’ documents, typically developed over successive face-to-face GAC meetings; and
- 4) ‘issues’ documents, including interim issues documents.<sup>47</sup>

Pursuant to GAC Operating Principle 46, “[a]dvice from the GAC to the ICANN Board shall be communicated through the Chair.”<sup>48</sup>

The 9 September 2013 Letter setting forth the GAC’s advice on .WINE and .VIN constituted written advice in the form of a letter signed by the GAC Chair on behalf of the GAC. Further, the 9 September 2013 Letter was submitted to ICANN in accordance with the procedure governing the transmission of GAC Advice as set forth in the Guidebook. As the 9 September Letter was provided as GAC advice, ICANN was required, under applicable Guidebook provisions and under ICANN’s Bylaws, to consider it. (Guidebook, § 3.1 (“ICANN will consider the GAC Advice on New gTLDs as soon as practicable.”); Bylaws, Art. XI, § 2.1.j (“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account....”)).) While the Requesters suggest that the substance of the 9 September 2013 Letter violated GAC Operating Principle 47, neither the BGC nor the Board is in the position to question the validity of what came to the Board as GAC advice. The ICANN Board’s consideration of advice provided by the GAC Chair on behalf of the GAC in accordance with the procedures set forth in the Guidebook and ICANN’s Bylaws does not support reconsideration.

The Requesters’ main concern appears to be that the 9 September 2013 Letter “did not

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<sup>47</sup> <https://gacweb.icann.org/display/GACADV/GAC+Advice> (emphasis added).

<sup>48</sup> <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>.

convey the full range of views expressed by the GAC members,” such that the 9 September 2013 Letter “can’t therefore be taken as a basis for any Resolution.” (Request 14-13, § 6, Pg. 7.)

However, the 9 September 2013 Letter contains the following:

While there is no GAC consensus advice on specific safeguards, it deserves to be noted that the crux of the matter relates to the handling of geographical indications, for which there is a range of views among the GAC membership. Some members support referencing geographical indications while others are opposed.<sup>49</sup>

Accordingly, while the GAC Chair’s 9 September 2013 Letter may not exhaustively detail the nature of each specific viewpoint, the varying views expressed by GAC members were set forth in the letter.

Further, the 9 September 2013 Letter stated that “[t]he GAC or its members may communicate further details to the Board as to the nature of the differences in views.”<sup>50</sup> Notably, various GAC Members, including the European Commission, the European Union Member States, Norway, and Switzerland, submitted their views on .WINE and .VIN following the 9 September 2013 Letter.<sup>51</sup> And, as is discussed further below, the NGPC considered this correspondence in connection with the issuance of the Resolutions.

**2. The Requesters’ Suggestion that the GAC Chair Should Have Informed GAC Members of the ICANN Board’s 22 March 2014 Resolution Does Not Involve Board Action Subject to Reconsideration.**

The Requesters state that because the GAC Chair is a non-voting liaison on the NGPC, the GAC Chair is required to inform the GAC of her presence at meetings in which the NGPC considers issues pertaining to the public policy interests and the work of the GAC. The Requesters suggest that because the GAC Chair did not inform the GAC of her presence at

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<sup>49</sup> <http://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en.pdf>

<sup>50</sup> *Id.*

<sup>51</sup> *See, e.g.*, <https://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en.pdf>, <https://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en.pdf>

relevant meetings, and further failed to inform the GAC of the Board's 22 March 2014 Resolution before it was made public, reconsideration is appropriate. (Request 14-13, § 6, Pg. 10; Request 14-14, § 3, Pg. 2.)

In support, the Requesters rely on Article VI, Section 9.5 of ICANN's Bylaws, which provides in relevant part:

Non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization.

The Requesters' suggestion does not support reconsideration because the Requesters are challenging the conduct of the GAC Chair, not an action or inaction of the ICANN Board or ICANN staff. To the extent that the Requesters are challenging the action of the GAC Chair in her capacity as a non-voting liaison to the Board, it should be noted that no individual voting Board member or non-voting liaison speaks or acts for the Board. Accordingly, the Requesters have not presented a sufficient basis for reconsideration. A single non-voting liaison's actions in reporting to his or her appointing Advisory Committee is in no way a Board action.<sup>52</sup>

### **3. The Board Did Not Fail to Consider Material Correspondence in Passing the Resolutions.**

The Requesters state that the Board failed to consider material information in passing the Resolutions, including letters sent by the European Union, governmental organizations, and other stakeholders. (*See, e.g.*, Request 14-15, § 8, Pgs. 7-8; Request 14-17, § 8, Pgs. 7-8.) Specifically, the Requesters suggest that the Board failed to consider the following correspondence:

- 23 April 2013 Letter from the EFOR

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<sup>52</sup>Further, nothing in the Bylaws requires the GAC Chair to inform the GAC of her presence at NGPC meetings or otherwise report on resolutions passed by the NGPC. The Bylaws allow the non-voting liaisons the discretion to use materials provided to them for purposes of consulting with their respective committee or organization. However, the non-voting liaisons are not required to do so. (Bylaws, Art. VI, § 9.5.)



- 26 April 2013 Letter from the CIVC
- 20 June 2013 Letter from the International Trade Policy Wine Institute
- 9 July 2013 Letter from the Organisation for an International Geographical Indications Network
- 8 August 2013 Letter from the Napa Valley Vinters
- 19 August 2013 Letter from the EFOW
- 29 August 2013 Letter from the Long Island Wine Council
- 12 September 2013 Letter from the European Commission
- 7 November 2013 Letter from the European Commission
- 15 November 2013 Letter from the Organization of American States
- 3 February 2014 Letter from EU Member States, Norway, and Switzerland
- 19 March 2014 Letter from the European Parliament
- 26 March 2014 Letter from the European Commission
- 2 April 2014 Letter from the Rioja Governing Council

The Requesters' statements are unsupported.

First, the NGPC considered all the correspondence cited by the Requesters in its deliberation on the Resolutions. As to the 22 March 2014 Resolution, the NGPC has confirmed that it did consider these correspondence in the approved Minutes and Rationale for that resolution.<sup>53</sup> As to the 4 April 2014 Resolutions, in its Preliminary Report of the Meeting of the New gTLD Program Committee, which took place on 3-4 April 2014, the NGPC clearly stated that “the NGPC acknowledges the correspondence received on .WINE and .VIN since the

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<sup>53</sup> <http://www.icann.org/en/groups/board/documents/minutes-new-gtld-22mar14-en.htm#1.a>.

ICANN Singapore meeting, including,” among others, the 19 March 2014 Letter from the European Parliament and the 26 March 2014 Letter from the European Commission cited by the Requesters.<sup>54</sup> The list provided by the NGPC was intended to be a representative, and not exhaustive, list of the correspondence considered by the NGPC. The NGPC did consider all of the correspondence cited by the Requesters in its deliberation on the 4 April 2014 Resolutions and has likewise confirmed that in the approved Minutes and Rationale for that resolution.<sup>55</sup>

Further, even if the NGPC had not considered each individual letter cited by the Requesters, the NGPC specifically considered the range of views expressed in those letters throughout its consideration of the GAC advice relating to the .WINE and .VIN applications. In the Preliminary Report of the Meeting of the NGPC, which took place on 22 March 2014, the NGPC specifically stated that it considered, as part of its deliberations on .WINE and .VIN, the GAC’s Buenos Aires Communiqué.<sup>56</sup> The GAC’s Buenos Aires Communiqué detailed the varying views on .WINE and .VIN set forth in the correspondence cited by the Requesters:

Some members are of the view, after prolonged and careful consideration, that the existing safeguards outlined in the GAC’s Beijing Communiqué and implemented by the ICANN Board are appropriate and sufficient to deal with the potential for misuse of the .wine and .vin new gTLDs.

...

Other members consider that delegation of .wine and .vin strings should remain on hold until either sufficient additional safeguards to protect GIs are put into place in these strings to protect the consumers and businesses that rely on such GIs; or common ground has been reached for the worldwide protection of GIs via international fora and wide array of major trade agreements.<sup>57</sup>

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<sup>54</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

<sup>55</sup> <http://www.icann.org/en/groups/board/documents/minutes-new-gtld-04apr14-en.htm#1.a>.

<sup>56</sup> <https://www.icann.org/en/groups/board/documents/prelim-report-new-gtld-22mar14-en.htm>.

<sup>57</sup> *Id.*

Accordingly, while the 22 March 2014 Resolution and Rationale did not specifically identify each piece of correspondence cited by the Requesters, the NGPC did consider the information and views contained in such correspondence in its deliberations on .WINE and .VIN. Similarly, as noted above, the Preliminary Report of the Meeting of the New gTLD Program Committee, which took place on 3-4 April 2014 clearly reflects that the NGPC considered the range of views expressed in the correspondence cited by the Requesters.

In Request 14-16, the Requester also argues that, in passing the Resolutions, the Board failed to consider two letters sent by the European Commission to the GAC, including:

- 29 July 2013 letter from Linda Corugedo Steneberg to GAC members; and
- 19 September 2013 letter from Linda Corugedo Steneberg to the GAC Chair.

(Request 14-16, § 8, Pgs. 7-8.) These letters, however, were *not* sent to ICANN. Instead, both were addressed and sent only to members of the GAC. Article IV, Section 2.2.b. of the Bylaws states that reconsideration is not proper if “the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act.” (Bylaws, Art. IV, §2.2.b.) As such, though the letters were not considered in connection with the Resolutions, the NGPC was neither aware of the existence of the letters nor had it been provided the letters by the Requesters. Because the information could have been – but was not – submitted to the NGPC for consideration, reconsideration is not supported here.

**4. The Commission and Consideration of the Independent Legal Analysis of Professor Jérôme Passa Does Not Support Reconsideration.**

**a) Article XI-A Does Not Apply Because the Board Did Not Solicit Professor Passa’s Advice in Connection with the Cited Provision of the Bylaws.**

The Requesters claim that the Board violated Article XI-A, Subsections 1.3 and 1.6 by:  
(1) failing to consult with the GAC prior to seeking advice from Professor Passa; and

(2) not giving the GAC an opportunity to comment on Professor Passa’s advice.<sup>58</sup>

Article XI-A of the Bylaws applies to external expert advice sought for the purpose of “allow[ing] the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN.” (Bylaws, Art. XI-A, § 1.1.) As Professor Passa’s Independent Legal Analysis was not sought pursuant to Article XI-A of the Bylaws, the BGC finds that this suggestion by the Requesters does not support reconsideration.<sup>59</sup>

As discussed below, the GAC’s advice on the .WINE and .VIN applications was issued pursuant to the GAC’s authority as provided under Article XI, Section 2.1 of the Bylaws and Module 3.1 of the Guidebook.<sup>60</sup> Professor Passa’s opinion was obtained as part of the implementation of the New gTLD Program, and specifically pursuant to Module 3.1 of the Guidebook. Because the NGPC’s action in obtaining Professor Passa’s was not sought pursuant to Article XI-A of the Bylaws, the NGPC was not obligated to provide the GAC with the opportunity to comment on Professor Passa’s retention or expert opinion before the NGPC acted

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<sup>58</sup> Subsection 1.3(b) of Article XI-A provides that “[i]n the event that the Board determines . . . that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with [GAC] regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

Subsection 1.6 of Article XI-A provides that “[t]he [GAC], in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.”

<sup>59</sup> Subsection 1.5 of Article XI-1 provides that “[e]xternal advice pursuant to this Section shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN body in carrying out its responsibilities.” The Requesters argue that the use of the word “responsibilities” indicates that Article XI-A, Section 1 applies to expert advice sought for purposes other than aiding the policy-development process. (Request 14-13, § 3, Pg. 3.) However, the provisions of Subsection 1.5 are explicitly limited to advice sought “pursuant to this Section.”

<sup>60</sup> The GAC was formed to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.” (Bylaws, Art. XI, § 2.1.a.) Section 2.1.i of Article XI of the Bylaws provides that the GAC “may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” (*Id.* at § 2.1.i.)

on the GAC advice relating to .WINE and .VIN. Accordingly, the Requesters' position that the NGPC's consideration of Professor Passa's Independent Legal Analysis action on 22 March 2014 constitutes a violation of section 1.6 of Article XI-A of the Bylaws is unsupported.

Module 3.1 of the Guidebook, and not Article XI-A of the Bylaws (as cited by the Requesters), sets forth the parameters in which GAC Advice will be given under the New gTLD Program and also sets forth the process for considering the GAC's input with respect to expert advice regarding new gTLDs. Module 3.1 provides, in pertinent part:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board *may consult with independent experts*, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

(Guidebook, § 3.1) (emphasis added).

Under this provision, the Board has the discretion to seek independent expert opinion on the issues raised in the GAC's Advice. This provision does not state that the Board must consult with the GAC after independent consultation has been obtained before a decision can be taken. Notably, there is no reference in Module 3.1—or anywhere in the Guidebook—to Article XI-A of the Bylaws.

**b) The Scope of the Issues Considered by Professor Passa Does Not Support Reconsideration.**

The Requesters claim that “[t]he scope of [Professor Passa’s] analysis is intentionally limited,” that “the most essential question is left out of the analysis” (i.e., questions relating to disputes likely to arise following assignment of new gTLDs “during which the second-level domains open in the gTLDs will be exploited”), and that the scope of Professor Passa’s assignment “does not provide the necessary insights for the NGPC to respond adequately to

GAC's requests. (Request 14-15, § 8, Pgs. 13-14; *see also* Request 14-13, § 8, Pg. 14 (“It is debatable whether Mr. Passa’s expert legal advice is sufficiently thought through and pertinent and whether Mr. Passa has considered the politically sensitive background of this matter when issuing his advice.”).)

The Requesters do not claim, however, that Professor Passa failed to analyze and appropriately consider the questions and issues posed to him by the ICANN Board. Instead, the Requesters object to the scope of Professor Passa’s assignment. That is not a basis for reconsideration. As noted above, Module 3.1 of the Guidebook provides that the ICANN Board, in its discretion, “may consult with independent experts.” That the Board may also define the scope of its consultation with independent experts is equally encompassed by this provision.

**c) The Board Did Not Fail to Consider Material Information with Respect to the Independent Legal Analysis.**

The Requesters suggest that the Board failed to consider certain material findings in the Independent Legal Analysis. (Request 14-15, § 8, Pgs. 12-16; Request 14-13, § 8, Pgs. 14-16.) Specifically, the Requesters state that certain key points in the advice provided by Professor Passa were “completely ignored by the NGPC.” (Request 14-13, § 8, Pg. 14.) In support, the Requesters state only that the NGPC failed to quote or otherwise mention these specific points in the Rationale for the Resolutions. (*Id.*) The Requesters’ statement is unsupported.

As reflected in the 22 March 2014 Resolution:

[T]he NGPC commissioned an analysis of the legally complex and politically sensitive background on the GAC’s advice regarding .WINE and .VIN, ***which the NGPC considered as part of its deliberations on the GAC’s advice.***

Thus, contrary to the Requesters’ claim, the NGPC did consider the Independent Legal Analysis. That the NGPC did not recite or quote every sentence of the Independent Legal Analysis does not mean that the NGPC did not consider the entire report. The Requesters cite no

provision in the Guidebook, the Bylaws, or otherwise requiring the NGPC to quote the report in its entirety.

**d) The Requesters' Disagreement with the Conclusions of the Independent Legal Analysis is Not a Basis for Reconsideration.**

The Requesters suggest that parts of the Independent Legal Analysis are “severely wrong” insofar as Professor Passa relies on Article 22 of the TRIPS agreement in support of his finding that “a geographical indication does not enjoy absolute or automatic protection against any use of an identical or similar name by a third party.” (Request 14-15, § 8, Pgs. 14-15.) The Requesters note that Article 23 is the relevant provision. The Requesters also more generally suggest that “[i]t is debatable whether Mr. Passa’s external expert legal advice is sufficiently thought through.” (Request 14-13, § 8, Pg. 14; Request 14-19, § 8, Pg. 13.)

In this regard, the Requesters do not suggest that Professor Passa relied on false or inaccurate material information. Instead, the Requesters disagree with Professor Passa’s process and ultimate expert legal opinion. The Requesters’ substantive disagreement with Professor Passa’s legal opinion is not a basis for reconsideration.<sup>61</sup>

**5. Permitting Additional Time for Impacted Parties to Negotiate is Not Properly the Subject of a Request for Reconsideration.**

The Requesters challenge the Board’s 4 April 2014 Resolution insofar as it directed the President and CEO to not commence the contracting process for .WINE and .VIN for 60 days to “provide additional time for the relevant impacted parties to negotiate,” which the Requesters

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<sup>61</sup> Requesters also seek “clarification” on “how and under what circumstances the legal expert/author was selected,” what “background information” was submitted to Professor Passa, and the date the report was drafted. (*See, e.g.*, Request 14-13, § 8, Pg. 15.) The Requesters claim that absent such information, “the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties’ rights to be heard.” (*Id.*) The Requesters, however, fail to explain how this information request is properly subject to the reconsideration process set forth in ICANN’s Bylaws. The BGC concludes that it is not.

claim was contrary to GAC advice.<sup>62</sup> The Requesters note that while the NGPC stated that it was accepting the advice identified in the Singapore Communiqué, that Communiqué stated only that the GAC members “believe[d] the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter,” and did not mention the imposition of a deadline on negotiations. (RR 14-24, § 6, Pg. 8.) The Requesters suggest that that deadline “materially affects the Requesters and their ability to discuss and negotiate effectively.” (*Id.* § 6, Pg. 9.)

The Requesters have not stated a proper ground for reconsideration in this regard. Pursuant to ICANN’s Bylaws, Article IV, Section 2.2, a reconsideration request challenging Board action may be submitted only if the Requester is adversely affected by: (1) an action or inaction of the ICANN Board that was taken or refused to be taken without consideration of material information; and (2) an action or inaction of the ICANN Board that was taken as a result of the Board’s reliance on false or inaccurate information. (Bylaws, Art. IV, § 2.2.a-c.) Here, the Requesters simply disagree with the Board’s decision to include a 60-day window in which the impacted parties were encouraged to negotiate. That is not a proper basis for reconsideration.

#### **6. The Requests Are Premature.**

To establish standing to bring a reconsideration request under ICANN’s Bylaws, each Requester must demonstrate that it has been “adversely affected” by the Resolutions at issue in the Requests. (Bylaws, Art. IV, § 2.2.) The Requesters here have not met this burden because any “adverse affect” claimed by the Requesters presupposes that .WINE and .VIN have already been delegated without the safeguards preferred by the Requesters. However, at this point neither .WINE nor .VIN has been delegated. Indeed, the NGPC, in its 4 April 2014 Resolutions,

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<sup>62</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.



specifically “direct[ed] the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do.”<sup>63</sup> The adverse impact that the Requesters cite is therefore speculative at present and is insufficient to support reconsideration.<sup>64</sup>

## **VI. Recommendation**

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore recommends that the Reconsideration Requests be denied without further consideration.

Although the BGC recommends that the Requests be denied, the BGC and the NGPC want to acknowledge the Requesters for having participated in the reconsideration process and recognize the Requesters’ concerns. For the benefit of all relevant impacted parties, ICANN continues to encourage the Requesters and the Applicants to negotiate and discuss these sensitive issues.

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<sup>63</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>

<sup>64</sup> Requesters also object to language in the 4 April Resolutions recommending that “the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.” (Request 14-17, § 6, Pg. 3; Request 14-24, § 6, Pg. 10; Request 14-25, § 6, Pg. 10; Request 14-26, § 6, Pg. 3.) However, Requesters do not explain how this recommendation is properly the subject of a reconsideration request under ICANN’s Bylaws. Instead, it appears that the Requesters simply disagree with the recommendation, but Requesters’ substantive disagreement with the recommendation does not constitute a basis for reconsideration.