

## 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**

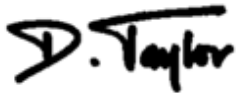
The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

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