

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`, `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 3rd, 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 laws¹ on unfair competition and consumer protection, these acts are illegal (articles 5, 6 and 7 of Law 3/1991, of 10th January, on Unfair Competition and articles 19 and 20 of Royal Legislative Decree 1/2007, of 16th 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 10th 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

¹ All Spanish laws and regulations can be founded at 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 10th 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 29th 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 4th 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 26th 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 2nd 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 9th 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 7th 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 29th July 2013 for information.

- Law 24/2003, of 10th 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 27th 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 2nd April 2014 addressed, inter alia, to the ICANN Board of Directors.

Terms and Conditions for Submission of Reconsideration Requests

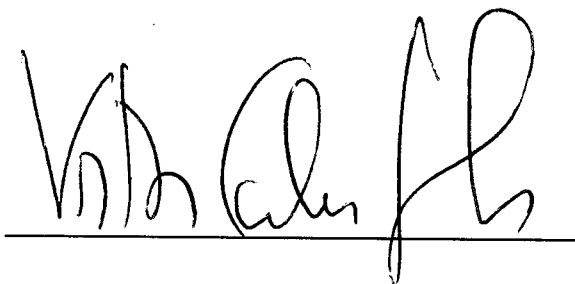
The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

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. P.', written over a horizontal line.

Signature

8th April 2014

Date