

## 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

---

<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

---

Signature

---

Date