

May 17, 2013

**VIA EMAIL**

John Jeffrey, Esq.  
General Counsel and Secretary  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

Re: Independent Objector's Conflict of Interest

Dear Mr. Jeffrey:

This firm represents Patagonia, Inc. (“Patagonia”) in connection with its .patagonia gTLD application, Appl. No. 1-1084-78254. As we trust you are aware, the Independent Objector (“IO”) has filed a Community Objection against the .patagonia gTLD application,<sup>1</sup> a copy of which is attached. Patagonia contends, and we document below, that the IO has a conflict of interest under every standard potentially applicable under Section 3.2.5 of the Applicant Guidebook, and that this conflict of interest requires that the IO’s Community Objection against the .patagonia application be withdrawn.

ICANN’s intervention in this matter is imperative: The Independent Objector refuses to acknowledge and act on this blatant conflict of interest; instead, he categorically denies that such a conflict exists. Moreover, and notwithstanding his role as legal representative in several proceedings pending before the International Court of Justice, we have identified no bar of which the IO is a member, rendering it impossible for Patagonia to lodge an ethics complaint regarding this conflict of interest. Accordingly, action by ICANN to effect the withdrawal of the IO’s Community Objection against the .patagonia application is the only possible remedy. Such an action is required by ICANN’s mandate of accountability and transparency and is consistent with ICANN’s recent focus on and actions to prevent conflicts of interest.

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<sup>1</sup> Community Objection of Prof. Alain Pellet, Independent Objector, Against Patagonia, Inc.’s Application 1-1084-78254.

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## I. *The Independent Objector's Conflict of Interest*

The facts underlying the IO conflict of interest are simple. The IO, Professor Alain Pellet, has a long-standing professional relationship with the Argentine Republic. Professor Pellet's CV states that the Argentine Republic appointed him as Arbitrator in *Mobil Exploration and Development Argentina Inc. v. Argentina* (ICSID ARB/04/15) (2005); that the Argentine Republic also appointed him as Arbitrator in *Bank of Nova Scotia v. Argentina* (UNCITRAL – suspended) (2005); and that he subsequently served as Counsel and Advocate for the Argentine Republic in the case before the International Court of Justice concerning *Certain Pulp Mills on the Uruguay River* in 2006-2010. On information and belief, the IO has taken no steps to recuse himself from further appointments as counsel or party-nominated arbitrator by the Argentine Republic since the May 2012 announcement of his selection as IO – let alone since his December 24, 2012 initial observations to Patagonia and since the filing of his Community Objection against the .patagonia application. Moreover, on information and belief, the IO has taken no steps to update his CV (as available at [www.alainpellet.eu](http://www.alainpellet.eu)).

Furthermore, the IO has appointed as counsel to represent him in the Community Objection proceeding against Patagonia's .patagonia application individuals who have previously represented or currently represent the Argentine Republic or the Republic of Chile. For instance, according to his CV, Mr. Daniel Müller also represented the Argentine Republic in the case concerning *Certain Pulp Mills on the River Uruguay* in 2006-2010.<sup>2</sup> Meanwhile, Mr. Samuel Wordsworth represents the Republic of Chile before the International Court of Justice in a maritime dispute between it and Peru.<sup>3</sup> This dispute is pending and has been pending since 2008.<sup>4</sup> Finally, a third individual appointed as counsel by the IO, Héloïse Bajer-Pellet, appears to be Professor Pellet's daughter or daughter-in-law.

The Argentine Republic and the Republic of Chile have made clear their opposition Patagonia's .patagonia application. Both countries filed Early Warnings against the .patagonia application;<sup>5</sup> and both countries signed a Ministerial Statement that was characterized in the Chilean Early Warning as agreement of both countries “on the importance of protecting the use of the name Patagonia, in all the international forums, because it is an important geographic

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<sup>2</sup> See <http://www.muellerdaniel.eu/Documents/cv-eng.pdf>.

<sup>3</sup> See <http://www.essexcourt.net/cvs/sword.pdf>.

<sup>4</sup> See <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=137>.

<sup>5</sup> See <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>.

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region belonging to the territory of both countries.”<sup>6</sup> The Ministry of Foreign Affairs of the Argentine Republic has filed its own Community Objection against the .patagonia application,<sup>7</sup> although the GAC representatives of both countries vigorously sought (unsuccessfully) during the recent ICANN Meeting GAC Advice that the .patagonia application should be rejected. By virtue of their opposition to the .patagonia application, the Argentine Republic and the Republic of Chile have a material interest in the outcome of the IO’s Community Objection.

Although the IO claims to be acting “in the best interests of the public who use the global Internet,”<sup>8</sup> the arguments in his Community Objection rely directly on the actions and statements of Argentine and Chilean government representatives. Specifically, the IO’s Community Objection relies on statements and positions taken by the Argentine Republic and the Republic of Chile in the GAC Early Warnings they filed on November 20, 2012, and on a Ministerial Statement signed by representatives of the Argentine Republic and the Republic of Chile; it also argues that the two states’ opposition to Patagonia’s .patagonia application warrants “particular attention.”<sup>9</sup> His Community Objection takes no account of the facts and information provided by Patagonia in its detailed, seven-page response to the IO’s initial notice.<sup>10</sup> Accordingly, the IO’s decision to pursue the Community Objection is in the interest of his (and his counsel’s) former (and prospective future) client, the Argentine Republic, which will benefit if the IO’s Community Objection against the .patagonia application is successful.

## *II. Under All Applicable Standards, The Independent Objector’s Conflict of Interest Requires Withdrawal of The Community Objection Filed Against .patagonia.*

Section 3.2.5 of the Applicant Guidebook provides that the IO must “be and remain independent,” and that “[t]he various rules of ethics for judges and international arbitrators provide models for the IO to declare **and maintain** his/her independence.” (emphasis added) Although the Applicant Guidebook does not specify a set of relevant rules, the IO’s Community

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<sup>6</sup> Early Warning of the Republic of Chile, .patagonia (Nov. 20, 2012), accessible at <https://gacweb.icann.org/download/attachments/27131927/Patagonia-Chile-78254.pdf?version=1&modificationDate=1353451977000&api=v2> at 3.

<sup>7</sup> Community Objection of Ministry of Foreign Affairs of Argentina Against Patagonia, Inc.’s Application 1-1084-78254.

<sup>8</sup> Community Objection of Prof. Alain Pellet, Independent Objector, Against Patagonia, Inc.’s Application 1-1084-78254, at 6.

<sup>9</sup> *Id.* at 16, ¶ 49.

<sup>10</sup> Copies of both documents are attached. Patagonia provides a copy of its January 20, 2013 letter solely for reference and use by the ICANN Legal Department in connection with its evaluation of Patagonia’s request herein.

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Objection against the .patagonia application is improper under all applicable standards, including:

- the ethical standards imposed by leading international arbitration institutions, including the International Chamber of Commerce (“ICC”) International Court of Arbitration;
- the Rules of Expertise of the ICC Centre for Expertise;
- the ethical standards generally applied by practitioners in international arbitration, as evidenced by the Guidelines on Conflicts of Interest in International Arbitration (2004) published by the International Bar Association (“IBA”); and
- the ICANN Conflicts of Interest Policy.

A. *The ICC Rules of Arbitration and Rules of Expertise*

The IO’s prior relationship with the Argentine Republic poses a conflict of interest under the ICC Rules of Arbitration, and the substantially similar standard in the ICC’s Rules of Expertise.

Article 11(1) of the ICC Rules of Arbitration requires that “[e]very arbitrator must be and remain impartial and independent of the parties involved in the arbitration.” *The Secretariat’s Guide to ICC Arbitration*<sup>11</sup> notes that “[a]n arbitrator’s independence and impartiality is assessed...in the context of disclosure obligations under Article 11(2) and 11(3)...” (¶ 3-375.) Article 11(2) requires the disclosure of:

...any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties, as well as any circumstances which could give rise to reasonable doubts as to the arbitrator’s impartiality. (Emphasis added.)

Article 14(1) permits the parties involved in an arbitration to “challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise.”

Two leading practitioners, both of them former Secretaries General of the ICC International Court of Arbitration, have pointed out with respect to a previous version of the ICC Rules of Arbitration that “the [ICC Court of Arbitration] has tended, in recent years, to

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<sup>11</sup> J. Fry, S. Greenberg and F. Mazza, *The Secretariat’s Guide to ICC Arbitration*, ICC Publication No. 729, 2012 Edition.

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construe the requirement of independence very broadly.” (Derains and Schwartz, *Guide to the ICC Rules of Arbitration*<sup>12</sup> at 120.)

Under the ICC Rules, disclosure of facts or circumstances that could call into question an arbitrator’s independence is not, in itself, the objective. The disclosure of a fact or circumstance that gives rise to a conflict does not cure the conflict. Disclosure is intended to allow the parties to assess if, based on the disclosed facts and circumstances, legitimate doubts about an arbitrator’s independence exist so that a party may avail itself of the opportunity to challenge that arbitrator’s appointment.

Here, the fact that the Argentine Republic retained the IO as counsel after it twice appointed him as an arbitrator, that the Argentine Republic was the IO’s client for four to five years in a proceeding that required a significant amount of time (and presumably generated significant fees), and that that representation ended relatively recently all call into question the IO’s independence and raise significant, material doubts about his impartiality, whether considered from the point of view of Patagonia or that of a reasonable independent third party. Given the IO’s past relationship with the Argentine Republic, it is likely that factors other than the merits of a Community Objection against Patagonia’s .patagonia application – namely, the IO’s past client relationship with the Argentine Republic and the prospect of a future client relationship with the Argentine Republic – have influenced his decision to file a Community Objection against Patagonia’s .patagonia application.

The same logic applies to two of the IO’s three appointed counsel. Because Mr. Müller has also previously represented the Argentine Republic in a long-running arbitration in association with the IO, it is likely that, like the IO, he has been influenced by factors other than the merits in representing the IO in this matter. This concern is all the more acute in the case of Mr. Wordsworth, who apparently continues to represent the Republic of Chile in its maritime dispute, even as he represents the IO in the present case. As the IO’s counsel act as his agents, their conflicts must be imputed to the IO and his conflicts imputed to them. The fact that Mr. Müller and the IO represented the Argentine Republic in the same matter also demonstrates that Professor Pellet is unable to separate his current role as IO from his previous (and prospective future) role as the Argentine Republic’s counsel.

Because Patagonia could challenge the IO’s impartiality and independence under the ICC Rules of Arbitration and Rules of Expertise if he was an arbitrator assigned to arbitrate the Community Objection against the .patagonia application, ICANN has a basis to effect the withdrawal of the IO’s Community Objection against the .patagonia application.

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<sup>12</sup>

2nd Ed., 2005.

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This conclusion is also warranted under the ICC Rules of Expertise, which govern ICANN's New gTLD Dispute Resolution Procedure for Community Objections. The ICC Expertise Rules states that "[e]very expert must be independent of the parties involved in the expertise proceedings, unless otherwise agreed in writing by such parties." (ICC Expertise Rules, Art. 7(3).) That principle is reflected in the requirement that experts:

...sign a statement of independence and disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties... (*Id.*, Art. 7(4). Emphasis added.)

This standard is substantially equivalent to that of the ICC Rules for Arbitration and similarly compels the withdrawal of the IO's Community Objection against the .patagonia application.

## B. *General Arbitration Practice*

The IO's former relationship with the Argentine Republic also poses a conflict of interest under general rules of arbitration practice, as embodied in the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines").

General Principle 2.b of the *IBA Guidelines on Conflicts of Interest in International Arbitration* provides that an arbitrator should decline an appointment or refuse to continue to act as an arbitrator in an ongoing proceeding "if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence."<sup>13</sup> General Principle 2.c provides that "Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."<sup>14</sup>

The IBA Guidelines divide common scenarios giving rise to conflicts of interest into a series of lists. The Red List includes conflicts that either preclude the potential arbitrator's appointment or condition that appointment upon the express consent of the parties. If an arbitrator "regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income from therefrom," that situation

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<sup>13</sup> International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918>.

<sup>14</sup> *Id.*

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falls within the scope of the non-waivable Red List. (IBA Guidelines, ¶ 1.4.) If an arbitrator “regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom,” that situation falls within the scope of the waivable Red List. (*Id.*, ¶ 2.3.8.)

The Orange List includes conflicts that “may give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” (*Id.*, Part II, ¶ 3.) The IBA Guidelines therefore permit the parties to object to an arbitrator’s appointment if the arbitrator discloses an Orange List conflict. (*Id.* and General Standard 4(a).) A conflict falls within the scope of the Orange List if an arbitrator:

- “has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship” (*Id.*, ¶ 3.1.1); or
- “has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties” (*Id.*, ¶ 3.1.3.),

Here, the IO’s prior professional relationship with the Argentine Republic raises at the very least an Orange List conflict, as the nature of that relationship clearly falls within the scope of paragraphs 3.1.1 and 3.1.3. Standing alone, this is enough to raise “justifiable doubts” regarding the IO’s “impartiality or independence” and permits Patagonia to object to the IO’s ability to proceed with his Community Objection. The same would be true of Mr. Müller’s former relationship with the Argentine Republic.

Moreover, Mr. Wordsworth, counsel to the IO, appears to maintain a *current* relationship with the Republic of Chile. If this relationship involves any regular advice, it falls within paragraphs 1.4 or 2.3.8, raising a Red List conflict, due to the direct interest of the Republic of Chile in the success of the IO’s Community Objection. As Mr. Wordsworth is acting as the IO’s agent, that Red List conflict must be imputed to the IO.

Finally, the IO has not recused himself from further appointments as counsel or party-nominated arbitrator by the Argentine Republic while his Community Objection is pending. Accordingly, new conflicts could arise while this matter is pending, which would also bring the IO’s conflict of interest within the scope of one of the Red Lists. The same could be true if the IO is acting or has acted for the Argentine Republic in any matters that he has not disclosed.

### C. *ICANN’s Conflicts of Interest Policy*

Finally, the principles of impartiality and independence embodied in ICANN’s own Conflicts of Interest Policy (“COI Policy”) make clear that, based on the assumption that the IO is a Covered Person, the IO has a conflict of interest.

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Under the COI Policy, a conflict of interest arises where “a Covered Person has disclosed a Potential Conflict that may in the judgment of a majority of the Disinterested members of the Board or Board Governance Committee, as applicable, adversely impact the Covered Person’s ability to act fairly and independently.” (COI Policy, § 7.1(d).)

A “Potential Conflict” means:

...(i) a direct or indirect Financial Interest in a transaction, contract or arrangement being considered by ICANN by a Covered Person or a member of a Covered Person’s Family; (ii) a Duality of Interest by a Covered Person or a member of a Covered Person’s Family with respect to another party to a transaction, contract, or arrangement being considered by ICANN that has not been waived in writing by all parties to the transaction, contract or arrangement; or (iii) a close personal relationship between the Covered Person, or a member of a Covered Person’s Family, with an individual who is, directly or indirectly through business, investment, or Family, a party to a transaction, contract, or arrangement being considered by ICANN. (*Id.*, § 7.1(s). Emphasis added.)

Here, Professor Pellet’s role as Independent Objector is incompatible with his close professional relationships as attorney and arbitrator for the Argentine Republic. The IO’s past client relationship with the Argentine Republic and the prospect of a future client relationship with the Argentine Republic appears to have influenced the IO’s decision to file a Community Objection against Patagonia’s .patagonia application. This also appears to be true of Mr. Müller and Mr. Wordsworth, due to their own representation of the Argentine Republic and the Republic of Chile, respectively.

In addition, Professor Pellet’s appointment of Héloïse Bajer-Pellet, his daughter[-in-law], as counsel to the Independent Objector in relation to this Community Objection also constitutes a “direct or indirect Financial Interest” in the matter, which gives rise to further potential conflicts that are inconsistent with Professor Pellet’s duties to ICANN. Under the COI Policy, as under all other applicable rules, these relationships call for withdrawal of the IO’s Community Objection.

\* \* \* \*

Patagonia first raised its concerns about the conflict of interest described here in its January 20, 2013 letter to the IO, a copy of which is attached. The IO has not addressed these issues. His bare assertion in his Community Objection that he is “not representing the interests of his former clients,” without any reference to any of the standards discussed in this letter, is inadequate. Accordingly, Patagonia respectfully requests that ICANN take the action necessary to effect the withdrawal of the IO’s Community Objection against Patagonia’s .patagonia application.



# COVINGTON

COVINGTON & BURLING LLP

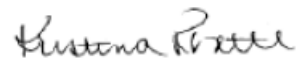
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Thank you for your attention to this important matter.

Sincerely yours,



Kristina Rosette

## Attachments

cc: Dr. Stephen D. Crocker, Chair, ICANN Board of Directors  
Hilary Dessouky, Esq., Patagonia, Inc.



International Chamber of Commerce

*The world business organization*

International Centre for Expertise Centre international d'expertise

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### OBJECTION FORM TO BE COMPLETED BY THE OBJECTOR

- *Objections to several Applications or Objections based on more than one ground must be filed separately*
- *Form must be filed in English and submitted by email to [expertise@iccwbo.org](mailto:expertise@iccwbo.org)*
- *The substantive part is limited to 5000 words or 20 pages, whichever is less*

**Disclaimer:** *This form is the template to be used by Objectors who wish to file an Objection. Objectors must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).*

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

ICC International Centre for ADR Centre international d'ADR de la CCI  
38 Cours Albert 1er, 75008 Paris, France  
Tel +33 (0)1 49 53 30 52 Fax +33 (0)1 49 53 30 49  
E-mail [expertise@iccwbo.org](mailto:expertise@iccwbo.org) Website [www.iccexpertise.org](http://www.iccexpertise.org)

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## Identification of the Parties, their Representatives and related entities

### Objector

Name	Prof. Alain Pellet, Independent Objector
Contact	
Address	16, Avenue Alphonse de Neuville
City, Country	92380 Garches, France
Telephone	
Email	courriel@alainpellet.eu

### Objector's Representative(s)

Name	Ms Héloïse Bajer-Pellet
Contact	
Address	15, Rue de la Banque
City, Country	75002 Paris, France
Telephone	+33 1 53 45 47 47
Email	avocat@bajer.fr

Name	Mr. Daniel Müller
Contact	
Address	20, Avenue du Général de Gaulle
City, Country	78290 Croissy sur Seine, France
Telephone	+33 1 39 76 52 29
Email	mail@muellerdaniel.eu

Name	Mr. Phon van den Biesen
Contact	
Address	De Groene Bocht, Keizersgracht 253
City, Country	1016 EB Amsterdam, The Netherlands
Telephone	+31 20 7 37 18 69
Email	phonvandenbiesen@vdbkadvocaten.eu

Name	Mr. Sam Wordsworth
Contact	
Address	24 Lincoln's Inn Fields
City, Country	WC2A 3EG London, United Kingdom
Telephone	+44 20 7813 8000
Email	SWordsworth@essexcourt.net

**Applicant**

Name	Patagonia, Inc.
Contact	Ms. Megan Marble
Address	259 W. Santa Clara Street
City, Country	Ventura, CA - 93001, United States
Telephone	+18058894445
Email	megan.m.marble@patagonia.com

**Other Relevant Entities**

Name	-
Address	-
City, Country	-
Telephone	-
Email	-

*Add separate tables for any additional relevant related entity*

**Disputed gTLD**

**gTLD Objector objects to**

Name	.Patagonia (Application ID: 1-1084-78254)
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*If there is more than one gTLD you wish to object to, file separate Objections.*

**Objection**

**What is the ground for the Objection (Article 3.2.1 of the Guidebook and Article 2 of the Procedure)**

**Limited Public Interest Objection:** the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

**or**

**Community Objection:** there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

*Check one of the two boxes as appropriate. If the Objection concerns more than one ground, file a separate Objection.*

## **Objector's Standing to object (Article 3.2.2 of the Guidebook and Article 8 of the Procedure)**

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(Statement of the Objector's basis for standing to object, that is, why the Objector believes it meets the requirements to object.)

In accordance with Article 3.2.5 of the Guidebook, the Independent Objector (IO) is granted standing to file a Community Objections "notwithstanding the regular standing requirements for such objections". He is acting in the best interests of the public who use the global Internet and initiates and prosecutes the present objection in the public interest.

According to the same Section, the IO can object in the event that "at least one comment in opposition to the application is made in the public sphere". This condition is met. The Application for .Patagonia has given rise to numerous comments in opposition, on the comments webpage of ICANN<sup>1</sup> and on the ICANN's Governmental Advisory Committee (GAC) Early Warning website.<sup>2</sup> Comments in opposition are also reported more generally in the public sphere.<sup>3</sup>

Article 3.2.5 of the Guidebook states that "the IO must be and remain independent and unaffiliated with any of the gTLD applicants". The IO reassures that he has no link with the applicant objected and, more generally with any of the gTLD applicants. This is equally true for his legal representatives. The IO considers himself to be impartial and independent as required by the Guidebook; he confirms hereby that he is acting in no other interest but the best interests of the public who use the global Internet.

In accordance with the principle of full transparency he is committed to, the IO wishes to specify that he had been nominated by Argentina as an arbitrator<sup>4</sup> and that he has also acted as Counsel to Argentina in the case concerning *Pulp Mills on the River Uruguay*

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<sup>1</sup> <https://gtdcomment.icann.org/comments-feedback/applicationcomment/viewcomments>.

<sup>2</sup> See the Early Warning submitted by the Argentinean GAC member:

<https://gacweb.icann.org/download/attachments/22938690/Patagonia-AR-78254.pdf?version=1&modificationDate=1353465809000>, updated

<https://gacweb.icann.org/download/attachments/22938690/GAC+EW+Submission+PATAGONIA+2.pdf?version=1&modificationDate=1356054993000>; and the Early Warning submitted by the Chilean GAC member:

<https://gacweb.icann.org/download/attachments/22938690/Patagonia-Chile-78254.pdf?version=1&modificationDate=1353451977000>.

<sup>3</sup> A research on Google associating the terms ".patagonia" and "gTLD" leads to 1290 results referring for most of them to comments made on the Application

(<https://www.google.fr/search?q=.patagonia+gTLD&aq=.patagonia+gTLD&sourceid=chrome&ie=UTF-8#hl=fr&spell=1&q=.patagonia+gTLD&sa=X&ei=rkonUa->

[\\_Oeem0AXIo4Bo&ved=0CC8QvwUoAA&bav=on.2,or.r\\_gc.r\\_pw.r\\_cp.r\\_qf.&bvm=bv.42768644,d.d2k&fp=7162ec4455623bec&biw=1680&bih=865](https://www.google.fr/search?q=.patagonia+gTLD&aq=.patagonia+gTLD&sourceid=chrome&ie=UTF-8#hl=fr&spell=1&q=.patagonia+gTLD&sa=X&ei=rkonUa-_Oeem0AXIo4Bo&ved=0CC8QvwUoAA&bav=on.2,or.r_gc.r_pw.r_cp.r_qf.&bvm=bv.42768644,d.d2k&fp=7162ec4455623bec&biw=1680&bih=865)).

<sup>4</sup> In the cases *Mobil Exploration and Development Argentina Inc., Suc. Argentina S.S. v. Republic of Argentina* (ICSID ARB/04/16) (2005) and in the case *Banka of Nova Scotia v. Argentina* (UNCITRAL – suspended) (2005) – he resigned from these positions before the initiation of the proceedings.

(2006-2010) before the International Court of Justice. This prior professional relationship between the IO and one of the governments having submitted a GAC Early Warning does not call into question the IO's independence. It has nothing to do with his decision to object. Moreover, the IO has also acted as Counsel for Peru in a case *against Chile* concerning maritime delimitation.

The IO, as a party to the present proceedings, is not representing the interests of his former clients. He is acting in the sole interests of the public who use the global Internet. The relationship between the IO and a State has nothing to do with his decision to object or not.

**Description of the basis for the Objection (Article 3.3.1 of the Guidebook and Article 8 of the Procedure) - Factual and Legal Grounds**

*(Description of the basis for the Objection, including: a statement giving the specific ground upon which the Objection is being filed, and a detailed explanation of the validity of the Objection and why it should be upheld.)*

1. The Application for .Patagonia has been submitted by Patagonia, Inc., “a company which makes high-quality clothing for climbing, surfing, fly fishing and general outdoor use, as well as wetsuits and surfboards”.

2. According to its Application, the purpose of the .Patagonia registry is “to provide the general public, the outdoor industry, and potential as well as existing consumers of their products and services with an authenticated and more secure experience, to protect the Patagonia brand, and to promote [their] company”.<sup>5</sup> The Applicant made clear that “only Patagonia, Inc. may register and use a .patagonia domain name”<sup>6</sup> and that “Patagonia [, Inc.] will be the only registrant and user of .patagonia domain names”.<sup>7</sup>

3. Therefore, if the Application were positively received, it would become a closed brand gTLD.

4. The Application has led to numerous comments in opposition. These are mainly from citizens from Argentina and Chile living in the geographical region of Patagonia, which is shared by both countries. They argue that the region of Patagonia is a national wealth, attracting numerous tourists, culturally rich and diverse, and a natural heritage of a significant importance for its inhabitants. They do not accept the launch of a new gTLD, which would be granted the name of their region and suggest that the gTLD should be overseen by the governments of Argentina and Chile, and only in the interests of their citizens.

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<sup>5</sup> Application, point 18 (a).

<sup>6</sup> *Ibid.*, point 18 (b).

<sup>7</sup> *Ibid.*, point 22.

5. After an exchange of views with the Applicant, the IO decided to file the present objection against the Application on the ground of the “community objection” provided by Section 3.2.1 of the Guidebook.

## **1. Statement of the Ground upon Which the Objection is being Filed**

6. According to the Guidebook, a “community objection” is warranted when “there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”

7. In order to evaluate the merits of a “community objection” the Expert Panel shall “use appropriate general principles (standards)” as set out in Section 3.5 of the Guidebook, as well as “other relevant rules of international law in connection with the standards.”

8. Article 3.5.4 sets out four tests which need to be met cumulatively for a “Community objection” to prevail:

- The community invoked by the objector is a clearly delineated community (Community test);
- Community opposition to the application is substantial (Substantial opposition test);
- There is a strong association between the community invoked and the applied-for gTLD string (Targeting test);
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted (Detriment test).

## **2. Detailed Explanation of the Validity of the Objection and Why the Objection should be Upheld**

9. The four tests of a community objection provided for in the Guidebook are met in the present case. Indeed, the Application for .Patagonia encounters substantial opposition from a significant portion of the community to which the string may be explicitly and implicitly targeted and is likely to create material detriment to the rights or legitimate interests of that community. The applied-for gTLD string .Patagonia targets, at least implicitly, the community of the Patagonia region in South America (a), which constitutes a clearly delineated



community in the sense of the Guidebook (b). The opposition against the Application is substantial (c) and the Application creates a likelihood of material detriment to the rights and legitimate interests of the Patagonia community (d).

*a. Targeting Test*

10. A “community objection” is warranted if a strong association between the community concerned and the applied-for gTLD string can be proved. In other words, the string used is or could be clearly linked to the community, the rights and interests of which are at stake.

11. The link between the applied-for gTLD and the community can be explicit, i.e., voluntarily sought for by the Applicant, as established in its Application or in other statements made by the Applicant.

12. As mentioned by Patagonia, Inc. in its Application form, the Application is not for a community-based TLD. Indeed, the Applicant states that “only Patagonia, Inc. may register and use a .patagonia domain name”.

13. Even if the Applicant has not applied for a community-based gTLD, it does not exclude the string being linked implicitly to a community. As stated on the Guidebook, “[a]ll applicants should understand that a formal objection may be filed against any application on community grounds, even if the applicant has not designated itself as community-based or declared the gTLD to be aimed at a particular community.” (Section 1.2.3.2 of the Guidebook).

14. The Guidebook confirms that a relevant factor to be taken into account in order to evaluate the Targeting test is “[a]ssociations by the public”. The 2007 ICANN Final Report on the Introduction of new gTLD also indicates that “implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use”<sup>8</sup>. The test is therefore not limited to the assumptions and the intended use proposed in the Application, but is primarily concerned with the expectations of the average Internet users and their perception of and associations with the string. Useful elements for the determination if an applied-for gTLD string targets a community are the identity of the string and the usual denomination or abbreviation used by and for a community, or whether the string clearly describes the community and its members without including elements outside the community.

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<sup>8</sup> Implementation Guideline P, <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part08aug07.htm> (‘2007 ICANN Final Report’).

15. In the present case, there is an obvious link between the applied for string .Patagonia and the region of Patagonia. The identity of the applied-for gTLD with the name of the region situated in south Argentina and Chile means that it is evidently susceptible to being associated by Internet users with the region of Patagonia.

16. The GAC Early Warnings issued by the Argentinean and the Chilean GAC members<sup>9</sup> make clear that the string is associated with the name of the region Patagonia by the public. As reported by Chile, Patagonia is a “region [...] globally known by its name, as a major tourist destination of our Country, but it is also an important part of the territory of Chile, and it is the home of a vibrant and strong community”. It is also clearly demonstrated by the public comments, i.e. the recurrent ones made on the ICANN comments page stating “Patagonia is a bi-national region name with cultural and economic interests, not represented in anyway by the applicant”<sup>10</sup> or “Patagonia has nothing to do with clothing, it’s a geographic area with vast natural and beautiful landscapes of Argentina and Chile.”<sup>11</sup> The Applicant itself acknowledges on its website the link between the Company name and the region of Patagonia stating:

“To most people, especially then, Patagonia was a name like Timbuktu or Shangri-La, far-off, interesting, not quite on the map. Patagonia brings to mind, as we once wrote in a catalog introduction, ‘romantic visions of glaciers tumbling into fjords, jagged windswept peaks, gauchos and condors.’ It’s been a good name for us, and it can be pronounced in every language.”<sup>12</sup>

17. Therefore, there is a strong association between the Patagonia community and the applied-for gTLD string.

*b. Community Test*

18. The Guidebook does not provide a clear definition of the term “community”. It merely recalls that an objector “must prove that the community expressing opposition can be regarded as a clearly delineated community” (Article 3.5.4) and refers to a list of non-limited “factors” that the Expert Panel could refer to check if this test is met. It includes for example the recognition at a local/global level, the level of formal boundaries, the length of existence, the global distribution, or the size of the community.

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<sup>9</sup> See fn 2 above.

<sup>10</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/11924>.

<sup>11</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/6386>.

<sup>12</sup> See <http://www.patagonia.com/us/patagonia.go?assetid=3351>

19. The term “community” refers to a group of people living in the same place or having a particular characteristic in common.<sup>13</sup> The distinctive element of a community is therefore the commonality of certain characteristics. The individuals or entities composing a community can share a common territory, region or place of residence, a common language, a common religion, a common activity or sector of activity, or other characteristics, values, interests or goals which distinguish them from others.

20. The Guidebook does not determine which kind of common characteristics, values or goals are relevant for the issue whether a given group constitutes a community, nor does it put any limits in that regard. The 2007 ICANN Final Report confirms that “community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community.”<sup>14</sup>

21. One of the relevant criteria is whether the group of individuals or entities can be clearly delineated from the others, if the members of the “community is delineated from Internet users in general”<sup>15</sup> in establishing what particularity they have in common. The recognition of the community as such among its members, on the one hand, and by the general public at a global or a local level, on the other hand, depending on its actual distribution, is in that regard a useful factor to be taken into account.

22. In the present case, the relevant community is composed of inhabitants and entities from both Argentina and Chile living in the geographical region of Patagonia, which is shared by both States. Located at the southern end of South America, the region is of world renown. It goes from the southern section of the Andes Mountains to the southwest towards the Pacific Ocean and from the east of the mountain range to the valleys, it follows the Colorado River south, towards Carmen de Patagones in the Atlantic Ocean. To the west, it comprises the territory of Valdivia through the Tierra del Fuego archipelago at its southernmost tip. Around 4 296 239 inhabitants are living on the 1,140,532 square kilometers of Patagonia.

23. The name Patagonia comes from the word “patagón” used by Magellan in 1520 to describe the native people that his expedition thought to be giants. As pointed out in the Chilean and Argentinean GAC Early Warnings, the region Patagonia appears in several old and antique maps and books about the region dating from the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>16</sup>

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<sup>13</sup> See <http://oxforddictionaries.com/definition/english/community>.

<sup>14</sup> Implementation Guideline P, <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

<sup>15</sup> Evaluation question No 20 of the Guidebook, Attachment to Module 2.

<sup>16</sup> See fn 2 above.

24. As explained in the Chile GAC Early Warning,<sup>17</sup> the name Patagonia is used in official documents, i.e., in Article 3 of the Treaty of Limits of 23 July 1881 between Argentina and Chile,<sup>18</sup> or in the Arbitration Award of 18 April 1977 concerning the Beagle Channel.<sup>19</sup>

25. Members of this community do not only share a common place of living, but also a cultural, historic and linguistic common background. They also share common economic goals and activities and interests such as preserving and promoting its natural environment. Patagonia is a famous tourist destination known for its contrasting relief and great diversity of landscapes, lakes and forests in the Andes, to glaciers and windswept steppes.

26. The Guidebook places relevance on the degree of “formal” boundaries delimiting the community from others. This factor needs be interpreted with regard to the specific situation of each community, and in particular its level of organization and structure. An organized community – i.e., a community which has some entity dedicated to the community and its activities – has usually clearer formal boundaries described in terms of membership or registration. The situation is different in case of communities which are less structured or organized, like those based on a common place of origin or which use a common language. This is the case of the Patagonia community which is geographically divided between two State, Chile and Argentina. Despite its looser organization and structure, it is clearly recognizable as distinct from others, at a local, national, and also global level. Organization and structure, even if they can help to identify a community and its delineation, are not relevant distinctive criteria for the existence of a clearly delineated community or a sign of lack of cohesiveness.

27. Numerous criteria proving the existence of a delineated community are developed in the GAC Early Warnings made by Argentina and by Chile. For Chile, Patagonia is a “region [...] globally known by its name, as a major tourist destination of our Country, but it is also an important part of the territory of Chile”. Both have concluded that Patagonia is “the home of a vibrant and strong community”.<sup>20</sup>

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<sup>17</sup> <https://gacweb.icann.org/download/attachments/22938690/Patagonia-Chile-78254.pdf?version=1&modificationDate=1353451977000>.

<sup>18</sup> Reproduced in Emilio Lamarca, Boundary Agreements in force between the Argentine Republic and Chili, Buenos Aires, 1898, Index, pp. 5 and 25, referred to in *The Cordillera of the Andes Boundary Case (Argentina/Chile)*, 20 November 1902, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. IX, pp. 29-49.

<sup>19</sup> *Dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, *RIAA*, Vol. XXI, pp. 53-264.

<sup>20</sup> See <https://gacweb.icann.org/download/attachments/22938690/Patagonia-Chile-78254.pdf?version=1&modificationDate=1353451977000> and <https://gacweb.icann.org/download/attachments/22938690/Patagonia-AR-78254.pdf?version=1&modificationDate=1353465809000>.

c. *Substantial Opposition Test*

28. According to the Guidebook, a “Community objection” is warranted in the event of “substantial opposition within the community”. This test and its scope of application depend largely on the circumstances and on the context of each case.

29. The Guidebook includes several factors, which the Expert Panel could use in order to determine if such “substantial opposition” with regard to an application exists. These factors include the number of expressions of opposition relative to the composition of the community, the representative nature of entities expressing opposition, the level of recognized stature or weight among sources of opposition, distribution or diversity among sources of expressions of opposition (regional, subsectors of community, leadership of community, membership of community), historical defense of the community in other contexts, and costs incurred by the objector in expressing opposition, including other channels the objector may have used to convey opposition.

30. This list of factors is not limitative. It focuses, almost exclusively, on the number of oppositions expressed or the representative nature of those having expressed opposition, i.e., the part of the community represented by those having expressed opposition and its significance with regard to the community in its entirety. These criteria are useful, in particular in the case of well-organized and structured communities. They are more difficult to apply in case of communities that lack organizational structures or clear representation.

31. A mere numerical criterion was certainly not the intent of the authors of the Guidebook and the Expert Panel is not limited to a mere numerical analysis balancing the number of those having expressed opposition or are deemed to be represented by those having expressed opposition, on the one hand, and the overall size of the concerned community, on the other hand. The word “substantial” cannot be defined as limited in that way. If it can certainly refer to an important size or number, it is also used for something of “considerable importance” or “considerable ... worth”.<sup>21</sup> It is therefore not only the number of oppositions which should be taken into account, but also the material content of comments and oppositions expressed by those concerned, and in particular, the importance of the rights and interests at stake. Particularly importance should be paid in that regard to comments made by governments through the GAC.

32. The fact that the IO was granted the possibility to file “Community Objections” confirms the necessary broad meaning of the terms “substantial opposition”. Indeed, as he

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<sup>21</sup> See <http://oxforddictionaries.com/definition/english/substantial>.

has pointed out,<sup>22</sup> the IO would not file a formal “Community objection” if a single established institution is better placed to represent the community concerned. The role of the IO is to defend the public interests and to act on behalf of the public for the defense of rights and interests of communities which lack institutions which obviously could represent the community in the present context. Article 3.2.5 of the Guidebook also indicates:

“In light of the public interest goal noted above, the IO shall not object to an application unless *at least one comment* in opposition to the application is made in the public sphere.” (emphasis added)

33. This shows that even a single comment can trigger a “Community objection” if it raises issues in relation to rights and interests of a community which can be associated with the applied-for gTLD.

34. In the present case, the level of opposition to the Application for the .Patagonia gTLD is of importance in both ways. The Application is one of the most commented upon. On the public comments website,<sup>23</sup> 1,147 comments nearly all in opposition have been posted. This alone is a clear indication of the importance of the opposition the Application is generating. On the other hand, the level of support for the Application is very weak if not virtually inexistent.

35. It is also striking that, regardless of the panel/objection ground ticked by the commentators (community objection ground, geographic names evaluation panel, limited public interest objection ground etc.), the reasons for opposition are similar in nature: the string .Patagonia should not be reserved to a company that has no material link with the region of Patagonia.

36. These numerous negative comments, also found on Internet, are aligned with a powerful opposition coming from representative entities or persons. It is very significant that the Argentinean and Chilean members of the GAC expressed their concerns in two Early Warnings. As underlined by Chile, by a joint Ministerial Statement signed between the Governments of Chile and Argentina on 8 November 2012,<sup>24</sup> the Ministers of both countries “agreed on the importance of protecting the use of the name Patagonia, in all the international forums, because it is an important geographic region belonging to the territory of both countries.”<sup>25</sup> Moreover, as noted in a supplementary Argentinean Early Warning, the

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<sup>22</sup> See i.e., <http://www.independent-objector-newgtlds.org/english-version/the-independent-objector-s-comments-on-controversial-applications/africa-general-comment/>.

<sup>23</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>.

<sup>24</sup> Original text in Spanish:

[http://www.minrel.gob.cl/prontus\\_minrel/site/artic/20121108/asocfile/20121108174808/declaracion\\_d](http://www.minrel.gob.cl/prontus_minrel/site/artic/20121108/asocfile/20121108174808/declaracion_d).

<sup>25</sup> <https://gacweb.icann.org/download/attachments/22938690/Patagonia-Chile-78254.pdf?version=1&modificationDate=1353451977000>.

initial Early Warning “has been given full support and endorsement” by numerous countries (21).

37. These Early Warnings are an undeniable indication that “the application is seen as potentially sensitive or problematic by one or more governments” and of the substantial opposition it generates (Article 1.1.2.4 of the Guidebook).

38. Therefore, the substantial opposition cannot be denied.

39. The fact that Patagonia Inc. has been able to register its trademarks in Argentina or Chile could not be opposed and has no effect in the present procedure. It is one thing that under given national legislation the protection of brands can and has been authorized without opposition at a national level with regards to intellectual property rights and the use of a brand in commercial contexts. But it is a different thing to determine whether a community is opposed to the use of its commonly applied name by a company as a closed gTLD on the global Internet with the effect that use of the name is in practical terms denied to the community at one international level.

*d. Detriment Test*

40. A community objection is warranted if the application creates “a likelihood of detriment to the rights or legitimate interests of the community or to users more widely”.<sup>26</sup> It is certainly the case with the Application for .Patagonia.

41. The Guidebook includes some guidance with regard to the Detriment test, which needs to be addressed with regard to the specific elements and particularities of each application, on the one hand, and the interests and rights of the community to which the applied-for gTLD can be targeted, on the other hand. The material detriment can result from harm to reputation of the community, interference with its core activities, economic or other concrete damage to the community or significant portions of the community. In order to assess the likelihood of such harm or damage, the Expert panel can take into account a variety of factors, including the dependence of the community on the DNS for its core activities, the intended use of the gTLD as evidenced in the Application, but also the importance of the rights and interests at stake for the community targeted and for the public more generally. The Guidebook puts particular attention to the issue whether the Applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user and community interests. In such a case, it is

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<sup>26</sup> 2007 Final Report, Implementation Guideline P.

more than likely that the rights and interests of the community will be detrimentally affected by operation of the gTLD as projected by the Applicant.

42. The Application filed by Patagonia, Inc. is for a closed brand TLD and aims at protecting “the Patagonia brand, [promoting the] company”.<sup>27</sup> If it were positively received, it would only host websites in relation to the Applicant Company and the community implicitly targeted would not be authorized to benefit from the gTLD, despite the fact that it bears the name of their region. Thus, it is not disputed that the Applicant does not intend to act in accordance with the interests of the Patagonia community.

43. This risk of appropriation is clearly feared by members of the Community who explain that “Patagonia is the southernmost region of South America, shared by Argentina and Chile with landscapes and attractions unique in the world. The .Patagonia domain must belong to the people who live there and be free to be used by the people of Patagonia and not a private company. Please listen to the wishes of the Patagonian people”.<sup>28</sup> The question would not arise if this was an open-brand Application, but it is not.

44. If received positively, the Application and its limited access policy would interfere with the community’s core activities by limiting their development and its promotion. Indeed, the inhabitants of Patagonia have interests in benefiting from a gTLD string bearing the name of their region. Such a gTLD string could for example help for promoting tourism in the region, host regional official websites or simply host websites of companies settled in the region. According to the public comments and to the Early Warnings issued, the region of Patagonia presents numerous unique characteristics and it is legitimate for its inhabitants to enjoy access to such a domain name (as opposed to a national domain name).

45. Depriving people or entities from Patagonia from obtaining a .Patagonia domain name means that the entire name space will be confiscated by a single commercial company. The Applicant would be the only one to make a profit from the name of a region whose reputation is of world renown.

46. Furthermore, the GAC Communiqué of 17 October 2012 states that “strings that have broad or multiple uses or meanings, and where one entity is seeking exclusive use”, must be a subject of concern because they can be detrimental to the others. This is the case of the Application for .Patagonia: the term has different uses (name of a brand/ name of a region); and Patagonia Inc. is seeking a close brand gTLD. This is necessarily detrimental to the Community of the people and entities in Patagonia.

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<sup>27</sup> Application, point 18 (a).

<sup>28</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/237>.



47. Anticipating this type of situation, the Guidebook develops provisions aimed at protecting geographical names. Indeed, section 2.2.1.4 of the Guidebook provides that “applications for strings that are country or territory names will not be approved” and that certain geographic names require government support such as capital city name, city name or sub-national place name (such as county, province, or state). These names are entered on the ISO 3166 standard list published by the International Organization for Standardization.<sup>29</sup> The region of Patagonia is not on the list and is therefore not caught by Article 2.2.1.4 of the Guidebook. But the fact that Patagonia is not listed as a protected geographic term does not imply that a single private entity can appropriate this name for its exclusive use. Especially as its exclusion from this special protection can easily be explained: it is not a capital city name, nor a city name, nor a sub-national place name such as county, province, or state. But it is a well delineated bi-national community’s heritage:

- Patagonia covers “sub-national places”. In Argentina, the Patagonia region comprises six different provinces,<sup>30</sup> and in Chile, the Patagonia region comprises two different provinces.<sup>31</sup>
- It is situated within the national territories of two different States.

48. The mere fact that Patagonia is not listed as a geographical name in the instruments referred to does not preclude the possibility for a community objection. Despite its geographical character, the previous sections have demonstrated that the relevant tests for a community objection to be upheld are clearly met.

49. Moreover, particular attention should be given to the fact that the Application is not supported the Argentinean and Chilean governments. On the contrary, they have explicitly opposed it, as community members. This constituted strong evidence that the Application is likely to detriment the interests of the community implicitly targeted. Allowing the applied-for closed brand gTLD .Patagonia means confiscating the use of this name and will harm the legitimate interests of the relevant community.

50. The Public Interest Commitments submitted on 6 March 2013<sup>32</sup> show that the Applicant is conscious of the importance and the sensitivity of this issue; it has tried to organize a meeting with representatives of the governments of Argentina and of Chile “to discuss the concerns they have raised in their Early Warnings to provide more detail about

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<sup>29</sup> [http://www.iso.org/iso/country\\_codes.htm](http://www.iso.org/iso/country_codes.htm).

<sup>30</sup> See GAC Early Warning of Argentina: <https://gacweb.icann.org/download/attachments/22938690/Patagonia-AR-78254.pdf?version=1&modificationDate=1353465809000>.

<sup>31</sup> See GAC Early Warning of Chile: <https://gacweb.icann.org/download/attachments/22938690/Patagonia-Chile-78254.pdf?version=1&modificationDate=1353451977000>.

<sup>32</sup> <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus:downloadpicposting/1466>

Patagonia's plans for the use of .patagonia, and to discuss potential alternative remedial measures". But no meeting has taken place, and no concrete measures to meet the concerns have been taken.

51. Consequently, the launch of a closed brand gTLD .Patagonia as foreseen by the Application is likely to prejudice the legitimate interests of the community of Patagonia.

### **Remedies Requested**

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*(Indicate the remedies requested.)*

The Independent Objector requests the Expert panel to hold that the present objection is valid. Therefore, the Expert panel should uphold the present Objection against the .Patagonia Application.

In addition, the Independent Objector requests that its advance payments of costs shall be refunded in accordance with Article 14 (e) of the Procedure (Attachment to Module 3 - New gTLD Dispute Resolution Procedure).

### **Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

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A copy of this Objection is/was transmitted to the Applicant on 13 March 2013 by e-mail to the following address: [megan.m.marble@patagonia.com](mailto:megan.m.marble@patagonia.com)

A copy of this Objection is/was transmitted to ICANN on 13 March 2013 by e-mail to the following address: [newgtld@icann.org](mailto:newgtld@icann.org)

### **Filing Fee (Article 1 Appendix III to the Rules and Article 8(c) of the Procedure)**

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In accordance with Article 3.2.5 of the Guidebook, ICANN is responsible to provide the funding on behalf of the Independent Objector.

The Independent Objector hereby explicitly grants ICC the right to contact ICANN directly with regard to any payment matters for the Objections.

**Description of the Annexes filed with the Objection (Article 8(b) of the Procedure)**

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*List and Provide description of any annex filed.*

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Date: 12 March 2013

Signature: \_\_\_\_\_

A handwritten signature in blue ink, appearing to be 'N. R. M.', is written over a horizontal line.



## **The New Generic Top-Level Domains**

**And**

**The Independent Objector's Opinions on Controversial Applications**

## Controversial Application

- .Patagonia - Patagonia, Inc.

## Overview of the comments against the controversial application

The application for the new gTLD string “.patagonia” has given rise to numerous comments on the public comments webpage of ICANN as well as in several articles published on the web. Most of the comments against the application raise identical issues.

The application for “.patagonia” has been submitted by the Patagonia, Inc., “a company which makes high-quality clothing for climbing, surfing, fly fishing and general outdoor use, as well as wetsuits and surfboards. According to the application, the purpose of the “.patagonia” application is to provide the general public, the outdoor industry, and potential as well as existing consumers of their products and services with an authenticated and more secure experience, to protect the Patagonia brand, and to promote the company<sup>1</sup>”. Therefore, if the application were positively received by ICANN, it would become a closed brand gTLD.

Opponents to the launch of such a domain name are mainly citizens from Argentina and Chile living in the geographical region of Patagonia, which is shared by both countries. They argue that the region of Patagonia is a national wealth, attracting numerous tourists, culturally rich and diverse, and a natural heritage of a significant importance for its inhabitants. They do not accept the launch of a new gTLD, which would be granted the name of their region and suggest that the gTLD should be overseen by the government of Argentina and Chile, and only in the interests of their citizens.

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<sup>1</sup> Section 18(a) of the application.

## The Independent Objector's position

It should be noted that, acting in the interests of global Internet users, the IO has the possibility to file objections against applications on the community and limited public interest grounds.

### Community Objection

For the IO to consider filing a community objection, there must be a substantial opposition to the gTLD application from a representative portion of the community to which the gTLD string may be explicitly or implicitly targeted. Therefore, the community named by the IO must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection.

When assessing whether a community objection is warranted, the IO bases his review on four preliminary tests.

1. As for the first test, (*the IO determines if the community invoked is a clearly delineated community*), the IO notes that the notion of “community” is wide and broad, and is not precisely defined by ICANN’s guidebook for the new gTLD program. It can include a community of interests, as well as a particular ethnical, religious, linguistic or similar community. Moreover, communities can also be classified in sub-communities (i.e. the Jewish community in New York or the Italian community on Facebook). However, beyond the diversity of communities, there are common definitional elements.

For the IO, a community is a group of individuals who have something in common (which can include their place of residence – i.e. the French, South-East Asian or Brazilian community – or a common characteristic – i.e. the disability community), or share common values, interests or goals (i.e. the health, legal, internet or ICANN community). For the purpose of the IO evaluation, it is clear that what matters is that the community

invoked can be clearly delineated, enjoys a certain level of public recognition and encompasses a certain number of people and/or entities.

In the present case, the IO first notes that public comments made on the community ground try to prove the existence of such a community, being the community of the inhabitants of the region of Patagonia, and generally express an opinion in the name of the designated community.

Patagonia is a region located at the Southern end of South America and is shared by Argentina and Chile. The region is known worldwide and attracts many tourists. In view of the broad elements of definition mentioned above, there is no doubt for the IO that inhabitants of the region of Patagonia form a geographical community, which can be delineated for the present purpose. If they have a common place of residency, the region of Patagonia, they also share similar interests, one obviously being the promotion and preservation of their region.

Also, the IO notes that ICANN laid down some rules in its applicant guidebook with a view to protecting geographical names. In this regard, section 2.2.1.4 of the applicant guidebook states that “applications for strings that are country or territory names will not be approved”. These names are entered on the ISO 3166 standard list published by the International Organization for Standardization. It defines « internationally recognized codes for the representation of names of countries, territories or areas of geographical interest, and their subdivisions<sup>2</sup> ». After review, the IO notes that the region of Patagonia is not on the list and is therefore not caught by section 2.2.1.4 of the applicant guidebook.

2. As for the second and third test, (*The IO verifies if there is a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*), the IO notes that the application for the new gTLD string “. Patagonia” is one of the most commented. On the public comments webpage available on ICANN website, 1132 comments have already been posted. However, as previously explained, the number of negative comments is not a decisive factor for the IO’s decision to make, or not, an objection.

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<sup>2</sup> [http://www.iso.org/iso/country\\_codes.htm](http://www.iso.org/iso/country_codes.htm)

When reviewing the application, the IO also pays a particular attention to the representative nature of entities or persons expressing opposition as well as well as the level of recognized stature or weight among sources expressing opposition. In this regard, the IO notes that early warnings<sup>3</sup> have been issued by the Argentinean and Chilean representatives of the ICANN's governmental Advisory Committee<sup>4</sup> (GAC). Notably, Chile underlined in its notice that, on November 8<sup>th</sup> 2012, “was signed a Ministerial Statement<sup>5</sup> between Chile and Argentina Governments, where the Ministers of both countries indicate the following: “they agreed on the importance of protecting the use of the name Patagonia, in all the international forums, because it is an important geographic region belonging to the territory of both countries<sup>6</sup>”.

The Argentinean representative of ICANN GAC, Dr. Olga Cavalli, has also expressed her concerns about the application during the last ICANN meeting in June. Moreover, in a letter of 3 August 2012 addressed to the members of the ICANN board, Ambassador Alfredo Morelli, director of the Unit of Technology and Energy from the Ministry of Foreign Affairs of Argentina, stated that “Argentina believes that the ICANN board must ensure that the panel judging new gTLDs application should not allow the use of Patagonia as a closed brand TLD”.

As mentioned by Ambassador Morelli in his letter, Patagonia is a brand commercialized by a private company of the same name but also a “region of Argentina that comprises the provinces of the south of the country”. The IO is thus of the opinion that, if the applied for gTLD string does not intend to explicitly target the region of Patagonia, an implicit link

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<sup>3</sup> “The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs or of a formal objection at a later stage in the process. Refer to section 1.1.2.4 of the Applicant Guidebook for more information on GAC Early Warning”.

<sup>4</sup> “The GAC's key role is to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements”, more information can be found on the GAC's website,

<https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>

<sup>5</sup> Original text in Spanish:

[http://www.minrel.gob.cl/prontus\\_minrel/site/artic/20121108/asocfile/20121108174808/declaracion\\_d](http://www.minrel.gob.cl/prontus_minrel/site/artic/20121108/asocfile/20121108174808/declaracion_d)

<sup>6</sup> <https://gacweb.icann.org/download/attachments/22938690/Patagonia-Chile-78254.pdf?version=1&modificationDate=1353451977000>



can easily be identified. Moreover, on its own website, the company acknowledges the link between the company name and the region<sup>7</sup>.

3. Finally and as the fourth test (*the IO conduct when assessing whether an objection is warranted or not, the application for the Top-Level Domain name must create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted*), it can be considered that inhabitants of Patagonia have interests in benefiting of a gTLD string bearing the name of their region. Such a gTLD string could for example help for the promotion of tourism in the region, host regional official websites or simply host websites of companies settled in the region. According to the public comments, the region of Patagonia presents numerous unique characteristics and it may be legitimate for its inhabitants to enjoy access to such a domain name (as opposed to a national domain name).

However, the application filed by Patagonia, Inc. is for a closed brand TLD. Thus, if it is positively received by ICANN, it would only host websites in relation to the applicant company. In this case, people from Patagonia won't be able to obtain a ".patagonia" domain name for any other purposes. Consequently, it can be considered that the launch of a closed brand TLD ".patagonia" could interfere with the legitimate interests of inhabitants of the region of Patagonia.

**Therefore, as for his possibility to object on the community ground, the IO is of the opinion that an objection against the application for a new gTLD string ".Patagonia" could be warranted. It is the policy of the IO not to make an objection when a single community having an interest in an objection can lodge such an objection directly except if the said community could invoke good reasons not to do so or when several communities are in the same interest and an application could raise issues of priority or modalities of the objection. This might be so in the present case since, while clearly**

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<sup>7</sup> "To most people, especially then, Patagonia was a name like Timbuktu or Shangri-La, far-off, interesting, not quite on the map. Patagonia brings to mind, as we once wrote in a catalog introduction, "romantic visions of glaciers tumbling into fjords, jagged windswept peaks, gauchos and condors." It's been a good name for us, and it can be pronounced in every language". <http://www.patagonia.com/us/patagonia.go?assetid=3351>

**delineated, the interested community is not institutionalized and straddles the border between two different states, Argentina and Chile.**

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### **Limited Public Interest Objection**

**The IO notes that for the purpose of his evaluation based on the limited public interest ground of the application for “.patagonia”, no relevant comment has drawn his attention. Nor can he personally find any reason for making an objection on this ground.**

January 20, 2013

**VIA EMAIL**

Professor Alain Pellet  
ICANN Independent Objector  
16, Avenue Alphonse de Neuville  
92380 Garches  
FRANCE

**CONFIDENTIAL**

Re: Patagonia, Inc.'s .patagonia gTLD Application

Dear Professor Pellet:

This firm represents Patagonia, Inc. (“Patagonia”) in connection with Patagonia’s .patagonia gTLD application. We write in response to your Initial Notice of December 24, 2012, in which you expressed concerns regarding certain aspects of the .patagonia application and reached the conclusion that a Community Objection against Patagonia’s .patagonia application by the Independent Objector (“IO”) could be warranted. Although Patagonia appreciates the opportunity to respond, it respectfully disagrees with your assessment and takes this opportunity to address your concerns.

First, Patagonia believes there are such significant impediments to meeting the burden of proof required to prevail with a Community Objection against Patagonia’s .patagonia application, not the least of which are Patagonia’s long-standing trademark rights in its PATAGONIA marks in both Argentina and Chile, that an objection is not warranted. Although this letter identifies several reasons why a Community Objection against Patagonia’s .patagonia application is not warranted, we do not respond in detail to each point of your assessment. Separately, Patagonia is concerned that your past professional relationship with the Republic of Argentina and your potential future professional relationship with the Republic of Argentina presents a conflict of interest with respect to any Community Objection against Patagonia’s .patagonia application. Even if you disagree, the appearance of impropriety is likely to taint the outcome of any objection you may file against Patagonia’s .patagonia application and would likely be imputed to ICANN itself. Accordingly, these reasons counsel against both a Community Objection against the .patagonia application as well as any objection brought by you as Independent Objector against the .patagonia application.

Finally, Patagonia requests that you treat this response as confidential and not disclose, quote, describe or summarize it in whole or in part publicly or to any third party.

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## I. The Burden of Proof for a Community Objection Is Unlikely to be Met

As you know, ICANN’s Applicant Guidebook sets forth four factors that an objector must prove to prevail with a Community Objection. For the reasons set forth more fully below, Patagonia believes that significant questions exist regarding the ability of any objector to prove all four required factors in a Community Objection against the .patagonia application.

### A. Identified “Clearly Delineated Community” Appears to Lack Commonality of Interest

Patagonia respectfully disagrees with your assessment that the “inhabitants of the region of Patagonia” constitute a “clearly delineated community.”

As your assessment notes, “the interested community is not institutionalized and straddles the border between two different states.” In addition, public comments and the Early Warnings themselves suggest that the Argentinean and Chilean citizens living in this region do not form a single, cohesive community with a commonality of interest.

The 26 public comments that object to the .patagonia application on community grounds highlight a distinct lack of cohesiveness. For instance, these comments identify the “relevant community” as the inhabitants of Argentinean Patagonia, as the inhabitants of Chilean Patagonia, or—as the assessment itself puts it—as inhabitants of both countries. Likewise, the commenters disagree regarding the “proper” beneficiaries of a .patagonia gTLD. Some argue that “[t]he domain .[p]atagonia *should be used by companies* in the Patagonia region”;<sup>1</sup> while others state that “[t]he .patagonia domain *should not be used by a company*.”<sup>2</sup> Some contend that the .patagonia string “should belong to *Argentinean and Chilean* domain registrars”;<sup>3</sup> others want the string to be used by “[n]obody but ARGENTINA.”<sup>4</sup>

The Early Warnings filed by the Argentinean and Chilean GAC representatives demonstrate the same absence of commonality of interest. Argentina’s Early Warning mentions the Patagonian region’s “vibrant local community,” but does so with reference to the inhabitants of “a region of Argentina,” not Argentina and Chile. Similarly, Chile’s Early Warning explicitly states that “[t]he national community”—presumably the Chilean national community—“must prevail above any brand interest.”

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<sup>1</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/396> (emphasis added)

<sup>2</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/2072> (emphasis added).

<sup>3</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/2041> (emphasis added).

<sup>4</sup> <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/2073> (emphasis added).

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Moreover, the Early Warnings mention several regional interests that appear highly incompatible, if not contradictory. Argentina's Early Warning, for instance, states that "Patagonia is well known by the beauty of its landscapes" but in the same breath notes the region's potential for oil drilling and mining—activities not generally known for preserving or maintaining "the beauty of [a] landscape[]." Chile's Early Warning makes similar arguments.

## B. Substantial Opposition Is Not What It Seems

Patagonia also respectfully disagrees with your assessment regarding substantial opposition to its .patagonia application.

Patagonia agrees with the IO's assessment that the number of negative comments that an application receives should not be a decisive factor in the IO's decision whether or not to make an objection. This principle is particularly important here for several reasons. First, only 26<sup>5</sup> commenters have objected to the .patagonia TLD on community grounds. The vast majority of comments were submitted on geographic grounds—an objection that is unwarranted, because, as the assessment recognizes, "Patagonia" is not a "geographic name" as defined by ICANN. Second, even taking into account all of the public comments submitted against Patagonia's .patagonia application, the vast majority contain no reference to a connection to the region of Patagonia. Finally, Patagonia has evidence that suggests that third parties offered compensation to persons who submitted comments against its .patagonia application. Given these facts, Patagonia believes that the number of negative comments should be afforded little weight.

Patagonia disagrees with the IO's apparent reliance on the actions and comments of Argentinean and Chilean government representatives regarding Patagonia's .patagonia application. Based on the public comments made by the Argentinean GAC representative and the content of the Early Warnings filed by both Argentina and Chile, it seems more likely than not that the Governments of Argentina and Chile fully intend to pursue GAC Advice against Patagonia's .patagonia application. The IO's reliance on the statements made by Argentina and Chile effectively creates an additional, indirect remedy for these governments; a remedy that neither needs given the avenues available to them directly through the GAC.

Further, Patagonia's long-standing trademark rights in Argentina and Chile and the historical lack of any other special, governmental protection for the name "Patagonia" make clear that the "historical defense of the community in other contexts" factor weighs heavily in Patagonia's favor. Both Argentina and Chile have granted trademark registrations to Patagonia for trademarks that contain or consist of the mark PATAGONIA (collectively, the "Patagonia TRADEMARKS"). Patagonia owns 12 registrations in Argentina for PATAGONIA

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<sup>5</sup> The number drops to 24 if comments submitted after the September 26 deadline or to the Community Evaluation Panel are excluded.

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Trademarks, the earliest of which issued over 20 years ago. Similarly, Patagonia owns 8 registrations in Chile for PATAGONIA Trademarks, the earliest of which issued over 28 years ago.<sup>6</sup> Most of Patagonia's Argentinean registrations for PATAGONIA Trademarks are incontestable. (Chilean trademark law does not provide for incontestability.) The trademark laws of Argentina and Chile contain no provision under which the respective Trademark Office could unilaterally revoke, cancel, or withdraw Patagonia's registrations for the PATAGONIA Trademarks in that country.

Patagonia's ownership of these trademark registrations in Argentina and Chile demonstrates that the laws of Argentina and Chile not only do not prohibit commercial use of the name "Patagonia" by entities that are not organized in Argentina or Chile, respectively, but that the laws of both countries affirmatively protect such use. The laws of Argentina and Chile have not provided special protection for the name "Patagonia," and did not prohibit Patagonia's application for and operation of the .patagonia gTLD. Finally, the November 8, 2012 Ministerial Statement between Argentina and Chile, which referenced the "importance of protecting the use of the name Patagonia," does not change and should not trump this history – especially as it came almost five months after Patagonia's .patagonia application was publicly disclosed on Reveal Day.

C. Strong Association between Patagonia and the .patagonia gTLD String

Patagonia has extensive evidence of a strong public association between it and its applied-for .patagonia gTLD string, which it reserves for now.

D. Material Detriment Is Highly Unlikely

Finally, Patagonia believes it is far from clear that any objector could demonstrate that Patagonia's .patagonia application creates "a likelihood of material detriment to the rights of legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted." The IO's assessment does not appear to consider any of the six factors outlined in the Applicant Guidebook, and none supports a finding of likelihood of material detriment.

To the contrary, Patagonia has made extensive efforts to support the region's residents and to protect its wild landscapes. Working with the Nature Conservancy and Ovis XXI, Patagonia has developed a sustainable grazing protocol to protect some 15 million acres of grasslands in southern Argentina and Chile. With financial, volunteer, and fundraising support

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<sup>6</sup> Patagonia owns hundreds of registrations for its PATAGONIA Trademarks in nearly 100 countries, including in all but 2 of the countries that provided their "full support and endorsement" in the "Supplemental" Early Warning filed by Argentina.

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from Patagonia, the nonprofit Conservación Patagónica has been working for the past eight years to transform a 650,000-acre former sheep ranch in southern Chile into the country's next national park. Each year, Patagonia uses at least 1% of its sales to support environmental work, largely through a grant program; in 2012, Patagonia made over \$4M in grants, including to a dozen groups operating in Argentina and Chile. Finally, Patagonia's Our Common Waters initiative works to protect wild rivers and to promote healthy freshwater ecosystems, and last year, Patagonia used that initiative to raise awareness of the environmental harms of damming in Chilean Patagonia.

In light of these broad and varied efforts, it is difficult to conceive of ways in which Patagonia's .patagonia application creates "a likelihood of material detriment." Patagonia respectfully suggests that the IO's assessment does not identify any. That assessment simply states that if the .patagonia string is delegated to Patagonia, "people from [the region of] Patagonia won't be able to obtain a '.patagonia' domain name for any other purposes." Yet, this analysis appears to be inconsistent with the Applicant Guidebook, which specifies that "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment."

## II. The Independent Objector Appears to Have a Conflict of Interest

Beyond the merits of any Community Objection against Patagonia's .patagonia application, the facts indicate that, under the applicable standard, you appear to have a conflict of interest that prevents you from pursuing a Community Objection against Patagonia's .patagonia application.

Your CV states that Argentina appointed you as Arbitrator in *Mobil Exploration and Development Argentina Inc., Suc. Argentina S.S. v. Republic of Argentina* (ICSID ARB/04/15) (2005); that Argentina also appointed you as Arbitrator in *Bank of Nova Scotia v. Argentina* (UNCITRAL – suspended) (2005); and that you subsequently served as Counsel and Advocate for Argentina in the case before the International Court of Justice concerning *Certain Pulp Mills on the Uruguay River* in 2006-2010.

Section 3.2.5 of the Applicant Guidebook provides that "[t]he various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence." General Principle 2.b of the *IBA Guidelines on Conflicts of Interest in International Arbitration* provides that an arbitrator should decline an appointment or refuse to continue to act as an arbitrator in an ongoing proceeding "if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or

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independence.”<sup>7</sup> General Principle 2.c provides that “Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.”<sup>8</sup>

Your own assessment makes clear that Argentina has a material interest in the outcome of your assessment whether a Community Objection against Patagonia’s .patagonia application is warranted and, if so, the outcome of any such Community Objection that you may file. A reasonable third person with knowledge – that Argentina retained you as counsel after it twice appointed you as an arbitrator, that Argentina was your client for four to five years in a proceeding that required a significant amount of time (and presumably generated significant fees), and that that representation ended relatively recently – would certainly have justifiable doubts about your impartiality. Such a reasonable and informed person could certainly reach the conclusion that there was a likelihood that factors *other* than the merits of a Community Objection against Patagonia’s .patagonia application – namely, your past client relationship with the Republic of Argentina and the prospect of a future client relationship with the Republic of Argentina – may influence your assessment of whether a Community Objection against Patagonia’s .patagonia application is warranted and, if so, whether you file one.

While it is Patagonia’s position that these circumstances present a clear conflict of interest, Patagonia also believes that the IO must avoid even the appearance of any such impropriety. Any conflict of interest or appearance of such a conflict will undoubtedly be imputed to ICANN itself, particularly in light of ICANN’s own recent conflict of interest issues. Patagonia respectfully submits that, whether your past legal representation of and client relationship with Argentina constitutes a conflict of interest (as Patagonia maintains) or the appearance of impropriety, this relationship furnishes separate and additional grounds against both a Community Objection against the .patagonia application as well as any objection brought by you as Independent Objector against the .patagonia application.

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<sup>7</sup> International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918>.

<sup>8</sup> *Id.*



# COVINGTON

COVINGTON & BURLING LLP

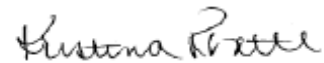
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For the above-stated reasons, Patagonia believes that serious impediments exist both to any Community Objection against its .patagonia gTLD application, and to a Community Objection against that application filed by you. Please do not hesitate to contact us should you require any clarifications.

Respectfully submitted,



Kristina Rosette

cc: Hilary Dessouky, Esq., Patagonia, Inc.