

**RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**  
**RECONSIDERATION REQUESTS 14-13, 14-14, 14-15, 14-16, 14-17, 14-18, 14-19, 14-20,**  
**14-21, 14-22, 14-24, 14-25, 14-26**

**14 MAY 2014**

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The Requesters, which include representatives of the European Commission, the United Kingdom Government, the French Government, the Spanish Government, various GI Organizations,<sup>1</sup> the Italian Government, the Portuguese Government, the Luxembourg Government, and the Swiss Government,<sup>2</sup> seek reconsideration of one or more of the NGPC Resolutions 2014.03.22.NG01, 2014.04.04.NG01, 2014.04.04.NG02, 2014.04.04.NG03, and 2014.04.04.NG04, which relate to the applications for .WINE and .VIN.

**I. Brief Summary.**

Afilias Limited, dot Wine Limited, and June Station, LLC applied for .WINE and are in a contention set. Holly Shadow, LLC applied for .VIN. The Requesters, various national governments and entities asserting the interests of grape growers and wine and spirit drink producers, request reconsideration of one or more NGPC<sup>3</sup> resolutions: (1) 2014.03.22.NG01 (“22 March 2014 Resolution”); and (2) 2014.04.04.NG01, 2014.04.04.NG02, 2014.04.04.NG03,

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

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

<sup>3</sup> New gTLD Program Committee.

and 2014.04.04.NG04 (“4 April 2014 Resolutions”) (collectively, the “Resolutions”), which relate to the applications for .WINE and .VIN.

In the 22 March 2014 Resolution, the NGPC “accept[ed] the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin” and, consistent with that advice, directed “that the applications for .WINE and .VIN should proceed through the normal evaluation process.”<sup>4</sup> As part of its deliberations, the NGPC considered, among many other things, the independent analysis of French Law Professor Jérôme Passa (“Independent Legal Analysis”) on this legally complex and politically sensitive matter.

After the NGPC approved the 22 March 2014 Resolution, in its Singapore Communiqué ICANN’s Governmental Advisory Committee (“GAC”) advised the Board that it believed that the NGPC had violated ICANN’s Bylaws, including Article XI-A, Section 1, Subsection 6, by failing to provide the GAC with the opportunity to comment on the Independent Legal Analysis before the NGPC accepted the GAC’s advice on the .WINE and .VIN applications. The GAC further advised that the Board “reconsider the matter” and that “applicants [for .WINE and .VIN] and interested parties [] be encouraged to continue their negotiations” with regard to additional safeguards for the proposed strings.<sup>5</sup>

On 4 April 2014, in response to the GAC’s Singapore Communiqué, the NGPC adopted the 4 April 2014 Resolutions, which stated that the NGPC: (1) “conclude[d] that there ha[d] been no process violation or error under the Bylaws” with respect to the 22 March 2014 Resolution; (2) “direct[ed] the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of

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<sup>4</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.

<sup>5</sup> <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=1&modificationDate=1395925159241&api=v2>.

publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do;” and (3) “recommend[ed] that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members.”<sup>6</sup>

On 8 April 2014, 9 April 2014, and 18 April 2014, the Requesters filed their Requests, seeking reconsideration of the Resolutions. Specifically, one or more of the Requesters claim that: (i) the Resolutions were based on information transmitted in violation of internal GAC Operating Principles; (ii) the Board failed to consider material information in passing the Resolutions; (iii) the Board relied on false or misleading information in passing the Resolutions; and (iv) the Board breached ICANN’s Bylaws with respect to the commission and consideration of external expert legal advice.

The BGC concludes that there is no evidence that the Board’s actions in adopting the Resolutions support reconsideration. As is discussed in further detail below, the Board: (i) properly considered GAC advice provided to the Board in accordance with the procedures set forth in ICANN’s Bylaws and the gTLD Applicant Guidebook; (ii) did not fail to consider any material information in passing the Resolutions; (iii) did not rely on false or misleading information in passing the Resolutions; and (iv) did not breach ICANN’s Bylaws with respect to the commission and consideration of external legal advice.

Further, the BGC notes that although the Requesters are concerned that the delegation of .WINE and .VIN without the safeguards preferred by the Requesters will adversely impact the Requesters, at present this remains uncertain and is therefore insufficient to establish the necessary Bylaws-mandated criteria to support the Reconsideration Requests.

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<sup>6</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

## **II. Facts.**

### **A. Background Facts.**

Afilias Limited, dot Wine Limited, and June Station, LLC applied for .WINE and are in a contention set. Holly Shadow, LLC applied for .VIN (collectively, the “Applicants”).<sup>7</sup>

On 11 April 2013, in its Beijing Communiqué, the GAC advised the Board not to proceed beyond initial evaluation on the .WINE and .VIN applications, noting that “further GAC consideration [of those strings] may be warranted.”<sup>8</sup>

On 18 April 2013, ICANN posted the Beijing Communiqué and officially notified applicants of the advice,<sup>9</sup> triggering the 21-day applicant response period pursuant to the Applicant Guidebook (“Guidebook”) Module 3.1.

From 23 April 2013 to 4 June 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address GAC advice regarding safeguards applicable to broad categories of new gTLD strings.<sup>10</sup>

On 22 May 2013, ICANN published applicant responses to the GAC’s Beijing Communiqué, which included the Applicants’ responses to the GAC’s Advice regarding the .WINE and .VIN applications.<sup>11</sup>

On 4 June 2013, the NGPC accepted the advice in the Beijing Communiqué.<sup>12</sup>

The National Appellation of Origin Wines and Brandy Producers (“CNAOC”), European Federation of Origin Wines (“EFOW”), the Comité Interprofessionel du Vin de Champagne

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<sup>7</sup> June Station, LLC and Holly Shadow, LLC are both affiliated with Donuts, Inc.

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[https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013\\_Final.pdf?version=1&modificationDate=1365666376000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2).

<sup>9</sup> <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>.

<sup>10</sup> <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>.

<sup>11</sup> <http://newgtlds.icann.org/en/applicants/gac-advice/beijing46> .

<sup>12</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm>.

(“CIVC”), the International Trade Policy Wine Institute, and the Organisation for an International Geographical Indications Network sent letters to the Board regarding their views on the delegation of .WINE and .VIN on 19 April 2013, 23 April 2013, 26 April 2013, 20 June 2013, and 9 July 2013, respectively.

On 18 July 2013, in its Durban Communiqué, the GAC advised the Board that it was continuing to consider the .WINE and .VIN applications, and that it needed an additional thirty days to conclude its consideration “due to the complexity of the matter.”<sup>13</sup>

The Napa Valley Vinters, the EFOW, and the Long Island Wine Council sent letters to the Board regarding their views on the delegation of .WINE and .VIN on 8 August 2013, 19 August 2013, and 29 August 2013, respectively.

On behalf of the GAC, the GAC Chair sent a letter dated 9 September 2013 (“9 September 2013 Letter”) to the Board advising that the GAC had “finalized its consideration of the strings .wine and .vin” and that “the applications should proceed through the normal evaluation process.”<sup>14</sup> The letter stated that “[w]hile there is no GAC consensus advice on specific safeguards, it deserves to be noted that the crux of the matter relates to the handling of geographic indications, for which there is a range of views among the GAC membership,” and that “[t]here is no international agreement among governments about how to treat geographical indications and, as a consequence, no basis for an agreement in the GAC on safeguards that would offer additional protections.”<sup>15</sup> Finally, the letter indicated that “[t]he GAC or its

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<sup>13</sup> <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.

<sup>14</sup> <https://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en.pdf>. The date on the GAC advice letter from the GAC Chair indicates 9 September 2013, but it was not received until 11 September 2013. Because the final letter was not available until 11 September, it was not considered as part of the NGPC’s action on 10 September 2013.

<sup>15</sup> *Id.*

members may communicate further details to the Board as to the nature of the differences in views.”<sup>16</sup>

On 10 September 2013, the NGPC accepted the advice in the Durban Communiqué concerning .WINE and .VIN (indicating that the GAC needed more time to consider the matters) and noted that it stood ready to hear the final advice from the GAC. Although the NGPC had not yet received the 9 September 2013 Letter, the NGPC did acknowledge that it had received an email from the GAC Chair on 10 September 2013 reiterating that the GAC had finalized its consideration of the strings. The NGPC stated that it would discuss both the 9 September 2013 Letter and 10 September 2013 email at a subsequent meeting.<sup>17</sup>

On 12 September 2013, the European Commission sent the Board a letter stating that, in its opinion, there had “not been any consensus decision overruling the advice given in Beijing [and] the advice provided at the GAC April meeting stands as long as there is no new consensus on the matter.” The European Commission also expressed its concern that “[t]he more general safeguards expressed in Annex 1 of the Beijing Communiqué are not specific enough to allow companies unrelated to the wine sector, and therefore not acquainted with the specificities of the global wine market and the importance of GIs, to run the two strings in a safe manner.”<sup>18</sup>

On 28 September 2013, the NGPC acknowledged receipt of the GAC advice in the 9 September 2013 Letter, and indicated that it “st[ood] ready to hear from GAC members as to the nature of the differences in views expressed in the advice while [it analyzed] the community

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<sup>16</sup> *Id.*

<sup>17</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10sep13-en.htm>. Although the letter from the GAC chair was dated 9 September 2013, it was not received by the Board until 11 September 2013. As a result, it was not considered as part of the NGPC’s action on 10 September 2013.

<sup>18</sup> <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en.pdf>.

input received on [the GAC's] advice.”<sup>19</sup> The NGPC directed staff to analyze the GAC advice and other community input, and to prepare an analysis and recommendation for the NGPC meeting in Buenos Aires, scheduled for November 2013.

On 7 November 2013, the European Commission again sent the Board a letter, stating that its concerns regarding the delegation of .WINE and .VIN would remain “until an agreement is reached between applicants and rights holders and a solution is commonly presented to ICANN by both parties as an example of good cooperation.”<sup>20</sup> On 15 November 2013, the Organization of American States sent the Board a letter regarding its concerns with respect to GI safeguards for .WINE and .VIN.<sup>21</sup>

On 19 November 2013, ICANN facilitated a dialogue between the applicant for .VIN and the affected non-governmental parties.

On 20 November 2013, in its Buenos Aires Communiqué, the GAC stated that:

Some members are of the view, after prolonged and careful consideration, that the existing safeguards outlined in the GAC's Beijing Communiqué and implemented by the ICANN Board are appropriate and sufficient to deal with the potential for misuse of the .wine and .vin new gTLDs . . . . Other members consider that delegation of .wine and .vin strings should remain on hold until either sufficient additional safeguards to protect GIs are put into place in these strings to protect the consumers and businesses that rely on such GIs; or common ground has been reached for the worldwide protection of GIs via international fora and wide array of major trade agreements.<sup>22</sup>

The GAC further advised that the Board “may wish to seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate

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<sup>19</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf>.

<sup>20</sup> <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en.pdf>.

<sup>21</sup> <http://www.icann.org/en/news/correspondence/baptista-to-crocker-15nov13-en.pdf>.

<sup>22</sup> <http://newgtlds.icann.org/en/applicants/gac-advice/buenosaires48>.

next steps in the process of delegating the two strings. GAC members may wish to write to the Board to further elaborate their views.”<sup>23</sup>

On 17 December 2013, the Australian Government sent a letter to the Board stating that it “consider[ed] that existing international and national arrangements concerning the appropriate use of GIs are sufficient to allow the delegation of .wine and .vin.”<sup>24</sup>

On 30 January 2014, the United States Government sent a letter to the Board stating that in its view, “the existing safeguards developed by the GAC and accepted by the ICANN Board provide sufficient protections to mitigate against possible abuses in domain name registrations at the second level of .wine and .vin.”<sup>25</sup>

On 3 February 2014, the European Union Member States, Norway, and Switzerland, sent the Board a letter recommending that the delegation of .WINE and .VIN be put on hold until “bilateral negotiations between GI right holders and applicants reach a successful outcome.”<sup>26</sup>

On 5 February 2014, the NGPC announced that it had “commissioned an analysis of the legally complex and politically sensitive background of the [.WINE and .VIN strings] in the context of the GAC advice in order to consider the appropriate next steps of delegating .WINE and .VIN.”<sup>27</sup> The analysis, which was to be performed by Jérôme Passa, a French law professor, was expected to be completed in time for consideration by the NGPC at ICANN’s March 2014 meeting in Singapore.

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<sup>23</sup> *Id.*

<sup>24</sup> <http://www.icann.org/en/news/correspondence/maurer-to-crocker-17dec13-en.pdf>.

<sup>25</sup> <http://www.icann.org/en/news/correspondence/strickling-to-crocker-30jan14-en>.

<sup>26</sup> <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>.

<sup>27</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-05feb14-en.pdf>.



On 19 March 2014, the European Parliament sent the Board a letter supporting the views expressed in the EU Members States' letter of 3 February 2014.<sup>28</sup>

On 22 March 2014, at the Singapore meeting, the NGPC adopted Resolution 2014.03.22.NG01, accepting the GAC advice identified in the 9 September 2013 Letter from the GAC Chair and directing ICANN staff to proceed with the normal evaluation process for the .WINE and .VIN applications.<sup>29</sup>

On 26 March 2014, the European Commission, the European Union Member States, Norway, and Switzerland sent the Board a letter expressing the view that there had been a number of process violations and procedural errors with respect to the 22 March 2014 Resolution.<sup>30</sup>

On 27 March 2014, in its Singapore Communiqué, the GAC stated that:

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

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

The GAC therefore advises:

That the Board reconsider the matter before delegating these strings. The GAC needs to consider the above elements more fully. In the meantime concerned GAC members believe the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter.<sup>31</sup>

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<sup>28</sup> <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en.pdf>.

<sup>29</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm#1.a>.

<sup>30</sup> <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-26mar14-en.pdf>.

<sup>31</sup> <https://gacweb.icann.org/download/attachments/27132037/Final%20Communique%20-%20Singapore%202014.pdf?version=1&modificationDate=1395925159241&api=v2>.

On 1 April 2014, the Consorzio Vino Chianti Classico sent a letter to the Board expressing its concerns that the delegation of the .WINE and .VIN gTLDs “may negatively impact our organisation’s ability to protect against fraudulent use of Wine related Geographical Indications (“GI”s) and the wine regions we represent.”<sup>32</sup> The Consorzio Vino Chianti Classico asked ICANN and the GAC to either “grant adequate protection to all wine growing regions including GIs....or withdraw the .WINE and .VIN extensions.”<sup>33</sup>

On 2 April 2014, the Board received letters from the Rioja Governing Council,<sup>34</sup> the European Union and its Member States, Norway, and Switzerland,<sup>35</sup> and CIVC<sup>36</sup> regarding the delegation of the .WINE and .VIN gTLDs and the 22 March 2014 Resolution.

On 3 April 2014, the Board received letters from the Napa Valley Vintners,<sup>37</sup> the Long Island Wine Council,<sup>38</sup> and the Instituto dos Vinhos do Douro e Porto<sup>39</sup> regarding the delegation of the .WINE and .VIN gTLDs and the 22 March 2014 Resolution.

On 4 April 2014, the NGPC adopted Resolutions 2014.04.04.NG01, 2014.04.04.NG02, 2014.04.04.NG03, and 2014.04.04.NG04, wherein the NGPC: (1) “accept[ed] the GAC advice identified in the Singapore Communiqué as it relates to the applications for .WINE and .VIN;” (2) “conclude[d] that there has been no process violation or error under the Bylaws” with respect to the 22 March 2014 Resolution; (3) “direct[ed] the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the

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<sup>32</sup> <http://www.icann.org/en/news/correspondence/zingarelli-to-chalaby-et-al-01apr14-en.pdf>.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> <http://www.icann.org/en/news/correspondence/lapuate-to-icann-board-et-al-02apr14-en>.

<sup>35</sup> <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en>.

<sup>36</sup> <http://www.icann.org/en/news/correspondence/barbier-to-icann-board-02apr14-en.pdf>.

<sup>37</sup> <https://www.icann.org/en/news/correspondence/reiff-to-crocker-03apr14-en>.

<sup>38</sup> <https://www.icann.org/en/news/correspondence/bate-to-icann-board-03apr14-en>.

<sup>39</sup> <https://www.icann.org/en/news/correspondence/cabral-to-icann-board-03apr14-en>.

date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do;” and (4) “recommend[ed] that the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.”<sup>40</sup>

Following the adoption of the 4 April 2014 Resolutions, the Chairman of the Board sent a letter to the GAC Chair explaining the actions taken by the NGPC.<sup>41</sup>

On 7 April 2014, the Santa Barbara Vintners sent a letter to the Board expressing their concerns regarding the delegation of the .WINE and .VIN gTLDs without additional safeguards.<sup>42</sup>

On 8 April 2014, the European Commission, the British Government, the French Government, the Spanish Government, and the GI organizations filed, respectively, Reconsideration Requests 14-13, 14-14, 14-15, 14-16, and 14-18, requesting reconsideration of the 22 March 2014 Resolution. That same day, the Spanish Government filed Reconsideration Request 14-17, requesting reconsideration of the 4 April 2014 Resolutions. On 9 April 2014, the Italian Government, the Portuguese Government, and the Luxembourg Government filed, respectively, Reconsideration Requests 14-19, 14-20, and 14-21, requesting reconsideration of the 22 March 2014 Resolution. On 18 April 2014, the Swiss Government, the GI Organizations, the French Government, and the Italian Government filed, respectively, Reconsideration

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<sup>40</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

<sup>41</sup> <https://www.icann.org/en/news/correspondence/crocker-to-dryden-04apr14-en.pdf>.

<sup>42</sup> <https://www.icann.org/en/news/correspondence/mclaughlin-to-icann-board-et-al-07apr14-en.pdf>.

Requests 14-22, 14-23, 14-24, and 14-25, requesting reconsideration of the 4 April 2014 Resolutions.

On 18 April 2014, the EFOW sent a letter to the Board stating that it had “invit[ed] the three [.WINE/.VIN] applicants to a meeting in Brussels under the auspices of the European Commission on 15 and 16 May,” that its “objective [was] to strike a deal before the end of the 60 day period” and that it “believe[d] that there is room for a mutually satisfactory agreement which would set out adequate safeguards.”<sup>43</sup>

On 30 April 2014, the New Zealand Government sent a letter to the Board expressing its position on the .WINE and .VIN applications, noting that it “has no problem with the recommendation from the New gTLD Program Committee (NGPC) that .wine and .vin be delegated without further restrictions.”<sup>44</sup>

On 5 May 2014, the EFOW sent a letter to the Board stating that it was “actively following up on the [4 April 2014 Resolutions] which invite[] ‘the relevant impacted parties to negotiate, which they are encouraged to do.’” The EFOW detailed the progress it had made in its attempts to schedule meetings with the Applicants. It concluded that it believed “that there is room for a mutually satisfactory agreement which would set out adequate safeguards” and that it invited the Board and other interested ICANN parties to “assist [] these multi-stakeholder[] negotiations in order to ensure a high level of transparency and accountability.”<sup>45</sup>

On 8 May 2014, the Australian Government sent a letter to the Board “reiterat[ing] [its] view that the existing safeguards that ICANN has agreed to for all new gTLDs are appropriate and sufficient to deal with the potential for misuse of terms relating to GIs in these domains.”

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<sup>43</sup> <https://www.icann.org/en/news/correspondence/curbastro-to-hickson-18apr14-en.pdf>.

<sup>44</sup> <https://www.icann.org/en/news/correspondence/parkes-to-crocker-30apr14-en>.

<sup>45</sup> <http://www.icann.org/en/news/correspondence/curbastro-to-sahel-beccalli-05may14-en.pdf>

**B. The Requesters' Claims.**

The Requesters seek reconsideration of one or more of the Resolutions. Specifically, in aggregate, the Requesters contend that the NGPC:

1. Improperly issued the Resolutions based on information submitted by the GAC Chair in violation of GAC Operating Principle 47. (Request 14-13, §§ 3, 6, 8, Pgs. 1-2, 6-7, 12-13; Request 14-15, § 8, 9-10; Request 14-16, § 8, Pgs. 9-10; Request 14-18, § 8, Pg. 11; Request 14-19, § 3, 6, 8, Pgs. 1-2, 7, 12; Request 14-20, § 8, Pgs. 5-6; Request 14-21, §§ 3, 6, 8, Pgs. 2, 7, 12-13; Request 14-22, § 8, Pgs. 4-5, Pgs. 5-6; Request 14-24, § 8, Pg. 13; Request 14-25, § 8, Pg. 11, Request 14-26, § 8, Pg. 6.)
2. Breached Article VI, Section 9 of ICANN's Bylaws because the GAC Chair, who is a non-voting liaison on the NGPC, failed to inform the GAC of the Board's pending vote on the 22 March 2014 Resolution. (Request 14-13, § 6, Pg. 10; Request 14-14, § 3, Pg. 2; Request 14-18, § 6, Pg. 9; Request 14-19, § 6, Pgs. 9-10; Request 14-21, § 6, Pg. 10.)
3. Failed to consider material correspondence, including letters sent by the European Union and various stakeholders, in passing one or more of the Resolutions. (Request 14-13, § 8, Pgs. 11-12; Request 14-14, § 3, Pg. 2; Request 14-15, § 8, Pgs. 6-8; Request 14-16, § 8, Pgs. 7-9; Request 14-17, § 8, Pgs. 7-8; Request 14-18, § 8, Pgs. 10-11; Request 14-19, § 8, Pg. 11; § , Pgs; Request 14-20, § 8, Pgs. 6-9; Request 14-21, § 8, Pgs. 11-12; Request 14-22, § 8, Pgs. 3-4, 8; Request 14-24, § 8, Pg. 12; Request 14-26, § 8, Pg. 5.)
4. With respect to Professor Jérôme Passa's Independent Legal Analysis:

- a. Violated Article XI-A of ICANN's Bylaws;
- b. Breached the Bylaws principles of fairness, transparency, and openness;
- c. Failed to consider material information contained in the Independent Legal Analysis; and
- d. Relied on false and inaccurate information.

(Request 14-13, § 6, Pgs. 8-10, 13-16; Request 14-14, § 3, Pg. 2; Request 14-15, § 8, Pgs. 11-16; Request 14-16, § 8, Pgs. 10-18; Request 14-17, § 8, Pgs. 8-11; Request 14-18, § 8, Pgs. 11-13; Request 14-19, § 6, Pgs. 8-9; Request 14-20, § 6, Pgs. 4-5; Request 14-21, § 6, Pgs. 8-10; Request 14-22, § 8, Pgs. 5-8; Request 14-24, § 8, Pgs. 13-16); Request 14-25, § 8, Pgs. 12-14; Request 14-26, § 8, Pgs. 6-9.)

- 5. Failed to consider material information, namely the GAC's Singapore Communiqué, in passing the 4 April 2014 Resolutions and imposing a 60-day deadline on negotiations between the Applicants and stakeholders regarding additional safeguards for .WINE and .VIN. (Request 14-17, §§ 6, 8, Pgs. 2-3, 7-8; Request 14-22, §§ 6, 8, Pgs. 2, 8; Request 14-24, § 8, Pgs. 8-10; Request 14-25, § 6, Pgs. 7-9; Request 14-26, § 8, Pg. 5.)

**C. Relief Requested.**

The Requesters ask that ICANN: (1) reverse and reconsider the Resolutions; and (2) grant sufficient time without a deadline for the Applicants and interested parties to negotiate appropriate safeguards. (Request 14-13, § 9, Pgs. 16-17; Request 14-14, § 9, Pg. 3; Request 14-15, § 9, Pg. 17; Request 14-16, § 9, Pgs. 18-19; Request 14-17, § 9, Pgs. 11-12; Request 14-18, § 9, Pg. 13; Request 14-19, § 9, Pgs. 15-16; Request 14-20, § 9, Pg. 10; Request 14-21, § 9, Pgs.

17-18; Request 14-22, § 9, Pg. 9; Request 14-24, § 9, Pgs. 16-17; Request 14-25, § 9, Pgs. 14-15; Request 14-26, § 9, Pgs. 14-15; Request 14-27, § 9, Pg. 8.)

### **III. Issues.**

In view of the claims set forth in the Requests, the issues are whether the Board:

1. Relied on false or misleading information in basing the 22 March 2014 Resolution on information submitted by the GAC Chair that the Requesters suggest was sent in violation of GAC Operating Principle 47.
2. Breached Article VI, Section 9 of ICANN's Bylaws because, the Requesters state that the GAC Chair, who is a non-voting liaison on the NGPC, failed to inform the GAC of the Board's 22 March 2014 Resolution.
3. Failed to consider material correspondence in passing the Resolutions.
4. Violated Article XI-A of ICANN's Bylaws with respect to the NGPC's solicitation of and reliance on the Independent Legal Analysis.
5. Breached the Bylaws principles of fairness, transparency, and openness with respect to the NGPC's solicitation of and reliance on the Independent Legal Analysis.
6. Failed to consider material information with respect to the Independent Legal Analysis.
7. Relied on false or misleading information with respect to the Independent Legal Analysis.
8. Failed to consider material information, namely the GAC's Singapore Communiqué, in passing the 4 April 2014 Resolutions and imposing a 60-

day deadline on negotiations between Applicants and stakeholders regarding additional safeguards for .WINE and .VIN.

#### **IV. The Relevant Standards for Evaluating Reconsideration Requests.**

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>46</sup> (Bylaws, Art. IV, § 2.) The Requesters are challenging a Board action or inaction. Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and in this case the NGPC agrees, that the requesting parties have not satisfied the reconsideration criteria set forth in the Bylaws.

#### **V. Analysis and Rationale.**

The Requesters have not demonstrated that the Board failed to consider material information or relied on false or inaccurate material information in passing the Resolutions so as to support reconsideration.

##### **1. The Requesters' Suggestion that the Resolutions Were Based on Information Transmitted in Violation of GAC Operating Principle 47 Does Not Support Reconsideration.**

The Requesters suggest that the Resolutions were “partly based on ... the GAC Chair letter to the ICANN Board dated 9 September 2013 as part of the GAC advice on .VIN and .WINE” and that “such materials are inaccurate, false and/or misleading.” (Request 14-24, § 8, Pgs. 12-13; Request 14-15, § 8, Pgs. 9-10; Request 14-20, § 8, Pgs. 5-6.) Specifically, the

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<sup>46</sup> Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by: (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.



Requesters claim that the GAC Chair’s 9 September 2013 letter “was sent to the ICANN Board without being circulated to GAC members first,” and that the letter was not, in fact, supported by a consensus of the GAC. (Request 14-24, § 8, Pgs. 12-13; Request 14-13, § 6, Pg. 7.)

According to the Requesters, the GAC Chair’s action in sending the 9 September 2013 Letter violated GAC Operating Principle 47, which provides that “[t]he GAC works on the basis of seeking consensus among its membership. . . . Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.” The Requesters state that because the 9 September 2013 Letter was sent in violation of GAC’s Operating Principles and did not accurately reflect the GAC’s consensus advice, it was misleading and should not have been considered by the Board. (Request 14-13, § 8, Pg. 12-13.) The Requesters’ assertions relating to GAC Operating Principle 47 do not support reconsideration.

The GAC was formed to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.” (Bylaws, Art. XI, § 2.1.a.) Section 2.1.i. of Article XI of the Bylaws provides that the GAC “may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” (*Id.* at § 2.1.i.) Module 3.1 of the Guidebook sets forth the parameters in which GAC Advice was to be given under the New gTLD Program, and states in relevant part:

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

(Guidebook, § 3.1.) The GAC has specifically articulated what constitutes such GAC Advice:

GAC members have worked on the basis that any explicit advice, in any written form, constitutes the kind of advice foreseen in the [ICANN] Bylaws. In practice, the GAC produces various kinds of written advice for communication to the Board, including:

- 1) letters signed by the GAC Chair on behalf of the GAC;
- 2) communiqués and submissions endorsed by the GAC at face-to-face meetings and inter-sessionally;
- 3) overarching ‘principles’ documents, typically developed over successive face-to-face GAC meetings; and
- 4) ‘issues’ documents, including interim issues documents.<sup>47</sup>

Pursuant to GAC Operating Principle 46, “[a]dvice from the GAC to the ICANN Board shall be communicated through the Chair.”<sup>48</sup>

The 9 September 2013 Letter setting forth the GAC’s advice on .WINE and .VIN constituted written advice in the form of a letter signed by the GAC Chair on behalf of the GAC. Further, the 9 September 2013 Letter was submitted to ICANN in accordance with the procedure governing the transmission of GAC Advice as set forth in the Guidebook. As the 9 September Letter was provided as GAC advice, ICANN was required, under applicable Guidebook provisions and under ICANN’s Bylaws, to consider it. (Guidebook, § 3.1 (“ICANN will consider the GAC Advice on New gTLDs as soon as practicable.”); Bylaws, Art. XI, § 2.1.j (“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account....”)).) While the Requesters suggest that the substance of the 9 September 2013 Letter violated GAC Operating Principle 47, neither the BGC nor the Board is in the position to question the validity of what came to the Board as GAC advice. The ICANN Board’s consideration of advice provided by the GAC Chair on behalf of the GAC in accordance with the procedures set forth in the Guidebook and ICANN’s Bylaws does not support reconsideration.

The Requesters’ main concern appears to be that the 9 September 2013 Letter “did not

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<sup>47</sup> <https://gacweb.icann.org/display/GACADV/GAC+Advice> (emphasis added).

<sup>48</sup> <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>.

convey the full range of views expressed by the GAC members,” such that the 9 September 2013 Letter “can’t therefore be taken as a basis for any Resolution.” (Request 14-13, § 6, Pg. 7.)

However, the 9 September 2013 Letter contains the following:

While there is no GAC consensus advice on specific safeguards, it deserves to be noted that the crux of the matter relates to the handling of geographical indications, for which there is a range of views among the GAC membership. Some members support referencing geographical indications while others are opposed.<sup>49</sup>

Accordingly, while the GAC Chair’s 9 September 2013 Letter may not exhaustively detail the nature of each specific viewpoint, the varying views expressed by GAC members were set forth in the letter.

Further, the 9 September 2013 Letter stated that “[t]he GAC or its members may communicate further details to the Board as to the nature of the differences in views.”<sup>50</sup> Notably, various GAC Members, including the European Commission, the European Union Member States, Norway, and Switzerland, submitted their views on .WINE and .VIN following the 9 September 2013 Letter.<sup>51</sup> And, as is discussed further below, the NGPC considered this correspondence in connection with the issuance of the Resolutions.

**2. The Requesters’ Suggestion that the GAC Chair Should Have Informed GAC Members of the ICANN Board’s 22 March 2014 Resolution Does Not Involve Board Action Subject to Reconsideration.**

The Requesters state that because the GAC Chair is a non-voting liaison on the NGPC, the GAC Chair is required to inform the GAC of her presence at meetings in which the NGPC considers issues pertaining to the public policy interests and the work of the GAC. The Requesters suggest that because the GAC Chair did not inform the GAC of her presence at

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<sup>49</sup> <http://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en.pdf>

<sup>50</sup> *Id.*

<sup>51</sup> *See, e.g.*, <https://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en.pdf>, <https://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en.pdf>

relevant meetings, and further failed to inform the GAC of the Board's 22 March 2014 Resolution before it was made public, reconsideration is appropriate. (Request 14-13, § 6, Pg. 10; Request 14-14, § 3, Pg. 2.)

In support, the Requesters rely on Article VI, Section 9.5 of ICANN's Bylaws, which provides in relevant part:

Non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization.

The Requesters' suggestion does not support reconsideration because the Requesters are challenging the conduct of the GAC Chair, not an action or inaction of the ICANN Board or ICANN staff. To the extent that the Requesters are challenging the action of the GAC Chair in her capacity as a non-voting liaison to the Board, it should be noted that no individual voting Board member or non-voting liaison speaks or acts for the Board. Accordingly, the Requesters have not presented a sufficient basis for reconsideration. A single non-voting liaison's actions in reporting to his or her appointing Advisory Committee is in no way a Board action.<sup>52</sup>

### **3. The Board Did Not Fail to Consider Material Correspondence in Passing the Resolutions.**

The Requesters state that the Board failed to consider material information in passing the Resolutions, including letters sent by the European Union, governmental organizations, and other stakeholders. (*See, e.g.*, Request 14-15, § 8, Pgs. 7-8; Request 14-17, § 8, Pgs. 7-8.) Specifically, the Requesters suggest that the Board failed to consider the following correspondence:

- 23 April 2013 Letter from the EFOR

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<sup>52</sup>Further, nothing in the Bylaws requires the GAC Chair to inform the GAC of her presence at NGPC meetings or otherwise report on resolutions passed by the NGPC. The Bylaws allow the non-voting liaisons the discretion to use materials provided to them for purposes of consulting with their respective committee or organization. However, the non-voting liaisons are not required to do so. (Bylaws, Art. VI, § 9.5.)

- 26 April 2013 Letter from the CIVC
- 20 June 2013 Letter from the International Trade Policy Wine Institute
- 9 July 2013 Letter from the Organisation for an International Geographical Indications Network
- 8 August 2013 Letter from the Napa Valley Vinters
- 19 August 2013 Letter from the EFOW
- 29 August 2013 Letter from the Long Island Wine Council
- 12 September 2013 Letter from the European Commission
- 7 November 2013 Letter from the European Commission
- 15 November 2013 Letter from the Organization of American States
- 3 February 2014 Letter from EU Member States, Norway, and Switzerland
- 19 March 2014 Letter from the European Parliament
- 26 March 2014 Letter from the European Commission
- 2 April 2014 Letter from the Rioja Governing Council

The Requesters' statements are unsupported.

First, the NGPC considered all the correspondence cited by the Requesters in its deliberation on the Resolutions. As to the 22 March 2014 Resolution, the NGPC has confirmed that it did consider these correspondence in the approved Minutes and Rationale for that resolution.<sup>53</sup> As to the 4 April 2014 Resolutions, in its Preliminary Report of the Meeting of the New gTLD Program Committee, which took place on 3-4 April 2014, the NGPC clearly stated that “the NGPC acknowledges the correspondence received on .WINE and .VIN since the

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<sup>53</sup> <http://www.icann.org/en/groups/board/documents/minutes-new-gtld-22mar14-en.htm#1.a>.

ICANN Singapore meeting, including,” among others, the 19 March 2014 Letter from the European Parliament and the 26 March 2014 Letter from the European Commission cited by the Requesters.<sup>54</sup> The list provided by the NGPC was intended to be a representative, and not exhaustive, list of the correspondence considered by the NGPC. The NGPC did consider all of the correspondence cited by the Requesters in its deliberation on the 4 April 2014 Resolutions and has likewise confirmed that in the approved Minutes and Rationale for that resolution.<sup>55</sup>

Further, even if the NGPC had not considered each individual letter cited by the Requesters, the NGPC specifically considered the range of views expressed in those letters throughout its consideration of the GAC advice relating to the .WINE and .VIN applications. In the Preliminary Report of the Meeting of the NGPC, which took place on 22 March 2014, the NGPC specifically stated that it considered, as part of its deliberations on .WINE and .VIN, the GAC’s Buenos Aires Communiqué.<sup>56</sup> The GAC’s Buenos Aires Communiqué detailed the varying views on .WINE and .VIN set forth in the correspondence cited by the Requesters:

Some members are of the view, after prolonged and careful consideration, that the existing safeguards outlined in the GAC’s Beijing Communiqué and implemented by the ICANN Board are appropriate and sufficient to deal with the potential for misuse of the .wine and .vin new gTLDs.

...

Other members consider that delegation of .wine and .vin strings should remain on hold until either sufficient additional safeguards to protect GIs are put into place in these strings to protect the consumers and businesses that rely on such GIs; or common ground has been reached for the worldwide protection of GIs via international fora and wide array of major trade agreements.<sup>57</sup>

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<sup>54</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

<sup>55</sup> <http://www.icann.org/en/groups/board/documents/minutes-new-gtld-04apr14-en.htm#1.a>.

<sup>56</sup> <https://www.icann.org/en/groups/board/documents/prelim-report-new-gtld-22mar14-en.htm>.

<sup>57</sup> *Id.*

Accordingly, while the 22 March 2014 Resolution and Rationale did not specifically identify each piece of correspondence cited by the Requesters, the NGPC did consider the information and views contained in such correspondence in its deliberations on .WINE and .VIN. Similarly, as noted above, the Preliminary Report of the Meeting of the New gTLD Program Committee, which took place on 3-4 April 2014 clearly reflects that the NGPC considered the range of views expressed in the correspondence cited by the Requesters.

In Request 14-16, the Requester also argues that, in passing the Resolutions, the Board failed to consider two letters sent by the European Commission to the GAC, including:

- 29 July 2013 letter from Linda Corugedo Steneberg to GAC members; and
- 19 September 2013 letter from Linda Corugedo Steneberg to the GAC Chair.

(Request 14-16, § 8, Pgs. 7-8.) These letters, however, were *not* sent to ICANN. Instead, both were addressed and sent only to members of the GAC. Article IV, Section 2.2.b. of the Bylaws states that reconsideration is not proper if “the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act.” (Bylaws, Art. IV, §2.2.b.) As such, though the letters were not considered in connection with the Resolutions, the NGPC was neither aware of the existence of the letters nor had it been provided the letters by the Requesters. Because the information could have been – but was not – submitted to the NGPC for consideration, reconsideration is not supported here.

- 4. The Commission and Consideration of the Independent Legal Analysis of Professor Jérôme Passa Does Not Support Reconsideration.**
  - a) Article XI-A Does Not Apply Because the Board Did Not Solicit Professor Passa’s Advice in Connection with the Cited Provision of the Bylaws.**

The Requesters claim that the Board violated Article XI-A, Subsections 1.3 and 1.6 by:  
(1) failing to consult with the GAC prior to seeking advice from Professor Passa; and

(2) not giving the GAC an opportunity to comment on Professor Passa’s advice.<sup>58</sup>

Article XI-A of the Bylaws applies to external expert advice sought for the purpose of “allow[ing] the policy-development process within ICANN to take advantage of existing expertise that resides in the public or private sector but outside of ICANN.” (Bylaws, Art. XI-A, § 1.1.) As Professor Passa’s Independent Legal Analysis was not sought pursuant to Article XI-A of the Bylaws, the BGC finds that this suggestion by the Requesters does not support reconsideration.<sup>59</sup>

As discussed below, the GAC’s advice on the .WINE and .VIN applications was issued pursuant to the GAC’s authority as provided under Article XI, Section 2.1 of the Bylaws and Module 3.1 of the Guidebook.<sup>60</sup> Professor Passa’s opinion was obtained as part of the implementation of the New gTLD Program, and specifically pursuant to Module 3.1 of the Guidebook. Because the NGPC’s action in obtaining Professor Passa’s was not sought pursuant to Article XI-A of the Bylaws, the NGPC was not obligated to provide the GAC with the opportunity to comment on Professor Passa’s retention or expert opinion before the NGPC acted

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<sup>58</sup> Subsection 1.3(b) of Article XI-A provides that “[i]n the event that the Board determines . . . that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with [GAC] regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.

Subsection 1.6 of Article XI-A provides that “[t]he [GAC], in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board.”

<sup>59</sup> Subsection 1.5 of Article XI-1 provides that “[e]xternal advice pursuant to this Section shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN body in carrying out its responsibilities.” The Requesters argue that the use of the word “responsibilities” indicates that Article XI-A, Section 1 applies to expert advice sought for purposes other than aiding the policy-development process. (Request 14-13, § 3, Pg. 3.) However, the provisions of Subsection 1.5 are explicitly limited to advice sought “pursuant to this Section.”

<sup>60</sup> The GAC was formed to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.” (Bylaws, Art. XI, § 2.1.a.) Section 2.1.i of Article XI of the Bylaws provides that the GAC “may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” (*Id.* at § 2.1.i.)



on the GAC advice relating to .WINE and .VIN. Accordingly, the Requesters' position that the NGPC's consideration of Professor Passa's Independent Legal Analysis action on 22 March 2014 constitutes a violation of section 1.6 of Article XI-A of the Bylaws is unsupported.

Module 3.1 of the Guidebook, and not Article XI-A of the Bylaws (as cited by the Requesters), sets forth the parameters in which GAC Advice will be given under the New gTLD Program and also sets forth the process for considering the GAC's input with respect to expert advice regarding new gTLDs. Module 3.1 provides, in pertinent part:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board *may consult with independent experts*, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

(Guidebook, § 3.1) (emphasis added).

Under this provision, the Board has the discretion to seek independent expert opinion on the issues raised in the GAC's Advice. This provision does not state that the Board must consult with the GAC after independent consultation has been obtained before a decision can be taken. Notably, there is no reference in Module 3.1—or anywhere in the Guidebook—to Article XI-A of the Bylaws.

**b) The Scope of the Issues Considered by Professor Passa Does Not Support Reconsideration.**

The Requesters claim that “[t]he scope of [Professor Passa’s] analysis is intentionally limited,” that “the most essential question is left out of the analysis” (i.e., questions relating to disputes likely to arise following assignment of new gTLDs “during which the second-level domains open in the gTLDs will be exploited”), and that the scope of Professor Passa’s assignment “does not provide the necessary insights for the NGPC to respond adequately to

GAC's requests. (Request 14-15, § 8, Pgs. 13-14; *see also* Request 14-13, § 8, Pg. 14 (“It is debatable whether Mr. Passa’s expert legal advice is sufficiently thought through and pertinent and whether Mr. Passa has considered the politically sensitive background of this matter when issuing his advice.”).)

The Requesters do not claim, however, that Professor Passa failed to analyze and appropriately consider the questions and issues posed to him by the ICANN Board. Instead, the Requesters object to the scope of Professor Passa’s assignment. That is not a basis for reconsideration. As noted above, Module 3.1 of the Guidebook provides that the ICANN Board, in its discretion, “may consult with independent experts.” That the Board may also define the scope of its consultation with independent experts is equally encompassed by this provision.

**c) The Board Did Not Fail to Consider Material Information with Respect to the Independent Legal Analysis.**

The Requesters suggest that the Board failed to consider certain material findings in the Independent Legal Analysis. (Request 14-15, § 8, Pgs. 12-16; Request 14-13, § 8, Pgs. 14-16.) Specifically, the Requesters state that certain key points in the advice provided by Professor Passa were “completely ignored by the NGPC.” (Request 14-13, § 8, Pg. 14.) In support, the Requesters state only that the NGPC failed to quote or otherwise mention these specific points in the Rationale for the Resolutions. (*Id.*) The Requesters’ statement is unsupported.

As reflected in the 22 March 2014 Resolution:

[T]he NGPC commissioned an analysis of the legally complex and politically sensitive background on the GAC’s advice regarding .WINE and .VIN, ***which the NGPC considered as part of its deliberations on the GAC’s advice.***

Thus, contrary to the Requesters’ claim, the NGPC did consider the Independent Legal Analysis. That the NGPC did not recite or quote every sentence of the Independent Legal Analysis does not mean that the NGPC did not consider the entire report. The Requesters cite no

provision in the Guidebook, the Bylaws, or otherwise requiring the NGPC to quote the report in its entirety.

**d) The Requesters' Disagreement with the Conclusions of the Independent Legal Analysis is Not a Basis for Reconsideration.**

The Requesters suggest that parts of the Independent Legal Analysis are “severely wrong” insofar as Professor Passa relies on Article 22 of the TRIPS agreement in support of his finding that “a geographical indication does not enjoy absolute or automatic protection against any use of an identical or similar name by a third party.” (Request 14-15, § 8, Pgs. 14-15.) The Requesters note that Article 23 is the relevant provision. The Requesters also more generally suggest that “[i]t is debatable whether Mr. Passa’s external expert legal advice is sufficiently thought through.” (Request 14-13, § 8, Pg. 14; Request 14-19, § 8, Pg. 13.)

In this regard, the Requesters do not suggest that Professor Passa relied on false or inaccurate material information. Instead, the Requesters disagree with Professor Passa’s process and ultimate expert legal opinion. The Requesters’ substantive disagreement with Professor Passa’s legal opinion is not a basis for reconsideration.<sup>61</sup>

**5. Permitting Additional Time for Impacted Parties to Negotiate is Not Properly the Subject of a Request for Reconsideration.**

The Requesters challenge the Board’s 4 April 2014 Resolution insofar as it directed the President and CEO to not commence the contracting process for .WINE and .VIN for 60 days to “provide additional time for the relevant impacted parties to negotiate,” which the Requesters

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<sup>61</sup> Requesters also seek “clarification” on “how and under what circumstances the legal expert/author was selected,” what “background information” was submitted to Professor Passa, and the date the report was drafted. (*See, e.g.*, Request 14-13, § 8, Pg. 15.) The Requesters claim that absent such information, “the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties’ rights to be heard.” (*Id.*) The Requesters, however, fail to explain how this information request is properly subject to the reconsideration process set forth in ICANN’s Bylaws. The BGC concludes that it is not.

claim was contrary to GAC advice.<sup>62</sup> The Requesters note that while the NGPC stated that it was accepting the advice identified in the Singapore Communiqué, that Communiqué stated only that the GAC members “believe[d] the applicants and interested parties should be encouraged to continue their negotiations with a view to reach an agreement on the matter,” and did not mention the imposition of a deadline on negotiations. (RR 14-24, § 6, Pg. 8.) The Requesters suggest that that deadline “materially affects the Requesters and their ability to discuss and negotiate effectively.” (*Id.* § 6, Pg. 9.)

The Requesters have not stated a proper ground for reconsideration in this regard. Pursuant to ICANN’s Bylaws, Article IV, Section 2.2, a reconsideration request challenging Board action may be submitted only if the Requester is adversely affected by: (1) an action or inaction of the ICANN Board that was taken or refused to be taken without consideration of material information; and (2) an action or inaction of the ICANN Board that was taken as a result of the Board’s reliance on false or inaccurate information. (Bylaws, Art. IV, § 2.2.a-c.) Here, the Requesters simply disagree with the Board’s decision to include a 60-day window in which the impacted parties were encouraged to negotiate. That is not a proper basis for reconsideration.

#### **6. The Requests Are Premature.**

To establish standing to bring a reconsideration request under ICANN’s Bylaws, each Requester must demonstrate that it has been “adversely affected” by the Resolutions at issue in the Requests. (Bylaws, Art. IV, § 2.2.) The Requesters here have not met this burden because any “adverse affect” claimed by the Requesters presupposes that .WINE and .VIN have already been delegated without the safeguards preferred by the Requesters. However, at this point neither .WINE nor .VIN has been delegated. Indeed, the NGPC, in its 4 April 2014 Resolutions,

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<sup>62</sup> <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>.

specifically “direct[ed] the President and CEO, or his designee, to not commence the contracting process for the applications for .WINE and .VIN for 60 days from the date of publication of these resolutions in order to provide additional time for the relevant impacted parties to negotiate, which they are encouraged to do.”<sup>63</sup> The adverse impact that the Requesters cite is therefore speculative at present and is insufficient to support reconsideration.<sup>64</sup>

## **VI. Recommendation**

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore recommends that the Reconsideration Requests be denied without further consideration.

Although the BGC recommends that the Requests be denied, the BGC and the NGPC want to acknowledge the Requesters for having participated in the reconsideration process and recognize the Requesters’ concerns. For the benefit of all relevant impacted parties, ICANN continues to encourage the Requesters and the Applicants to negotiate and discuss these sensitive issues.

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<sup>63</sup> <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04apr14-en.htm>

<sup>64</sup> Requesters also object to language in the 4 April Resolutions recommending that “the full Board consider the larger implications of legally complex and politically sensitive issues such as those raised by GAC members, including whether ICANN is the proper venue in which to resolve these issues, or whether there are venues or forums better suited to address concerns such as those raised by GAC members in relation to the .WINE and .VIN applications.” (Request 14-17, § 6, Pg. 3; Request 14-24, § 6, Pg. 10; Request 14-25, § 6, Pg. 10; Request 14-26, § 6, Pg. 3.) However, Requesters do not explain how this recommendation is properly the subject of a reconsideration request under ICANN’s Bylaws. Instead, it appears that the Requesters simply disagree with the recommendation, but Requesters’ substantive disagreement with the recommendation does not constitute a basis for reconsideration.