

## **Reconsideration Request Form**

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

### **1. Requester Information**

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

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

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

**Board action/inaction**

**Staff action/inaction**

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

The undersigned seek reconsideration of Resolutions 2014.04.04.NG01 – 2014.04.04.NG04 (the "Resolutions") issued by the ICANN Board New gTLD Program Committee ("NGPC"). The relevant parts of the Resolutions read as follows:

*"Whereas, on 9 September 2013, in a letter to the ICANN Board, the Governmental Advisory Committee (GAC) advised the Board that the GAC had finalized its consideration of the strings .WINE and .VIN, that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and that the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, on 20 November 2013, the GAC issued its Buenos Aires Communiqué, wherein it suggested that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

*Whereas, the NGPC asked staff to commission an independent legal analysis ("Independent Legal Analysis") of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN.*

*Whereas, on 22 March 2014, in Resolution 2014.03.22.NG01, the NGPC "accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and direct[ed] the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process."*

*Whereas, as noted in the Rationale of Resolution 2014.03.22.NG01, the NGPC*

considered the Independent Legal Analysis as part of its deliberations on the GAC's advice, which is published at <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf> [PDF, 771 KB].

Whereas, on 27 March 2014, in the Singapore Communiqué, the GAC noted that "there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6" in the ICANN Board's final deliberation of Resolution 2014.03.22.NG01 and advised that the ICANN Board reconsider the matter before delegating these strings.

Whereas, in the Singapore Communiqué, the GAC further advised that "concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."

Whereas, the NGPC has reviewed and considered the matter set forth in the Singapore Communiqué, specifically the issue raised by the GAC relating to its suggestion of a possible process violation or procedural error under ICANN Bylaws Article XI-A, Section 1, subsection 6.

Whereas, the NGPC recognizes that some GAC members remain concerned about the .WINE and .VIN applications, and the NGPC recognizes that this is a matter of great importance to these GAC members, as well as to the interested applicants for these top level domains.

Resolved (2014.04.04.NG01), the NGPC accepts the GAC advice identified in the Singapore Communiqué as it relates to the applications for .WINE and .VIN.

Resolved (2014.04.04.NG02), upon having considered the matter set forth in the GAC Singapore Communiqué suggesting that there may have been a process violation or procedural error, the NGPC concludes that there has been no process violation or procedural error under the Bylaws.

Resolved (2014.04.04.NG03), the NGPC directs the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do.

Resolved (2014.04.04.NG04), the NGPC recommends that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.

#### **Rationale for Resolutions 2014.04.04.NG01 – 2014.04.04.NG04**

The NGPC's action today, addressing the Governmental Advisory Committee's ("GAC") advice in the Singapore Communiqué concerning the .WINE and .VIN applications, is part of the ICANN Board's role to address advice put to the Board by the GAC. Article XI, Section 2.1 of the ICANN Bylaws <http://www.icann.org/en/about/governance/bylaws#XI> permits the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."

*Module 3.1 of the Applicant Guidebook ("AGB") sets forth the parameters in which GAC Advice will be given under the New gTLD Program. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.*

#### Factual Background

*The GAC previously issued advice to the Board on the New gTLD Program, and specifically on the .WINE and .VIN applications, through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning the .WINE and .VIN applications. In the Buenos Aires Communiqué, the GAC suggested that the Board may "wish to seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. GAC members may wish to write to the Board to further elaborate their views." ([https://gacweb.icann.org/download/attachments/33849634/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1390438464000&api=v2](https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1390438464000&api=v2) [PDF, 97 KB].)*

*Following the Buenos Aires Communiqué, the NGPC directed staff to commission independent legal analysis as to whether international law or national law in wine-growing regions -- France, Italy, Spain, Australia, elsewhere -- establish a bar that would entitle governments or administrative agencies to prevent administration of the .WINE and .VIN gTLDs and whether any rights or protections granted to wine-related geographic indications impose a duty on ICANN to provide for protection at the second level if the .WINE or .VIN strings were to be delegated (the "Independent Legal Analysis").*

*The Independent Legal Analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions." (<http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf> [PDF, 771 KB] at Pg. 7.)*

*On 22 March 2014, the NGPC adopted Resolution 2014.03.22.NG01, whereby it "accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and direct[ed] the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process." (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.) The NGPC noted that it considered the Independent Legal Analysis as part of its deliberations on the GAC's advice. (See *id.*) As part of Resolution 2014.03.22.NG01, the NGPC published the Independent Legal Analysis at <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en.pdf>*

[PDF, 771 KB].

On 27 March 2014, the GAC published its Singapore Communiqué. On the topic of .WINE and .VIN, the GAC stated as follows:

The GAC notes the NGPC Resolution 2014.03.22.NG01 concerning .wine and .vin as well as its rationale. In the final deliberation of the Board there appears to be at least one process violation and procedural error, including in relation to ByLaws Article XI-A, Section 1 subsection 6 which states:

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

The GAC therefore advises:

That the Board reconsider the matter before delegating these strings. The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.

<https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=1&modificationDate=1395925159241&api=v2>

[PDF, 448 KB].)

#### Discussion and Analysis

In sum, the NGPC has accepted the GAC advice and has carefully reviewed and evaluated whether there was a procedure or process violation under the Bylaws. The NGPC has determined that there was not because, among other reasons, ICANN did not seek the Independent Legal Analysis as External Expert Advice pursuant to Article XI-A, or any other portion of the Bylaws.

The GAC's advice on the .WINE and .VIN applications was issued pursuant to the GAC-related procedures in Module 3.1 of the Applicant Guidebook and not as External Expert Advice for purposes of the policy development process on new gTLDs, which was concluded in August 2007. Rather, the Independent Legal Analysis was obtained as part of the implementation of the New gTLD Program.

Under Module 3.1 of the Guidebook, the Board has the discretion to seek independent expert analysis on issues raised in the GAC Advice on new gTLD applications. This provision does not mention a Board consultation with the GAC after independent analysis has been obtained and before a decision is taken. There is no reference in Module 3.1, or elsewhere in the Applicant Guidebook, to Article XI-A, or any of its subsections.

Further, because the NGPC did not " . . . determine[] to take an action that is not consistent with the Governmental Advisory Committee advice, . . ." the NGPC did not "inform the Committee [of its determination] and state the reasons why it decided to not follow the advice" (Bylaws, Article XI, Section 2.1.j). Specifically, as noted in the Rationale of Resolution 2014.03.22.NG01, "[t]he action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC 'has finalized its

consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process." (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.) The NGPC obtained the Independent Legal Analysis, which it has the discretion to do under the Module 3.1 of the Applicant Guidebook, and in part at the suggestion of the GAC. Further, when the GAC suggested that the NGPC may want to seek such advice, the GAC did not ask the NGPC to provide the GAC with that advice (the Independent Legal Analysis) before taking action and accepting the GAC's advice on the .WINE and .VIN applications.

#### Decision

The NGPC has taken the GAC's suggestion of a potential process violation or procedural error very seriously and recognizes the import of the matters at issue. After careful consideration, the NGPC has concluded that there was no process violation or procedural error under the Bylaws, particularly because the Independent Legal Analysis was not sought as External Expert Advice pursuant to Article XI-A, or any other Bylaws provision. Rather, the Independent Legal Analysis was sought pursuant to Module 3.1 of the Applicant Guidebook, and partly at the GAC's suggestion.

Although NGPC did not find a process violation or procedural error under the Bylaws, consistent with ICANN's commitment to transparency, ICANN did attach to Resolution 2014.03.22.NG01 the Independent Legal Analysis concerning .WINE and .VIN. Further, for ease of reference, ICANN will provide a copy of the Independent Legal Analysis directly to the GAC.

Additional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting to allow the relevant impacted parties additional time to try to work out their differences.

Further, the full Board should consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.

In taking this action today, the NGPC acknowledges the correspondence received on .WINE and .VIN since the ICANN Singapore meeting, including:

- [Letter dated 19 March 2014 \[PDF, 120 KB\]](#) from Mr. Martin Schulz, President, The European Parliament
- [Letter dated 26 March 2014 \[PDF, 141 KB\]](#) from Ms. Linda Corugedo-Steneberg, Director – European Commission, Directorate-General for Communications Networks, Content and Technology
- [Letter dated 1 April 2014 \[PDF, 500 KB\]](#) from Mr. Sergio Zingarelli, President - Consorzio Vino Chianti Classico
- [Letter dated 2 April 2014 \[PDF, 68 KB\]](#) from Ms. Linda Corugedo-Steneberg, Director – European Commission, Directorate-General for Communications Networks, Content and Technology

- Letter dated 2 April 2014 [PDF, 1.23 MB] from Mr. Jean-Luc Barbier, General Director - Comité Interprofessionnel du Vin de Champagne (CIVIC)
- Letter dated 3 April 2014 [PDF, 226 KB] from Mr. Manuel de Novae Cabral, Presidente - Instituto os Vinhos do Douro e do Porto
- Letter dated 3 April 2014 [PDF, 739 KB] from Mr. Steven L. Bate, Executive Director - The Long Island Wine Council
- Letter dated 3 April 2014 [PDF, 924 KB] from Ms. Linda Reiff, President & CEO - Napa Valley Vintners
- Letter dated 3 April 2014 [PDF, 179 KB] from Mr. César Saldaña, Director General, Consejo Regulador Do Jerez-Xérès-Sherry

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

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

The Resolutions were published on 4 April 2014.

The resolution is posted in the ICANN website under <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

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

The undersigned and the French GAC representatives to the Governmental Advisory Committee became aware of the content of the Resolutions on 5 April 2014.

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

The French Government is mandated by the French Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.04.04.NG01, NG02, NG03 and NG04. The French government has serious concerns with three out of four aspects of the Resolutions:

(i) the NGPC's position that there was no process violation or procedural error in accordance with Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for failing to give the GAC an opportunity to comment on an opinion issued to the NGPC by a University Professor, Jérôme Passa;

(ii) the 60 days deadline given to the interested parties to negotiate; and

(iii) the question raised by the NGPC as to whether ICANN is the proper venue in which to resolve the issues raised by the .VIN and WINE TLDs.

(i) The NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Mr Passa

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

The French Government however maintain their position, detailed in its Request for Reconsideration regarding Resolution 2014.03.22.NG01, that the NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Pr. Passa was a violation of Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for the reasons set out in Section 8. 2) (b) below.

(ii) The 60 days deadline

In the Resolutions, the NGPC concluded that "[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting".

First, the French Government notes an inconsistency in the Resolutions. Indeed, the Resolutions state that "the NGPC accepts the GAC advice identified in the Singapore Communiqué". Such advice was as follows:

*"The GAC therefore advises:*

*That the Board reconsider the matter before delegating these strings.*

*The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter."*

Nowhere in its Singapore Advice did the GAC mention a deadline to reach an agreement and the objective pursued by the GAC is that the applicants and interested parties do reach an agreement, without any arbitrary deadlines. Therefore, the deadline of 60 days set by the Resolutions considerably restricts the GAC advice and therefore the NGPC does not appear to have fully accepted GAC advice as it states. This is not a minor point as a deadline appearing to allow the applications to proceed regardless of whether agreement is reached at the expiry of a certain time is clearly not conducive to reaching agreement.

The undersigned stresses that he fully appreciates that the applicants have business interests and thereby a wish for the delegation of .VIN and .WINE to proceed rapidly.

The French Government is not adverse to the delegation of these strings per se, it simply seeks sufficient and appropriate safeguards to prevent abuse of consumers around the globe and risk material detriment to the interests of the grape growers and wine and spirit producers that rely on Geographical Indications for their livelihood.

The legally complex and politically sensitive background makes for a challenging negotiation by itself plus whilst there is only one applicant for .VIN, there are three applicants for .WINE each with differing interests and business plans with varied ideas and commitment of how domain names would be allocated to third parties. It is important that these discussions can come to conclusion without interference from outside entities and the arbitrary deadline of 60 days serves to stifle the discussions.

Indeed, Resolution 2014.03.22.NG01 which precedes this Resolution 2014.04.04.NG01-2014.04.04.NG04 shocked the French Government as the ICANN NGPC effectively brought a close to the negotiations without any warning when they were in fact far from completion. The subsequent Resolution 2014.04.04.NG01-2014.04.04.NG04 perhaps serves to mitigate this earlier Resolution, by setting a time frame.

But this time frame is not based on the state of the negotiations and is an arbitrary one, which only encourages successful negotiations if the outcome is dependent on the fact of a negotiated settlement occurring. Depending on the extent of the applicants' cooperation and good faith, 60 days to reach an agreement between the applicants and the interested parties, will most likely not be sufficient and risks simply postpone the problem rather than fully addressing it.

As far as the French government is concerned, it is of uttermost importance that the applicants negotiate with the interested parties in good faith so as to ensure that the agreement ultimately reached is fully balanced, thought through and transparent. This is not something that can be achieved under the pressure of an artificial deadline of 60 days. The sole inclusion of the 60 days deadline in the Resolution serves to work against the parties negotiating rather than encouraging it as the GAC requested in its Singapore Communiqué. This is why there should not be a time limitation but rather a situation that enables both sides to come to an agreement, before the .VIN and .WINE are delegated.

The Resolutions' wording that "[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting" would appear to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, as has been the case in the past when deadlines were set, the applicants may be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once this deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to its successful applicant after contention set resolution. Such a situation is far from being conducive to good faith negotiations and to reaching a balanced agreement.

It may be that this is not the intention of the Resolution as a whole and that when 2014.04.04.NG03 is considered together with 2014.04.04.NG04 that the applications for



.WINE and .VIN will still not proceed and commence the contracting process until the full Board has considered the larger implications. It is hard for the undersigned to know which the correct interpretation is, and as such the Resolution is unclear and would benefit from being reconsidered so as to avoid misunderstanding and different interpretations.

In addition, if the first interpretation of the Resolutions is accurate, i.e. if the Resolutions' wording actually means that, if no agreement is reached within the 60 days deadline set by the NGPC, the new gTLDs for .VIN and .WINE will proceed to the contracting phase (though for .WINE the applicants remain in a contention set so cannot proceed immediately), this would also mean that the delegation of the .VIN and .WINE TLDs would be conducted without further consultation of the GAC. This would contradict the GAC's advice in its Singapore Communiqué that the Board should "reconsider the matter before delegating these strings" and "the GAC needs to consider the elements more fully" while such advice has been accepted by the NGPC in the Resolutions.

It would therefore seem that there is an inconsistency in the wording used by the NGPC in the Resolutions and that the NGPC would need to clarify its statements with respect to the consequences of a failure to reach an agreement within the 60 days deadline.

(iii) Whether ICANN is the proper venue in which to resolve the issues raised by the .VIN and WINE TLDs

The Resolutions raise the question of whether ICANN is the proper venue to resolve the issues raised by the .VIN and .WINE TLDs. ICANN needs to comply with International Laws on the subject of Geographical Indications ("GI"s) which are recognized by the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) which currently has 159 Member States. As such, GIs need sufficient protection in the .VIN and .WINE TLDs and ICANN needs to ensure sufficient precautions are in place to prevent infringement of GIs. Otherwise the French Government is of the opinion that the TLDs should not be delegated. Indeed this very point is included in the opinion of Pr. Passa, though it appears to have been overlooked, where he states:

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

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

As reflected in section 6, consumers and right holders are the stakeholders affected by

resolution 2014.04.04.NG01, NG02, NG03 and NG04. The protection of their legitimate rights has a public value as demonstrated above. The French Government represents that public interest and as such, it is also entitled to assert this reconsideration request.

If no acceptable agreement is reached between the relevant applicants and the interested parties within the 60 days deadline and the .WINE and .VIN TLDs are delegated as a consequence, as suggested by the text of the Resolutions, the direct outcome of this would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

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

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the French Government fears that the potential for abuse would considerably increase in online spaces were no specific protection to be granted to GIs. If wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse and fraudulent activities. The continued abuse in the existing TLDs such as .com, .net and ccTLDs demonstrates this is a valid concern. The global scope of having a new gTLD dedicated to WINE or VIN with a lack of clear rules and safeguards will only exacerbate these problems including:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited products may be facilitated with wide implications, including commercial detriment and health risks for consumers (non-compliance with product specifications);
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs as they would see it as a rogue space and this is certainly not the result expected or wished for by the applicants of these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Europe and also across the globe and we refer here to the numerous letters from wine producers and grape growers in the wine community but also is an incredible missed opportunity to create a secure and safe space in the DNS which is

supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The French Government therefore favors and calls for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

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

This Request relates to a Board action, namely the adoption of the Resolutions, which is based upon inaccurate, false, or misleading materials presented to the Board. The Resolutions and Resolution 2014.03.22NG01, which the French Government already sought the reconsideration of (

<http://www.icann.org/en/groups/board/governance/reconsideration/14-15/request-french-government-08apr14-en.pdf>), are both partly based on the following elements: the GAC Chair letter to the ICANN Board dated 9 September 2013 as part of the GAC Advice on .VIN and .WINE and Pr. Jerome Passa's analysis. In this respect, the French Government reiterates the statements included in their Request for Reconsideration regarding Resolution 2014.03.22NG01 that such materials are inaccurate, false, and/or misleading for the following reasons:

### **(i) The GAC's alleged consensus**

One of the grounds for the Resolutions is the GAC's alleged statement to the ICANN Board that "there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process". Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013. However:

- This letter was sent to the ICANN Board without being circulated to GAC members first.
- As explained in the Request for Reconsideration regarding Resolution 2014.03.22NG01 filed by the French Government, it is also clear that the statement quoted in the Rationale of Resolution 2014.03.22.NG01 and re-iterated in 2014.04.04.NG01-2014.04.04.NG04 that the GAC "has finalized its consideration of the strings .wine and .vin" and further advised that "the applications for .WINE and .VIN should proceed through the normal evaluation process" is not a consensus view of the GAC. As such the NGPC is taking action that is not consistent with the GAC Advice, it is rather taking action based on a letter that was never supported by a consensus of the GAC (see subsequent letters from the European Commission already referred to).
- And as can be noted from the intense GAC discussions in their meetings and Communiqués since this letter of 9 September 2013 which was used as a basis for the Resolutions of 22 March 2014 and 4 April 2014, the fact of the matter is that the

GAC has not finalized its consideration as claimed in the letter. Indeed, even the latest GAC Singapore Communiqué states that: "The GAC needs to consider the above elements more fully". It does not appear to the French Government to be an indication that the GAC finalized its consideration back in September 2013.

This letter is therefore clearly misleading.

(iii) The failure to give the GAC an opportunity to comment on Pr. Passa's opinion

Although required to do so pursuant to Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws, the NGPC did not provide the GAC with an opportunity to comment on the legal opinion issued to the ICANN Board NGPC by Jérôme Passa. Although not inaccurate, false or misleading per se, Mr Passa's opinion, which is one of the materials considered by the NGPC to issue the Resolutions, is marred by a procedural error. It should therefore be considered as misleading and inaccurate.

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

Although recognized by the GAC, the NGPC refuses, in the Resolutions, to acknowledge the procedural issues raised. The NGPC indeed explains that "the Module 3.1 of the Applicant Guidebook (AGB) sets forth the parameters in which GAC Advice will be given under the New gTLD Program" and that Module 3.1 "does not mention a Board consultation with the GAC after independent analysis has been obtained and before a decision is taken".

The French Government however maintain its statements included in their Request for Reconsideration regarding Resolution 2014.03.22NG01 that the NGPC's failure to provide the GAC with an opportunity to comment on the legal advice issued by Pr. Passa was a violation of Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws for the following reasons:

- Module 3.1 "GAC Advice on New gTLDs", referred to by the NGPC, provides that "[T]he Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures". The subject matter areas of the objection procedures is defined by Module 3.2.1 relating to the Grounds for Objection which provides that "[A] formal objection may be filed on any one of the following four grounds (...) String Confusion Objection (...), Legal Rights Objection (...), Limited Public Interest Objection (...) and Community Objection". The issues relating to the .WINE and .VIN TLDs have never been raised in any of the types of objections listed in Module

3.2.1. and therefore, the undersigned finds it surprising to note that the NGPC considers that Pr. Passa's advice was provided in accordance with Module 3.1.

- Article XI-A, Section 1, paragraph 6 of the ICANN Bylaws refers to "any external advice" and does not restrict the GAC's opportunity to comment on advice sought pursuant to the Bylaws provision.
- It is difficult for the French Government to understand how the NGPC can consider that the Applicant Guidebook supersedes the ICANN Bylaws. Indeed, there are repeated references to the ICANN Bylaws in the Applicant Guidebook which reflect the fact that the Applicant Guidebook is governed by the ICANN Bylaws which govern any actions from ICANN in accordance with article 4 of ICANN's Article of Incorporation.
- The NGPC claims that "when the GAC suggested that the NGPC may want to seek such advice, the GAC did not ask the NGPC to provide the GAC with that advice (the Independent Legal Analysis) before taking action and accepting the GAC's advice on the .WINE and .VIN applications". However, the French Government considers it obvious that if the GAC asked the NGPC to seek advice, the GAC was interested in reading such advice and thus actually expected such advice to be shared with it.
- The undersigned notes that Pr. Passa provided a legal opinion on another "problematic" TLD, namely .AMAZON on 31 March 2014. On 7 April 2014, the GAC received a letter from Steve Crocker, the Chair of the ICANN Board of Directors, where he indicated that "ICANN provides this analysis to keep the parties informed and welcomes any additional information that they believe is relevant to the NGPC in making its final decision on the GAC's advice on .AMAZON (and related IDNs)". Therefore, the undersigned finds it strange that the same process was not followed with respect to Mr Passa's legal opinion on the .WINE and .VIN TLDs, especially considering that the GAC never requested the legal opinion on .AMAZON to be shared with it.

(iv) The content of the legal opinion issued by Pr. Passa

Concerning the legal opinion provided by Pr. Passa, the French Government, like the European Commission (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), questions the transparency of such legal opinion given that the process of appointing Pr. Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded, has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a "clear understanding of the legally complex and politically sensitive background" on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Pr. Passa's external expert legal advice is sufficiently in depth and unclear whether Pr. Passa has considered the politically sensitive background of this

matter when issuing his advice. For example, Pr. Passa only refers to the application filed by one of the applicants, namely the Donuts company, without consideration for the other applicants for .WINE. It therefore appears that additional legal advice, from other experts, designated in a transparent manner, should be considered.

It is also specifically worthwhile noting that Pr. Passa clearly states in his opinion that, if ICANN "had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD." This would certainly appear to be a key point in the advice provided by Pr. Passa, although it is completely ignored by the NGPC as it is not mentioned at all in the Rationale for the Resolutions.

The Rationale seeks to justify the Resolutions by quoting from another part of the expert analysis saying that "there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions". The undersigned agrees with this point but underlines that if the registry(ies) for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Pr. Passa is of the opinion that ICANN should reject the application.

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

The undersigned respectfully request from ICANN to:

- (i) Reconsider the Resolutions 2014.04.04.NG02 – 2014.04.04.NG04;
- (ii) As part of its reconsideration, take into account the existing relevant materials which failed to be considered when reaching the Resolutions as well as the lack of consensus of the GAC in this matter;
- (iii) Grant the necessary time to applicants and interested parties to reach a balanced, satisfactory and adequate agreement before the delegation of the .WINE and .VIN gTLD strings, without setting a deadline for doing so.
- (iv) Clarify the interplay between Resolutions 2014.04.04.NG03 and 2014.04.04.NG04 so that the parties to the discussions can have a clear understanding and not have different interpretations of the Resolutions.

If the intention of 2014.04.04.NG03 is to allow the applications to proceed to contracting after the 60 day deadline then this is a clear concern to the undersigned. However, it may be that this is not the intention of the Resolution as a whole when 2014.04.04.NG03 is considered together with 2014.04.04.NG04 which recommends that the full Board consider the larger implications of the legally complex and politically sensitive issues in relation to the .WINE and .VIN applications.

Indeed, the French Government would like to know at what point the full Board will consider the larger implications: in parallel to the 60 day period that negotiations are undertaken to find an acceptable solution to the legally complex and politically sensitive subject, or after the 60 days period is over?

If Resolutions 2014.04.04.NG03 and 2014.04.04.NG04 together mean that the contracting process will not commence until the expiry of those 60 days as well as the full Board consideration of whatever the state of play is at the end of those 60 days together with the wider implications then the two Resolutions appear to be compatible i.e. the process itself will not continue until both the full Board has considered matters and in the meantime the GAC has had further time as per its advice in the Singapore Communiqué to “consider the elements more fully”.

This is why the French Government requests that the contracting process does not commence immediately after the 60 day period is over, but only when the full Board has considered the larger implications as per 2014.04.04.NG04 and the GAC has also been in a position to consider the elements more fully as per its advice in the Singapore Communiqué.

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

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

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

In 1990 the Law on Protection of Appellations of Origin of 1919 was amended substantially and has since been incorporated into the Consumer code (Code de la Consommation). Later on, the changes required by EC Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs were incorporated to the French Law by the Law 94-2 of 3 January 1994 on the recognition of the quality of agricultural products and foodstuffs.

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

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<sup>1</sup> Journal Officiel, August 5, 1905.

origin as follows:

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

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

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

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

- European legislation:

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

Yes

No

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

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

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

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

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

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

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

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

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

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

18<sup>th</sup> April 2014

Signature

Date



**Pierre SELLAL**