

## 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

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 requests that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, as it resolved that *"the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his*

*designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process".*

The resolution is posted in the ICANN website under

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

This request is submitted in case resolution 2014.03.22.NG01 is not deemed superseded by resolutions 2014.04.04 NG01-2014.04.04 NG04.

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

The ICANN Board New gTLD Program Committee (NGPC) took its decision on 22.03.2014. Even though the URL <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22<sup>nd</sup> March 2014 as the date Resolution 2014.03.22.NG01 was published, the date 25<sup>th</sup> March 2014 was shown for some days on that very URL as the date of publication of the resolution and its rationale.

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

The undersigned and the French GAC representative to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communique drafting session. It should be highlighted that Governmental Advisory Committee was not

informed of the existence of this Resolution during the meeting with representatives of the NGPC on the 22<sup>nd</sup> March 2014 or at specific session between the GAC and the Board that took place on 25.03.2014.

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

The French Government is mandated by our Constitution to pursue the common good. We deem consumer interests and respect for applicable law as public interests. Both consumer interests and rule of law can be adversely impacted by Resolution 2014.03.22.NG01.

This Resolution lets the evaluation procedure of applications to .wine and .vin to proceed without demanding adequate safeguards to avoid the risks of consumer deception as to the true origin of the wines sold through e-commerce sites lodged under .wine and .vin TLDs. European GAC members have repeatedly declared that Category 0 Safeguard GAC Advice (Beijing Communiqué), specifically, safeguards 5 and 6, are not enough since there is no mention to geographic indications (GIs) and “applicable law” is a vague term that does not afford sufficient protection to GIs in all jurisdictions.

Whereas GIs are a token for quality wines worldwide, consumers, both within and outside Europe, may be led to think that they buy true Champagne, Bordeaux, Cognac or whatever other GI protected wine when purchasing from champagne.wine, bordeaux.wine, cognac.vin, chassagne-montrachet.wine or

macon.vin.

Cybersquatting and all sorts of GIs abuse have occurred in the domain name space as WIPO Standing Committee on the Law on Trademarks, Industrial Designs and Geographical Indications has proved in document SCT/10/6 dated April 3<sup>rd</sup>, 2003 on "Internet domain names and Geographical Indications" (see paragraphs 225 and 226 as well as its annexes).

The power these TLDs may have as a locus to find wines on the web increases the risk of deceiving acts happening. In an effort to protect vulnerable consumers, French law prohibits such acts. The French Consumer code makes any kind of deceiving acts misleading consumers unlawful in its article L. 121-1, which emanates from article 44 of the Royer Act of 27 December 1973.

In addition to the general consumer protection concerns expressed above, the French legislation has the same registration requirements as a Protected Designation of Origin in the European Regulation 510/2006. However, the notion of "particular qualities" of agricultural products is more precise in the French law. The specifications of the products take into account not only the geographical origin and tradition, which serve as the differentiation base of typical regional and specific organoleptic characteristics where the technology is not capable of being reproduced. To sum up, the *Law on the Protection of Appellations of Origin*<sup>1</sup> not only controls the geographical origin, but also the quality of the products. Geographical names, therefore, traditionally served not only as a statement of

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<sup>1</sup> Loi 93-949 du 26 juillet 1993, Journal Officiel, 27 July 1993.

origin, but also as a guarantee of quality and the maintenance of certain characteristics that must be taken into account.

These provisions, together with the relevant European Regulations, are the basis of the French legislation on geographical indications. We invite the Board Governance Committee to refer to the letter sent by the Commission on 29<sup>th</sup> July 2013 to GAC members to have a complete picture of the international and European legislation on the matter.

It must be added that the French Government must promote the development of all economic sectors, in particular, agriculture. In that regard, French wine exports have been experiencing a stagnation in quantity but a reinforcement in selling price. French wine exports were 7.600 million euros worth in 2012, compared to 1.021.897 euros US wines reached the same year (see International Trade Policy Wine Institute's letter to ICANN at <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en.pdf>). France remains as the first largest wine exporting country in 2012, while the US occupied the sixth position, with a total turnover of 1.077 million euros. French, Italian and Spanish wine products accounted for 56,4% of global output and 59% of export value. If we add to that group German and Portuguese exports, they make up a 63,9% share of all exports whereas the six new exporting countries (Australia, New Zealand, Chile, US, South Africa and Argentina) topped at 28,7% in 2011. United Kingdom, US and Germany are the main destination markets for our quality winess.

The French wine production represents 15 % of the total agricultural production (in value). Vines are traditionally set up in zones with a weak agronomical potential. PDO and PGI represent ¾ of this production.

**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 2014.03.22.NG01. 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.

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

**In the following section, the undersigned aims to provide the necessary details to prove that:**

**A) The Board has not considered certain material information.**

Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union

which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al-19mar14-en>

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other organisations and wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>

- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>
- Letter 8: <http://www.icann.org/en/news/correspondence/baptista-to-crocker-15nov13-en>

They all point out at harm that can be caused to consumer interests and wine right holders if delegation is done without proper safeguards. However, applicants are worried about the «commercial viability of theTLDs» if more safeguards are applied (see, for instance, June Station LLC comment to the Buenos Aires Communiqué).

ICANN has a duty to serve public interest (article I.Section 2.6 of the ICANN Bylaws and points 3 and 4 of the Affirmation of Commitments) and it should not slant towards the applicants' interests only because they are only a limited subset of stakeholders (point 4 of the Affirmation of Commitments).

B) The ICANN Board NGPC has also based its Resolution upon inaccurate and misleading materials.



## B.1 Misunderstanding about GAC consensus on ".vin" and ".wine":

The action that was approved by the NGPC on 22.03.2014 is allegedly based on GAC consensus, whereas in reality a significant number of GAC members were in consensus not to allow the .WINE and .VIN applications to proceed through evaluation until sufficient additional safeguards were in place. The reality is that the GAC as a whole could not reach consensus, what does not necessarily imply that the strings can proceed through the normal evaluation process without further consideration.

The letter from the GAC Chair to the Chair of the ICANN Board dated 09.09.2013 was sent without prior consultation of GAC members. As such, it represents a breach of GAC operating principle number 47. For it to have been given the weight that it deserves, the "opinion" conveyed by the GAC Chair should have been previously cleared with the GAC. The European Commission in its letter dated 03.02.2014 specifically covered this point and said "the EU, its Member States, Switzerland and Norway still believe that these general safeguards are not sufficient and that the Beijing Consensus was overruled inappropriately when the GAC Chair advised the Board to proceed with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached." More details of this EU position can be found on the two letters sent on behalf of the EU Commission to GAC members and GAC Chair quoted above.

The GAC Chair's statement that "The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed

through the normal evaluation process" is not a consensus view of the GAC as per the aforementioned Operating Principle, but a mere interpretation and opinion of the GAC Chair.

B.2 Insufficient analysis of the legally complex and politically sensitive background:

The Buenos Aires Communique 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.

The GAC has not received the terms of reference of the consultation addressed to Mr. Jérôme Passa. We wish we have received it for full transparency and proper evaluation of the NGPC action. However, it can be inferred from page 2 of Mr. Passa's report that the questions made fell short of the analysis the GAC recommended to carry out. The politically sensitive background of this matter has not been considered at all by ICANN's request of advice and the resulting report (i.e. the various attempts at creating a multilateral system of notification and registration of geographical indications for wines according to article 23.4 of the TRIPS Agreement or at launching a UDRP for GIs in WIPO).

Moreover, it is debatable whether the external expert legal advice is sufficiently reasoned. In addition, the Rationale for Resolution is vague and does not make reference to the specific grounds on the basis of which the resolution is taken,

nor it addresses the specific arguments laid down in the legal advice received or makes reference to the panoply of letters and additional materials shared with the ICANN Board via formal correspondence.

### **B.3 Breach of ICANN Bylaws:**

Perhaps one of the most relevant arguments is that Article XI-A section 1 subsection 6 of the ICANN By-Laws requires that "the GAC - in addition to the supporting organisations or other advisory committees - shall have an opportunity to comment upon any external advice received prior to any decision by the Board". This important prerogative has not been respected.

### **Required Detailed Explanation:**

The undersigned wishes to elaborate on points B.2 and B.3 contained above. Point B.1 is sufficiently developed as set forth above.

### **B.2 detailed explanation:**

- On the process followed to seek expert external advice:

Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent

competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

Taking into account that the Buenos Aires GAC Communique requested the Board 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*" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?

Pending clarifications from the NGPC expressed on its reconsideration of the challenged Resolution, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

- On the scope of the consultation:

Although the Buenos Aires Communique seeks clarification of the legally complex and politically sensitive background and the next steps in order to delegate the two strings (please note that the GAC did not ask for the refusal to delegate the strings), Point 3, § 2 evidences that the author has only been "consulted on the specific issue of whether, on strictly legal grounds in the field of intellectual property law relating, in particular, to the rules of international law or fundamental principles, ICANN would be bound: a) to assign the new gTLDs in question to the applicant, or, to the contrary, to refuse to assign them in order to protect prior rights as mentioned above." The question is by all means misleading and it was clear from the outset that ICANN is not legally bound by international law to automatically grant or reject an application. On the contrary, our understanding is that for all domain names for which an application was submitted, a series of legal safeguards should be put in place by ICANN or by the potential Registries in order to efficiently protect public and private rights and interests. These safeguards vary however depending inter alia on the nature of the domain names concerned, on the specific concerns expressed by the GAC and the objectors, on the applicable legislation.

The scope of the analysis is intentionally limited by ICANN as indicated in Point 3, § 6 since the author confirms that "Given the wording of ICANN's questions to the undersigned, this opinion will concentrate exclusively on the reasons why ICANN might be led to assign or refuse to assign the new gTLDs in question, in other words on the disputes which have arisen during the evaluation stage of the

applications. It will not examine as its main focus questions and disputes likely to arise in the subsequent stage, following assignment of these new gTLDs during which the second-level domains open in the gTLDs will be exploited". In this regard, the most essential question is left out of the analysis and therefore it does not provide the necessary insights for the NGPC to respond adequately to GAC's requests.

As a consequence, half of the report (until "Secondly") is useless. Of course, "vin" and "wine" are generic terms and are not protected by geographic indications or any other intellectual property right. So, ICANN is obviously legally unimpeded to grant those TLDs to whoever applies for them. But, that is not the question that has held up GAC advice for a year.

The NGPC has chosen to stick to this part of the report to accept "GAC advice" to proceed with the evaluation process without additional safeguards and does not reason on the concerns expressed by Governments and right holders or on the considerations expressed in other sections of Mr. Passa's report. Thus, Resolution 2014.03.22.NG01 is ill reasoned.

- On the author's opinion on the scope of GIs:

The second part of the report is severely wrong. He indicates that "a geographical indication does not enjoy absolute or automatic protection against

any use of an identical or similar name by a third party", and refers to Article 22 of the TRIPS agreement which allegedly provides for protection where an indication is used in a manner which misleads the public. He further indicates that there are other provisions (i.e.: the Lisbon Agreement of 1958 or the EU relevant legislation (EU) No 1308/2013 on wines) that allow for a more extensive protection that includes the concept of evocation.

However, not only Article 22 of the TRIPS agreement also broadly encompasses (see point 2.b) thereof) "any use which constitutes an act of unfair competition (...)" ; but in addition, Article 22 of the TRIPS agreement is an incorrect legal basis as far as wines are concerned. Actually, wines (and spirits) enjoy an additional explicit protection under Article 23 of the TRIPS agreement which is considered in international fora as including the aforementioned concept of evocation, and which does not require any "misleading test" to be performed. Concretely, should an operator use the term "JapanChampagne.vin" there would be a clear indication of the actual origin thereof, so at first sight no misleading of the consumer as to the geographical origin, and accordingly no infringement of Article 22 TRIPS; but there would be nonetheless a clear violation of the relevant Article 23.1 TRIPS which prohibits any inappropriate use of a geographical indication, including in translation and where the true origin of the product is indicated.

- On the need to lay down adequate safeguards:

The most rightful conclusion of the report has not been taken into account by the NGPC. Jérôme Passa concludes that if there are indications that GIs can be subject to abuse as second level domains, ICANN should take precautions to prevent damage from being done (points 10 and 11). Indeed, the NGPC should be aware of the long history of abuse of GIs under other generic TLDs. WIPO has conducted studies, like the one mentioned above, on the matter with a view to setting up a UDRP for GIs.

Nonetheless, it is not enough to force the Registry to remind registrants of third-party rights, as Jérôme Passa suggests. There should be an enforcement mechanism which until now remains the main stumbling block in this process. This mechanism can only be decided by ICANN.

### **B.3 detailed explanation:**

The NGPC is bound by the Bylaws. Article XI Section 2.1 of the Bylaws –which Resolution 2014.03.22.NG01 refer to- is not the only section the Board must comply with in the implementation of the new gTLD programme. The Applicant Guidebook is not self-contained as the rule governing the gTLD programme and does not override the Bylaws, which is the superior norm to abide by.

Article XI-A Section 1 is also relevant as it details the procedure ICANN must



follow to seek external expert advice. At least, two breaches have been committed in relation to the report commissioned to Mr. Passa:

- Article XI-A Section 1 3 b as to the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.
  
- Article XI-A Section 1 6 regarding the need to consult, among others, with the GAC on the analysis received before taking any action.

**9. What are you asking ICANN to do now?**

The undersigned respectfully request from ICANN to:

- a) reverse its Resolution 2014.03.22NG01 considering the aforementioned information and comments;
  
- b) while reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed in Section 8;
  
- c) grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline.

**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 the 29<sup>th</sup> 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>2</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

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<sup>2</sup> Journal Officiel, August 5, 1905.

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 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.

BGC.

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

7<sup>th</sup> April 2014

Signature

Date

A handwritten signature in black ink, consisting of a series of connected loops and curves, positioned over a horizontal line.

**Pierre SELLAL**