

22 April 2019

Via email

ICANN Board of Directors
c/o Mr Cherine Chalaby, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: .Amazon Top-Level Domain Application

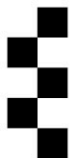
Dear Mr Chalaby

We are Lecturers in Law and Human Rights at the University of Essex and Middlesex University London (both in the UK) who specialize collectively in business and human rights and the rights of indigenous peoples. We write to ensure that the members of Board of Directors are aware of the international human rights law ('IHRL') issues, specifically the rights of indigenous peoples in the Amazon, raised by the Amazon corporation's application for certain .AMAZON Top-Level Domains ('TLDs'). IHRL indicates that the Amazon corporation should have ensured that the concerned indigenous peoples were consulted in relation to its application, and their consent to agreements that ensure fair and equitable benefits obtained in advance of the application. This is due to the nature of the potential impacts on the indigenous peoples as a result of being denied the ability to economically benefit from the .AMAZON TLDs.

We have read Professor Jérôme Passa's expert opinion addressing the international intellectual property law issues and Amazon's claims under human rights law. He did not consider the competing rights and claims of the indigenous peoples of the Amazon. As such, we have prepared the attached briefing for the Board of Directors. As we explain, IHRL uniquely recognizes the rights of indigenous peoples to control their own territories, identities, and development. These rights are distinct from those of the eight ACTO states. Some of the indigenous peoples of the Amazon already intentionally pursue eco-tourism or other economic activities, through which their identity and development is tied to the use of the English term 'Amazon.' The recognition under international law of their right to self-determination means that many more indigenous peoples in the Amazon will likely seek to pursue similar development paths in the future. The assignment of the .AMAZON TLDs to the corporation deprives the indigenous communities of their ability to use these TLDs as a means by which to assert and pursue their own economic and cultural development. As a result, under existing IHRL standards, the Amazon corporation should have ensured that the Amazonian communities were consulted before pursuing the application. In this particular case, the corporation should be required to ensure that consultations are undertaken with the concerned indigenous peoples aimed at obtaining their free prior and informed consent (FPIC) through culturally appropriate processes. Those processes should identify the risks posed to the indigenous peoples' rights and outline the proposed steps to mitigate and remediate any harms caused. Where the harms are significant, as we believe they are in this case, FPIC is needed and fair and equitable benefit sharing agreements should be entered into with the concerned indigenous peoples. These are minimum expectations under international law.

Because indigenous and tribal peoples are vested with collective rights under international law, respecting and applying these rights in this case would not create a broad precedent or loophole on issues of geographic identity for non-indigenous communities. Instead, the precedent would be very narrow, affecting only cases involving indigenous peoples and those peoples who, due to their particular histories and distinctive characteristics, are recognized under international law as having collective rights akin to indigenous peoples. Such an approach would be consistent with the responsibility of ICANN under IHRL.

We write this report in our personal capacities and have not solicited nor been offered any compensation for this letter. We are aware this information comes late in the process, but given our specific research focus, we only learned of this case's developments this weekend. We hope that given the seriousness of the issues, and both ICANN and the Amazon corporation's commitment to multi-stakeholder inclusion, the Board of Directors will take these concerns under consideration. We are also aware that it is the practice of ICANN to publish communications on its website. We will also publish the letter on the website of the Essex Business and Human Rights Project (<https://www1.essex.ac.uk/ebhr/>) as the issues are important broadly for researchers, practitioners, advocates, and activists in the areas of business and human rights and the rights of indigenous peoples.



University of Essex

If the Board of Directors has further questions, we are happy to provide assistance. Alternatively, we would encourage the Board to contact the independent experts entrusted by the United Nations to examine and educate states, private actors, and the public on the relevant legal issues. The UN Special Rapporteur on the Rights of Indigenous Peoples, Ms Victoria Tauli Corpuz, and the UN Working Group on Business and Human Rights, currently chaired by Professor Surya Deva, both have mandates that would allow them to answer your questions so as to provide clarity on the complexities raised by this case.

Sincerely yours

Dr Tara Van Ho JD, PhD, FHEA
Lecturer, School of Law and Human Rights Centre
University of Essex

Contact Information Redacted

Contact Information Redacted

Dr Cathal Doyle BEng, PGDip Economics, LL.M, PhD
Research Fellow, School of Law
Middlesex University London

Contact Information Redacted

Contact Information Redacted

The Rights of Indigenous Peoples and the .Amazon Top-Level Domain Application

In this briefing, we (1) highlight the rights of indigenous peoples under international law and (2) assess whether the indigenous peoples of the Amazon have an interest not only in the Spanish or Portuguese ‘Amazónica’ and ‘Amazonas,’ but also in the English term ‘Amazon.’ We (3) explain that the Amazon corporation has a responsibility to respect these rights, to ensure consultations occur with the indigenous peoples, and to secure their consent based on mutually beneficial agreements. We (4) note that there may be specific customary international law on these issues and (5) confirm that recognizing the rights of the indigenous peoples in this case would not create a unwieldy precedent for the Board of Directors moving forward. Finally, we (6) conclude that the balance of interests suggests that the TLDs should not be assigned to the Amazon corporation at this time, but may be assigned only after the Amazon corporation has met its IHRL responsibilities.

1. The Rights of Indigenous Peoples under International Law

Under international law, indigenous peoples are recognized as being vested with collective rights over their traditional territories which States and private actors are bound to respect. These include the right to self-determination and to self-determined development, to their cultural heritage and to preserve and maintain their distinct identities and unique relationships with their traditional territories. States are also obligated to take ‘special measures’ to guarantee the protection of these rights and indigenous communities’ ‘persons, institutions, property, labour, cultures and environment.’¹ The precise number of indigenous peoples in the Amazon is unknown. However, it is estimated that there are approximately 400 indigenous communities comprising of over 900,000 individuals mostly living in their traditional territories with which they hold unique and symbiotic relationships. While a minority of indigenous peoples choose not to be contacted, most indigenous peoples are actively pursuing their right to self-determined development, including through the development of life plans and sustainable development plans governing their territories. For many of these indigenous peoples, control over and development of tourism, environmental services and conservation, and traditional knowledge are of fundamental importance to their physical and cultural survival and identities as peoples. Some are in the process of developing their own tourism and/or conservation strategies and plans, while others have already embarked on tourism and or other ecologically friendly economic activities as a means of protecting and strengthening their identity and development. For example, the Pemón people in Canaima (Venezuelan Amazon) provide tours and hiking experiences for tourists from around the globe, to places such as Mount Roraima or Kerepakupai Meru (known in English as Angel Falls). In addition, the global conservation movement has recognized that indigenous peoples are the best protection against deforestation of the Amazon, as without adequate recognition and protection of their rights and interests the Amazon would be rapidly deforested.²

As part of their self-determined development plans indigenous peoples are adopting new technologies to map their territories and protect their lands from encroachment and environmental harms. This use of internet technologies is necessary not only to increase public awareness of violations of their rights but also to promote and facilitate their current and future economic activities.

Indigenous peoples have been actively engaged in the development of international law standards pertaining to the protection of their natural resources, including their traditional knowledge, tangible and intangible cultural heritage, and intellectual property in the context of discussions at the United Nations General Assembly, the Convention on Biological Diversity, and the World Intellectual Property Organization. The rights of indigenous communities and their members to self-identification, to identity, and to participate in decision-making that impact on their rights or interests, underpin these developments. International human rights bodies and regional courts have developed a series of safeguards in order to protect indigenous peoples in contexts where there may be significant impacts on their rights or where their cultural or physical survival may be at risk. Among these standards are the right to be consulted in order to obtain free prior and informed consent (FPIC), the need for indigenous and inclusive rights-based impact assessments, and the right to participate in the benefits of economic activity.

¹ ILO Convention 169: Indigenous and Tribal Peoples Convention (1989), at Article 4.

² S. Eton ‘Our Wealth Is the Forest’: Indigenous Tribes Are the Last Best Hope for the Amazon’ (October 2018), available at <https://pulitzercenter.org/reporting/our-wealth-forest-indigenous-tribes-are-last-best-hope-amazon>

The rights of the indigenous peoples are distinct from the rights and interests of the eight ACTO states. The relevant law is found in **ILO Convention 169**,³ the **United Nations Declaration on Indigenous Peoples (UNDRIP)**, international human rights instruments, and the **Convention on Biological Diversity**.⁴ The ILO Convention is binding on all eight ACTO states. While UNDRIP is not a treaty, the Inter-American Commission on Human Rights and Inter-American Court of Human Rights have found it relevant to defining the rights of indigenous peoples under the American Convention on Human Rights, which, like the European Convention on Human Rights, is one of three regional treaties that help define international human rights law. Additionally, Inter-American Court of Human Rights (IACtHR) has found the rights of indigenous peoples to self-determination under the UNDRIP, together with Common Article 1 of the **International Covenants on Civil and Political Rights (ICCPR) and Economic Social and Cultural (ICESCR)**, informs the interpretation of the American Convention on Human Rights when affirming the requirement to consult with Amazonian indigenous peoples and the need to obtain their FPIC.⁵

The relevant human rights instruments and associated jurisprudence recognize indigenous peoples' inherent rights and their entitlement 'to be secure in the enjoyment of their own means of subsistence and development.'⁶ By virtue of their right to self-determination, they are not only entitled to permanently exist as peoples but to determine the form of development they freely wish to pursue. This includes their right to the 'improvement of their economic and social conditions'⁷ and to 'strengthen their distinct political, legal, economic, social and cultural institutions.'⁸ In doing so, indigenous peoples are entitled to 'decide their own priorities ... as it affects their lives ... and to exercise control, to the extent possible, over their own economic, social and cultural development.'⁹ Their rights to self-determination and 'to be secure in the enjoyment of their own means of subsistence and development'¹⁰ entail an obligation to ensure that when development activities affect them, indigenous peoples are consulted in an appropriate and accessible manner¹¹ in order to obtain their consent through representatives of their own choosing.¹² In addition, governments must develop, 'with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.'¹³ Finally, 'in no case may a people be deprived of its own means of subsistence.'¹⁴ This right to self-determination right is non-derogable.

Collectively, these rights and obligations indicate that where a decision is likely to undermine the rights of indigenous peoples to pursue their own economic and social development, or where it would harm their institutions or their identity, they must be consulted in order to obtain their consent and there should be a culturally appropriate process through which they are adequately informed of any potential future impacts or restrictions on their rights and by which their effective participation in decision-making is guaranteed. It is worth noting that the right of indigenous peoples to be consulted has also been referred to in international investment arbitration as a norm of customary international law.¹⁵ As is explained below, these rights also entail responsibilities on the Amazon corporation to ensure the indigenous populations are consulted, and their FPIC is obtained. If it has pursued a course of action that limits, infringes on, or results in violations of the rights of indigenous peoples, the corporation should participate in remedial mechanisms and provide just compensation to those communities. It does not appear these steps have been taken in this case.

By granting the Amazon corporation the exclusive rights to administer the .AMAZON TLDs, ICANN would deprive the indigenous peoples of the use of relevant and culturally significant second-level names which may be of vital importance for

³ ILO Convention 169, n 1 above.

⁴ General Assembly Resolution 61/295 (13 September 2007) ('UNDRIP').

⁵ Inter-American Court of Human Rights, *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, at paras 92-96; Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v Ecuador*, Judgment of June 27, 2012 (Merits and reparations), at para 160.

⁶ UNDRIP, Article 20.

⁷ Ibid, Article 21.

⁸ Ibid, Article 5.

⁹ ILO Convention 169, Article 7; see also, UNDRIP, Article 23.

¹⁰ UNDRIP, Article 20.

¹¹ ILO Convention 169, Article 6.

¹² UNDRIP, Article 18.

¹³ ILO Convention 169 Article 2

¹⁴ International Covenant on Civil and Political Rights, Article 1(2); International Covenant on Economic, Social and Cultural Rights, Article 1(2).

¹⁵ *Grand River Enterprise Six Nations, Ltd. v. the United States* (2011).

guaranteeing their cultural and physical survival in the future. This is clear from the corporation's statements that even providing governments, like Brazil and Venezuela, with second-level names would undermine the corporation's strategic goals. Transferring administration of the .AMAZON TLDs to the corporation would render inaccessible a strategic interest of these indigenous peoples, potentially undermining their long-term development by usurping a valuable English language association for the purpose of the corporation's more limited interest. As a matter of international law, this action should only be undertaken following consultation with, and having obtained the consent of, the indigenous peoples themselves.¹⁶ This would also have been consistent with ICANN's own Guidelines, which require that consultations be held with 'relevant governments and authorities' to 'enlist their support or non-objection prior to submission of the application.' Under international law, indigenous peoples' authorities are recognized as the legitimate decision-making bodies on activities affecting their rights and interests.

2. Indigenous Peoples' Interest in the English word 'Amazon'

Admittedly, the law was not developed with the types of questions raised by the .AMAZON applications in mind. ILO Convention 169 was developed in 1989, 5 years before the corporation was founded, when such issues could not possibly be anticipated. Even the more recent UNDRIP was developed with an expectation that the harms indigenous communities would experience would primarily be from extractive companies and pharmaceutical companies extracting intellectual property in the form of traditional knowledge, rather than internet-based retail companies. More recently, greater attention has been directed to the protection of indigenous peoples' cultural heritage, identity and traditional knowledge, as reflected in the Nagoya Protocol to the Convention on Biological Diversity, and on-going negotiations and standard-setting processes at the World Intellectual Property Organization (WIPO).¹⁷ Five decades of developments have demonstrated that international human rights law instruments are living instruments that must be interpreted in light of contemporary developments. This body of law is therefore directly applicable in the current case even if the law was not developed with these impacts in mind.

The indigenous peoples of the Amazon have a legitimate and protected interest in the English word 'Amazon' for their own development and preservation of their cultural integrity. International law, including ILO Convention 169, recognizes that self-identification is a fundamental criterion to the determination of who is indigenous. Hundreds of indigenous peoples living in the Amazon identify as Amazonian peoples, or indigenous peoples of the Amazon. They do so in both national and international contexts, in their engagement with other indigenous peoples, with governments, civil society actors, corporations and with international organizations. In so doing, they are exercising their right to self-identify as such, and are expressing their cultural identity as peoples of the forest and river. Indeed, the names of these peoples in their own languages is often "people of the river" or "people of the forest". The concept of the Amazon is therefore deeply ingrained in their sense of who they are as a people and what they want for the future. The symbiotic relationship between the Amazon and its peoples is reflected in their essential role in maintaining the integrity of the forests and the Amazon river and tributaries that feed it.

Similarly, the very concept of the Amazon in the global imagination is intertwined with its indigenous peoples. Indigenous peoples of the Amazon are also recognized under this banner by other indigenous peoples throughout the world. To restrict their association with the Amazon in any way could also serve to restrict that important recognition by their fellow indigenous peoples. Finally, while they may use Spanish, Portuguese, and/or indigenous terms when speaking amongst themselves or within their states, the communities engaged in eco-tourism or other commercial activity also routinely use the English terms to attract the attention of English-speaking consumers, investors and donors. The relevant communities are often collectively referred to in the international domain as 'indigenous peoples of the Amazon,' 'the Amazon's indigenous peoples,' or similar expressions.¹⁸ These terms directly tie the indigenous peoples to the 'Amazon' region as it is known in English, and are used

¹⁶ ILO Convention 169, Articles 6, 7, 15; UNDRIP, Articles 19, 32; *Saramaka v Suriname*, n 5 above; UN Committee on the Elimination of all forms of Racial Discrimination, 'General Recommendation No. 23,' UN Doc. A/52/18, annex V, (1997).

¹⁷ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to The Convention on Biological Diversity, available at <https://www.cbd.int/abs/about/>. For background on indigenous peoples' involvement in WIPO, see <https://www.wipo.int/tk/en/indigenous/>.

¹⁸ See, e.g., Pachamama Alliance, 'Amazon Advocacy,' available at <https://www.pachamama.org/advocacy>; See also, S Schwartzman and B Zimmerman, 'Conservation Alliances with Indigenous Peoples of the Amazon,' *Conservation Biology*, Vol. 19, No. 3 (2005), pp. 721-727, available at <https://www.jstor.org/stable/3591060?mag=indigenous-reserves-and-the-future-of-the-amazon>; 'Amazon's indigenous peoples "never so threatened": pope,' *France24* (19 Jan 2018), available at <https://www.france24.com/en/20180119-amazons-indigenous-people-never-so-threatened-pope-0>; Rainforest Foundation US, Annual Report 2017, at p. 5, available at <https://rainforestfoundation.org/wp-content/uploads/2018/09/2017AnnualReport-small.pdf>.

not only by native English speakers but also by others who use English as their travelling or working language. Being able to self-identify as peoples of the Amazon, and to capitalize on that identification, helps some of the communities to pursue and secure their own economic development. While there is no risk that people purchasing from the corporation will confuse its numerous websites – such as amazon.co.uk – with providing information about the region or its diverse peoples, the use of the ‘.AMAZON’ TLDs risks co-opting and infringing upon the identity of the Amazonian peoples.

Professor Passa dismissed the concerns of the eight ACTO states, claiming that ‘the term “amazon” does not appear to correspond to the name of the Amazonia region in any language, and in particular in Spanish, Portuguese or English’ (para 5). What he apparently means is that the term does not appear in the ISO recognized lists. He suggested the states’ needs could be met by using the Spanish or Portuguese terms for the ‘Amazon.’ We share Professor Alonso Gurmendi publicly expressed doubts on Professor Passa’s assertion that the words ‘Amazonas’ or ‘Amazónica’ are sufficient alternatives to ‘Amazon.’¹⁹ Additionally, the indigenous peoples of the Amazon are associated with the ‘Amazon,’ not only the Amazonas or Amazónica. As noted, the relevant peoples are often referred to through their association with the term ‘Amazon.’ They are active under this banner in a broad range of international fora (including in relation to environmental protection and conservation, sustainable development, climate change, intellectual property, and human rights), where their rights and interests are addressed and their future autonomy and development guaranteed. The term ‘Amazon’ is also used in United Nations reports and official documents,²⁰ decisions of the Inter-American Commission and the Inter-American Court of Human Rights,²¹ news articles²² and travel guides.²³ As a result, defining their identity and pursuing their economic development through eco-tourism tied to the .AMAZON TLDs would not be sufficiently met by relying only on the Portuguese or Spanish TLDs.

Professor Passa’s conclusions merely suggest the limitations of the utility of the ISO standards, particularly when dealing with culturally complex or sensitive issues. While ICANN’s use of the ISO standards makes sense if it is trying to avoid contentious decisions over what constitutes a state or not, the ISO standards become less appropriate now that ICANN is allowing private actors to secure TLDs. That the ISO does not recognize the Amazon (or ‘Maghreb’ and ‘Patagonia’) as a geographic area suggests that the ISO standards are not fit to carry the full weight of ICANN’s needs. ICANN should consider alternative means of assessment that are better equipped for these types of issues and pays better attention to the territorial, self-governance and cultural rights of indigenous or tribal peoples.

In the future, indigenous peoples of the Amazon may use the internet for tourism and other economic initiatives that are integral to their territories, such as products produced through Amazonian material, indigenous knowledge derived from their territories, medication that is based on traditional Amazonian plants. Any restriction on their use of .AMAZON TLDs could constitute a significant limitation on these or other activities. The English version is the default for millions in the world, not just native English speakers, looking for information on *the* Amazon. Second-level domain names could help promote the economic development of the indigenous peoples that pursue eco-tourism or other economic endeavours, and could help secure the external identities of the Amazonian indigenous peoples. By foreclosing their ability to use relevant second-level

¹⁹ See, A Gurmendi ‘Who Owns the .Amazon? (And how many Kindles Would you Pay for it?)’, *Opinio Juris* (19 April 2019), available at <http://opiniojuris.org/2019/04/19/who-owns-the-amazon-and-how-many-kindles-would-you-pay-for-it/>

²⁰ See, e.g., United Nations Children’s Fund, Executive Board, ‘Recommendation for funding from other resources without a recommendation for funding from regular resources: Amazon subregional programme,’ UN Doc. E/ICEF/2002/P.L.29 (2002); Trade and Development Board, ‘Review of the technical cooperation activities of UNCTAD and their financing,’ UN Doc. TD/B/WP/202/ADD.1/Corr.1 at p 2, paras 193-194.

²¹ See, e.g., *Sarayaku v Ecuador*, n 5 above, at paras 21 24 and, fn 3.; *Jentel v. Brazil*, Comm’n No. 1769, Inter-Am. C.H.R., OEA/Ser.L/V/II.37, doc. 20, corr. 1 (1975) at para 6(b).

²² See, e.g., D Grossman, ‘Amazon’s Trees Get Taste of Air of the Future,’ *The Guardian* (19 April 2019), available at <https://www.theguardian.com/environment/2019/apr/19/amazons-trees-get-taste-of-air-of-the-future>; S Cowie, ‘Successive Land Attacks Stoke Fear in Brazil’s Amazon,’ *Al Jazeera* (12 April 2019), available at <https://www.aljazeera.com/news/2019/04/successive-land-attacks-stoke-fear-brazil-amazon-190412185926650.html>; ‘Earth Matters: Behind the Battle against Deforestation in the Amazon Rainforest,’ *CBS News* (22 April 2019), available at <https://www.cbsnews.com/news/earth-day-2019-how-deforestation-threatens-the-amazon-rainforest/>.

²³ See, e.g., Fodor’s Travel, ‘The Amazon,’ available at <https://www.fodors.com/world/south-america/brazil/the-amazon>; Rough Guides, ‘The Amazon,’ available at <https://www.roughguides.com/destinations/south-america/brazil/amazon/>; Lonely Planet, ‘Brazil: The Amazon,’ available at <https://www.lonelyplanet.com/brazil/the-amazon>; Rough Guides, ‘Communing with an Amazon shaman, Peru,’ available at <https://www.roughguides.com/article/communing-with-an-amazon-shaman-peru/>.

domains, or making them reliant on the corporation's willingness to do so, the corporation is negatively impacting on the economic development of these indigenous peoples, and undermining their asserted external identities.

Understanding the impact does not necessarily require the denial of the .AMAZON TLDs. Whether the TLDs are needed by the indigenous peoples is a question that only the indigenous peoples themselves are able to answer. This is inherent in their rights to self-determination, to set their own priorities, and to pursue their distinct identities and economic development. Many of the indigenous peoples of the Amazon find themselves at risk of cultural or physical extinction due to the activities of corporations and the failure of State to adequately protect their rights and interests. Given the potentially profound impact on the rights of the indigenous peoples of the Amazon, ICANN has a responsibility under international law to act with caution in any decision related to the assignation of the .AMAZON TLDs to a corporation that would deny the rights of indigenous peoples to benefit from their identity and impose significant restrictions on their internationally recognized rights and interests. That the very cultural and physical survival of numerous peoples are implicated underpins the requirement for FPIC of the concerned indigenous peoples and raises the threshold for any decision of ICANN that impacts on their identity. Were it not for the fact that the corporation is seeking exclusive rights over the '.Amazon' TLDs, allowing the corporation to also use those TLDs would perhaps not be so problematic, provided the concerned indigenous peoples were fully informed and adequately consulted in accordance with international human rights law standards. Since the corporation is seeking exclusive rights, however, the corporation should have undertaken 'human rights due diligence,' securing consultations with the indigenous communities, developed a plan for mitigating and remediating the harms, including through benefit-sharing agreements, and secured indigenous peoples' FPIC. Given the cumulative and long-term affect that such a decision would have on indigenous peoples who are already facing serious threats to their very survival and identity as peoples, these issues merit serious consideration by ICANN.

3. The Amazon corporation's Duty to Respect and Remedy these Rights

While the primary obligations for protecting the rights of the indigenous peoples rests with states, the corporation also has a duty to respect these rights. The UN Guiding Principles on Business and Human Rights, currently the most authoritative statement on business's responsibilities in the area of human rights, recognizes that businesses must avoid actions that will negatively impact on the realisation of human rights, including the rights of indigenous peoples.²⁴ Again, the instrument is non-binding in its own right, but the Inter-American Court of Human Right has cited the UN Guiding Principles when affirming that businesses must respect the rights of indigenous peoples.²⁵

To realize their responsibility to respect human rights, businesses should engage in 'human rights due diligence,' meaning they should actively seek to understand their impacts on human rights and work to mitigate those impacts.²⁶ The business is expected to do this even where a state fails in its own obligations to protect the rights of indigenous peoples.²⁷ Given that the corporation is aware of the indigenous peoples of the Amazon – in fact, the company was reportedly named after the River – it should have been actively promoting consultations with the concerned indigenous peoples in order to determine their views on and obtain their FPIC to the company's TLD applications. This approach would be consistent with the guidance provided to companies in the UN Global Compact Business Reference Guide on the UNDRIP and by the UN Working Group on Business and Human Rights.²⁸ The failure to do so means that the company itself has not lived up to the full range of international responsibilities relevant to its application.

Where a business does negatively impact on human rights, it is expected to provide remedies and reparations necessary to restore the individuals and communities harmed to the position they would have been in but for the impact. The UN Guiding Principles on Business and Human Rights recognize a general responsibility on businesses to do this,²⁹ while indigenous peoples also have a distinct right to 'just and fair redress' when they are 'deprived of their means of subsistence.'³⁰ We

²⁴ UN Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31 (2011) at Principle 11 and Commentary.

²⁵ Inter-American Court of Human Rights *Kaliña and Lokono Peoples v. Suriname* (2015)

²⁶ UN Guiding Principles on Business and Human Rights, n 24 at Principle 15 and Commentary.

²⁷ Ibid at Principle 11, Commentary.

²⁸ UN Global Compact 'The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples' (2015) available at <https://www.unglobalcompact.org/library/541>; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: "Business-related impacts on the rights of indigenous peoples" (7 August 2013) UN Doc A/68/279

²⁹ UN Guiding Principles on Business and Human Rights, n 24 at Principles 25, 29 and Commentary.

³⁰ UNDRIP, Article 20.

appreciate that the Amazon corporation has offered up to \$5 million USD in goods and services to ACTO, or \$625,000 per state, but this would not adequately compensate the indigenous peoples for the profound impact that they would experience. It is unlikely that the kindles offered would be accessible to the indigenous peoples, and for each indigenous community member to have a kindle would cost approximately \$72 million USD. Such an approach, however, would still be inappropriate as a matter of international law. Instead, the corporation is expected to consult with the indigenous communities to understand the harm they will experience and to develop a plan for mitigation and reparations appropriate to the needs of the communities and their individual members. The corporation should seek to obtain FPIC by providing the indigenous peoples with all the necessary information and participatory impact assessments to fully understand any potential harms they would experience. The corporation should also ensure mutually acceptable benefit sharing agreements as part of the process of obtaining FPIC.

4. There may be specific Customary International Law

The ACTO Working Group has asserted the existence of specific customary international law relevant to the protection of culturally or geographically significant names. Determining the existence of customary international law is a labour-intensive practice but the ACTO Working Group's claim is one that is important to investigate. We suspect there is some validity to this assertion, if not in all circumstances at least in situations where commercial interests have the potential to impact geographic development or indigenous peoples' rights. We would therefore encourage the ICANN Board of Directors to undertake or solicit a specific investigation into this issue.

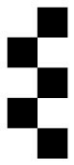
5. This Would Not Create an Unwieldy Precedent

We understand that the Board of Directors might be hesitant to create a precedent by which it recognizes the rights of communities to the names of geographical areas that encompass broad swaths of land. Recognizing the rights of indigenous peoples, however, would not create such a precedent. The internationally recognized and protected rights of indigenous peoples are distinct from any rights that might attach to members of other communities with a defined geographic identity. It would be inaccurate and inappropriate, for example, to compare the rights of indigenous peoples of the Amazon to Midwesterners in the US. The former are collective territorial, self-governance and cultural rights vested in indigenous peoples under international law, while the latter do not have any specific individual or collective right to be referred to as 'Midwesterners,' or to assert their identity as it relates to their 'Midwestern' origins. The rights and obligations addressed above are specific to indigenous peoples and a limited number of groups that are deemed akin to indigenous peoples, such as Afro-Descendent peoples in South America. As a result, addressing the rights of the indigenous peoples in this particular case does not create a precedent that can be used more generally by populations to assert claims over geographic names or identities. By addressing the rights of indigenous peoples, ICANN would be merely complying with established international law.

6. The Balance of Risks and Interests

Law is generally aimed at balancing and assigning risks and interests. In this case, the corporation was named after a river in a particular region that is inhabited by historically discriminated, exploited and frequently vulnerable indigenous peoples who are recognized as having distinct rights under international law. The very name of the region is inseparable from its indigenous peoples who have maintained its integrity and are intimately associated with it. It was the corporation's choice to use the river's and the region's name, and to pursue a course of action that put the corporation's interest at odds with those of the indigenous peoples of the Amazon. As explained above, the assignment of the .AMAZON TLDs to the corporation is likely to harm the economic interests, cultural integrity, self-determination and development of these indigenous peoples. International law calls for the corporation to have ensured that consultations were held with the indigenous peoples about this impact in order to obtain their informed consent to any impacts and to ensure that fair and equitable agreements are entered into with the indigenous peoples. The corporation does not appear to have fulfilled these responsibilities. It is these choices by the corporation that cause the problems under international human rights law.

Given the balance of risks and interests, assigning the corporation the exclusive rights to use and administer the .AMAZON TLDs would seemingly be rewarding it for ignoring its human rights responsibilities. The impact on the indigenous peoples is potentially profound. Awarding the TLDs under these circumstances would be a problematic decision that could potentially breach ICANN's own international responsibilities as an entity that is entrusted with regulating commercial interests on the internet. As a result, the ICANN Board should not assign the TLDs at this time, but should instead require the corporation to



ensure the indigenous peoples are consulted and prepare a report in which it acknowledges the risks it poses to the indigenous peoples, delineates the steps agreed to with the indigenous peoples to mitigate or remediate any harms, and the mutually beneficial agreements reached with indigenous peoples. These are minimum expectations under human rights law. The corporation's current commitment to ICANN's multi-stakeholder inclusion is not sufficient for this purpose. ICANN should therefore require the corporation to fulfil its international responsibilities in the area of human rights before it is given control over the .AMAZON TLDs.