

Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights

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Abstract

The right of indigenous peoples over their lands, territories, and natural resources has been developed in recent years by the Inter-American Court of Human Rights. When this right is in apparent or real conflict with the rights or interests of the extractive industry over these lands or natural resources, resolving the conflict presents complex legal and practical problems. The Inter-American Court has established standards that must be met in order to restrict indigenous peoples' rights over their lands and natural resources, as well as the requirement to conduct transparent consultations in good faith and, when applicable, obtain the free, prior, and informed consent of the affected indigenous peoples before a project can be approved in their territories. This article explores these standards and requirements, and analyzes their application by the Inter-American Court and the Inter-American Commission on Human Rights.

A. Introduction

In recent years, various international legal bodies have recognized the content of the rights of indigenous peoples. In the Americas, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court) have developed standards to give content to and define the contours of these rights, particularly the right to collective ownership of indigenous lands and territories. As these rights have expressly become part of Inter-American law, States are called upon to abide by them. In practice, however, respect for these rights often faces obstacles, particularly when faced with significant economic interests. For instance, when indigenous peoples' rights "compete" with the interests of members of the extractive industry – such as when the right to own or use a piece of land and its resources is disputed between an indigenous people and a mining concessionaire – legal rights on paper do not always translate into actual rights in practice.

This article explores the way the Inter-American Court and Commission have developed the content of the property rights of indigenous peoples over their lands and territories in the context of extractive projects. The article first provides an overview of the origin of the rights of indigenous peoples in modern international law, followed by a summary of Inter-American case law on the subject. The concluding sections provide a snapshot of the current status of the law in the Americas and concluding remarks for what may be expected in the near future in this area of Inter-American law.

B. Origins of the Right to Consultation

In a large number of extractive projects authorized on lands occupied by indigenous peoples, the indigenous peoples do not participate in the process that leads to the concession or exploitation agreement. Yet many of these indigenous peoples have inhabited the territories they now occupy for centuries, long before the current Nation States were created. The case could be made that the rights of indigenous peoples – including those over their lands and territories – exist irrespective of their recognition by the States, since the indigenous peoples pre-date the modern States. However, that is not the purpose of this article. Rather, its focus is on the recognition of indigenous peoples' rights in contemporary international law.

I. ILO Conventions

The International Labour Organization (ILO) was one of the first international bodies to expressly recognize the rights of indigenous peoples, when it adopted the *Indigenous and Tribal Peoples Convention* (ILO Convention No. 107)¹ in 1957. As the ILO now acknowledges, *ILO Convention No. 107* was founded on the assumption that indigenous and tribal peoples were “less advanced” temporary societies destined to disappear with modernization.² *ILO Convention No. 107* referred to indigenous “populations” and generally encouraged integration.³

As the views on the rights of indigenous peoples evolved in the 1970's and 1980's, and as indigenous peoples themselves began to participate more actively in the international legal arena, the United Nations revisited the integrationist approach of *ILO Convention No. 107*. In 1986, the Governing Body of the ILO convened a Committee of Experts to review the issue, and it concluded that “the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world”.⁴ As a result, in 1989 the ILO adopted

¹ International Labour Organization (ILO), *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 [ILO Convention No. 107].

² *Ibid.*, Art. 1 (a), 250.

³ ILO, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (2003), 4.

⁴ M. Tomei & L. Swepston, *A Guide to ILO Convention No. 169* (1995), 2.

the *Convention on Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169).⁵

Among other things, *ILO Convention No. 169* is founded on the belief that indigenous peoples are permanent societies, refers to indigenous and tribal “peoples” (as opposed to “populations”), and recognizes and respects ethnic and cultural diversity.⁶ *ILO Convention No. 169* provides that governments shall consult indigenous or tribal peoples whenever the government is considering legislative or administrative measures that may affect them.⁷ Consultations must be conducted “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”.⁸

Articles 13 to 19 of *ILO Convention No. 169* address indigenous peoples’ rights over their lands, territories, and natural resources. The Convention first states that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”.⁹ Article 15 addresses natural resources specifically, and provides that the “rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.”¹⁰ It adds that

“[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of

⁵ ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169].

⁶ ILO, ‘Convention No. 107’, available at http://www.ilo.org/indigenous/Resources/Publications/WCMS_114385/lang--en/index.htm (last visited 15 June 2013).

⁷ *ILO Convention No. 169*, Art. 6, *supra* note 5, 1386.

⁸ *Ibid.*, Art. 6 (2), 1386.

⁹ *Ibid.*, Art. 13 (1), 1387. As explained in Art. 13 (2), the use of the term “land” includes “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” *Ibid.*, Art. 13 (2), 1387.

¹⁰ *Ibid.*, Art. 15 (1), 1387.

such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”¹¹

ILO Convention No. 169 has become a primary international source of legal obligations for States with respect to indigenous peoples. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples has described it as a “momentous step in the consolidation of the contemporary international regime of indigenous peoples”, noting that it “provides significant recognition of indigenous peoples’ collective rights in key areas, including cultural integrity; consultation and participation; self-government and autonomy; land, territory and resource rights; and non-discrimination in the social and economic spheres”.¹²

As of July 2013, 22 countries have ratified *ILO Convention No. 169*. Fifteen of these are in the Americas: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

II. United Nations Declaration on the Rights of Indigenous Peoples

After years of public debate, the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* on 13 September 2007.¹³ As a declaration, it has no binding legal effect, but serves as a guideline for the conduct and aspirations of States. Similar to *ILO Convention No. 169*, the Declaration provides that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”.¹⁴

¹¹ *Ibid.*, Art. 15 (2), 1387.

¹² Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UN Doc A/HRC/9/9, 11 August 2008, 11, para. 32.

¹³ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1 [Declaration on the Rights of Indigenous People]. The declaration was adopted by an overwhelming majority, with 144 votes in favor, 4 against (Australia, Canada, New Zealand, and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine).

¹⁴ *Ibid.*, Art. 26 (2), 8.

Articles 27 and 32 of the Declaration both address the right to consultation with respect to projects affecting lands and natural resources. Article 27 provides that States shall establish “a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources”, and that indigenous peoples shall have the right to participate in this process.¹⁵ Article 32, in turn, specifically establishes the duty to consult with indigenous peoples and obtain their free and informed consent with respect to the exploitation of natural resources in their territories:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”¹⁶

As mentioned above, not all countries in the Americas have ratified *ILO Convention No. 169*, and the UN Declaration does not have binding legal effect for States. Nonetheless, regional instruments in the Inter-American human rights system also create obligations related to indigenous peoples.

III. Instruments of the Inter-American System of Human Rights

The 1948 *American Declaration on the Rights and Duties of Man* (“American Declaration”)¹⁷ and the 1969 *American Convention on Human Rights* (ACHR)¹⁸ address a broad range of human rights. The Declaration was one of the first international human rights instruments, and it addresses various fundamental rights and duties. The ACHR, in turn, addresses many fundamental rights and duties, and in addition establishes the Inter-American Commission and the Inter-American Court as the principal and autonomous OAS bodies with a mandate to promote and protect human rights in the Americas. While all OAS

¹⁵ *Ibid.*, Art. 27, 8.

¹⁶ *Ibid.*, Art. 32 (2), 9.

¹⁷ *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, 2 May 1948, OEA/ser.L/V/II.23, doc. 21 rev. 6 (1979) [American Declaration].

¹⁸ *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 [ACHR].

Member States have ratified the *American Declaration*, not all have ratified the ACHR.

The Declaration and the ACHR protect the rights of indigenous peoples, primarily the right to property,¹⁹ as well as the right to judicial protection,²⁰ and to participate in public affairs.²¹ Of particular importance for the present analysis, Article 21 ACHR provides:

- “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.”²²

In addition, the Permanent Council of the Organization of American States (“OAS”) has been reviewing a draft *American Declaration on the Rights of Indigenous Peoples*. The draft Declaration has been under review for over ten years, and there is no clear indication as to whether it will be approved in the near future.²³

C. Consultation and the Extractive Industry: Application in the Inter-American System of Human Rights

In the Inter-American System, a victim or victims wishing to initiate a case must first file a petition with the Inter-American Commission. If the petition meets the admissibility criteria established in the ACHR, and the Commission finds that the State has violated the petitioner(s)' human rights, the Commission typically issues a report on the merits of the case, including recommendations to the State. If the State does not comply with the recommendations, the

¹⁹ *American Declaration*, Art. XXIII, *supra* note 17; ACHR, Art. 21, *supra* note 18, 150.

²⁰ *American Declaration*, Art. XXV, *supra* note 17; ACHR, Art. 25, *supra* note 18, 151.

²¹ *American Declaration*, Art. XX, *supra* note 17; ACHR, Art. 23, *supra* note 18, 151.

²² ACHR, Art. 21, *supra* note 18, 150.

²³ For further information about the negotiation and review process, see the website established for that purpose by the Department of International Law of the OAS, ‘Indigenous Peoples’, available at http://www.oas.org/dil/indigenous_peoples_preparation_draft_american_declaration.htm (last visited 15 June 2013).

Commission may decide to take the case to the Inter-American Court, in accordance with Chapter VII of the ACHR, if the State concerned has ratified the ACHR and recognized the jurisdiction of the Inter-American Court.

The Court has binding authority only over States that have submitted to its jurisdiction. As mentioned above, not all OAS States have accepted the Inter-American Court's jurisdiction, so not all petitions can go to the Court. To date, 25 out of the 36 OAS Member States have ratified the *American Convention*, and 22 have recognized the Court's jurisdiction.²⁴ If a State has not ratified the ACHR, the Commission can issue recommendations based on the 1948 *American Declaration*, which was initially a non-binding instrument but is now interpreted as a source of legal obligations for all OAS Member States.²⁵

The Inter-American Commission and the Inter-American Court have received numerous petitions related to the rights of indigenous peoples in the context of extractive industry. Both the Commission and the Court have highlighted the importance and non-material value of natural resources for many indigenous peoples, for whom the relationship with the natural resources in the territories they occupy is "not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations".²⁶ When these

²⁴ For a complete list of ratifications and recognition of the Court's jurisdiction, see IACHR, 'American Convention on Human Rights', available at <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp> (last visited 15 June 2013).

²⁵ *Maya Indigenous Communities in the Toledo District v. Belize*, IACHR Case 12.053, 12 October 2004, Report No. 40/04, para. 85 [Maya Indigenous Communities Case].

²⁶ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 75, para. 149 [Awas Tingni Case] (" [...] the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."); *Maya Indigenous Communities Case*, *supra* note 25, para. 114 (" [...] indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly."); see also IACHR, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, 20-22, paras 55-57 [IACHR, Norms and Jurisprudence of the Inter-American Human Rights System].

collective, holistic spiritual connections with natural resources compete with substantial economic interests, the stakes of protecting human rights take on a different, greater dimension.

I. Early Pronouncements Related to the Rights of Indigenous Peoples Over Their Territories

As early as 1970, the Inter-American Commission recalled the duty of States to protect the rights of indigenous peoples to their lands.²⁷ In 1985, the Inter-American Commission issued a resolution in *Case 7615* regarding the Yanomami indigenous peoples of Brazil.²⁸ The case related to alleged human rights violations that followed the discovery in the 1970's of precious minerals in the territories traditionally occupied by the Yanomami. The discovery led to the rapid arrival in Yanomami territories of miners, explorers, and other non-indigenous people related to the mining projects; the newcomers brought with them diseases and epidemics that killed and severely affected many Yanomami. The Inter-American Commission found that the State had failed to take prompt and effective measures to protect the Yanomami indigenous people in this mining rush, which resulted in violations of the Yanomami's rights to life, liberty, and personal security (Article I of the *American Declaration*) to residence and movement (Article VIII), and to the preservation of health and well-being (Article XI).²⁹ The Inter-American Commission accordingly recommended, among other things, that Brazil demarcate the territory of the Yanomami Park, where mining and other non-indigenous activities would be prohibited. The resolution marked an important point in the development of indigenous peoples' rights in the Americas, as it confirmed that collective rights were protected in the Inter-American system of human rights.³⁰ Notably, the resolution did not discuss whether the Yanomami had a property right under the *American Declaration* to the lands and territories they occupied.

²⁷ IACHR, *The Human Rights Situation of the Indigenous Peoples in the Americas*, Chapter III: Doctrine and Jurisprudence of the IACHR on Indigenous Rights, OEA/Ser.L/V/II.108, doc. 62, 20 October 2000, 122 [IACHR, *The Human Rights Situation of Indigenous People*, Chapter III] (referring to *Guahibo Communities v. Colombia*, IACHR Case 1.690 (1970)).

²⁸ *Yanomami Indigenous Peoples v. Brazil*, IACHR Case 7615, Resolution No. 12/85, OEA/Ser.L/V/II.66/doc.10, rev. 1, 5 March 1985.

²⁹ *Ibid.*, para. 1 (dispositive section). Cf. *American Declaration*, Arts I, VIII, XI, *supra* note 17.

³⁰ IACHR, *The Human Rights Situation of Indigenous People*, Chapter III, *supra* note 27, 120.

In 1997, the Inter-American Commission noted the serious dangers that indigenous peoples faced in Brazil due to extractive projects. It stated that indigenous peoples'

“ownership and effective possession [was] constantly being threatened, usurped or eroded by various acts—in particular, by invasion and unlawful intrusion for the purpose of lumbering, mining, or agricultural operations, or for nonindigenous settlements [...] [and] by decisions to establish infrastructure in the form of roads, public works or energy, without the due consent of the indigenous populations affected thereby”.³¹

Although no cases had been decided in the Inter-American System at the time regarding the “due consent”, this report foreshadowed what would come in the following years.

Similarly, in 1997, the Inter-American Commission reported that the indigenous peoples of the Oriente region of Ecuador had been subjected to the full impact of oil development and extraction for many years.³² In particular, the Commission observed that it had received information regarding the alleged improper handling and disposal of toxic waste, which reportedly jeopardized the local indigenous communities' health and lives.³³

II. Decisions and Reports From the Petition and Case System: The Right to Consultation Begins to Take Shape

The issue of indigenous peoples' rights over their territories and natural resources had its first major iteration in the petition and case system in 2001, when the Inter-American Court decided the merits of the seminal case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.³⁴ The case related to the Mayagna (Sumo) Awas Tingni community, a community of over 600 people located in the Northern Atlantic Autonomous Region of Nicaragua. Although the community claimed the territory it inhabited as ancestral lands,

³¹ IACHR, *Report on the Situation of Human Rights in Brazil*, Chapter VI, OEA/Ser.L./V/II.97, doc. 29 rev. 1, 29 September 1997, para. 33.

³² IACHR, *Report on the Situation of Human Rights in Ecuador*, Chapter VII, OEA/Ser.L./V/II.96, doc. 10 rev. 1, 24 April 1997.

³³ *Ibid.*

³⁴ *Awas Tingni Case*, *supra* note 26.

it did not have legal title over it.³⁵ In the mid-1990's, the national and regional governments granted a logging concession to a private entity in the territory occupied by the Awas Tingni community, without its participation or consent.³⁶ The community claimed, among other things, that it had ancestral rights over the lands it occupied, even if the State of Nicaragua did not recognize them formally; it also argued that Nicaragua had violated its collective property rights over its lands by failing to demarcate it, granting logging concessions without consulting it, and by failing to provide effective remedies in its domestic legal regime for the community to assert those rights.³⁷ The State responded that the community had not made a formal request for their lands to be titled, and that it was in the process of enacting laws to address the issues raised by the Awas Tingni community.³⁸

The Court began its analysis of whether Nicaragua had violated Article 21 ACHR by noting that the property rights protected by Article 21 encompass material and immaterial things, "all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."³⁹ The Court then explained that Article 21 property rights include "the rights of members of the indigenous communities within the framework of communal property",⁴⁰ and, in a commonly cited passage, stated:

"Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."⁴¹

³⁵ *Ibid.*, 51, para. 103 (g).

³⁶ *Ibid.*, 52-53, para. 103 (m)-(o).

³⁷ *Ibid.*, 58-60, para. 104.

³⁸ *Ibid.*, 60-62, para. 105.

³⁹ *Ibid.*, 74, para. 144.

⁴⁰ *Ibid.*, 75, para. 148.

⁴¹ *Ibid.*, 75, para. 149.

The Court also emphasized the need to take indigenous peoples' customary law into account in order to give full protection to their property rights. Based on this understanding of the right to property, the Court held that the Awas Tingni community had the right to (i) have their lands demarcated and titled; and (ii) have the State abstain from authorizing or acquiescing in activities that may affect the use and enjoyment of the Awas Tingni's communal lands.⁴² Accordingly, the Court found that Nicaragua had violated the rights of the Awas Tingni community to use and enjoy their property, protected by Article 21 ACHR, by failing to demarcate and title those lands, and by granting concessions to third parties on those lands.⁴³ In this landmark case, the Court did not address the consultation process.⁴⁴

Shortly thereafter, the Inter-American Commission issued its merits report in another case touching upon the issue of indigenous peoples' rights in the context of the extractive industry, *Case of Mary and Carrie Dann v. United States*.⁴⁵ The case involved, among other things, claims by members of the Shoshone indigenous people that the government of the United States had authorized prospecting for gold mining in what they claimed were their ancestral lands in the State of Nevada, which they owned through their customary land tenure system.⁴⁶ The petitioners claimed that the government permitted mining prospecting, and that private actors conducting mining activities were poised to take control of the lands by operation of U.S. mining legislation or land exchanges with the U.S. government.⁴⁷ They claimed these acts violated their right to property, as protected by Article XXIII of the *American Declaration*.⁴⁸

The Commission first stated that Article XXIII of the *American Declaration* requires Member States to ensure that the determination of the status of alleged ancestral indigenous lands is "based upon a process of fully

⁴² *Ibid.*, 76, para. 153.

⁴³ *Ibid.*

⁴⁴ At the time *Awas Tingni* was decided, Nicaragua had not yet ratified *ILO Convention No. 169*. It did so on 25 August 2010.

⁴⁵ All IACHR cases discussed herein are available on the web page of the Rapporteurship on the Rights of Indigenous Peoples, 'Reports on Petitions and Cases', available at <http://www.oas.org/en/iachr/indigenous/decisions/iachr.asp> (last visited 15 June 2013).

⁴⁶ *Mary and Carrie Dann v. United States*, IACHR Case 11.140, 27 December 2002, Report No. 75/02, paras 40 & 45 [Dann Case].

⁴⁷ *Ibid.*, para. 40.

⁴⁸ Article XXIII of the *American Declaration*, *supra* note 17, states: "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." Since the United States has not ratified the ACHR, the petitioners could not assert violations of that treaty.

informed and mutual consent on the part of the indigenous community as a whole".⁴⁹ The Commission specifically rejected the State's argument that the property rights protected by the *American Declaration* were only individual rights, and not collective ones.⁵⁰ Since only a few members of the Shoshone people had participated in an alleged process to transfer title to the government, the Commission found that the property rights of the petitioners had not been respected. Accordingly, it recommended to the State to adopt an effective remedy to ensure respect for the petitioners' right to property in accordance with Article XXIII of the *American Declaration* in connection with their claims to property rights over their ancestral lands.⁵¹

The Commission addressed the issue more directly in the case of *Maya Indigenous Community of the Toledo District (Belize)*. There, the petitioners claimed that the State of Belize had violated, among others, Article XXIII of the *American Declaration*⁵² with respect to lands traditionally used and occupied by the Maya indigenous community for centuries, by granting logging and oil concessions in those lands, and failing to recognize and secure the territorial rights of the Maya people in those lands.⁵³ The petitioners also claimed that they owned their lands communally in accordance with their customary laws.⁵⁴ Following *Awas Tingni*, the Commission recognized the Maya community's collective right to own their ancestral lands, and the State's corresponding obligation to demarcate those lands.⁵⁵ The Commission added that the demarcation process "necessarily includes engaging in effective and informed consultations with the Maya people concerning the boundaries of their territory, and that the traditional land use practices and customary land tenure system be taken into account in this process".⁵⁶

The *Toledo District* petitioners also argued that logging and oil exploration concessions in their territories violated their property rights under Article XXIII of the *American Declaration*. The State acknowledged that it had granted

⁴⁹ *Dann Case*, *supra* note 46, para. 140.

⁵⁰ *Ibid.*, paras 93 & 131.

⁵¹ *Ibid.*, para. 173 (1). Since the United States has not ratified the ACHR has not submitted to the jurisdiction of the Inter-American Court, and consequently the case could not be referred to the Court.

⁵² Belize has not ratified the ACHR.

⁵³ *Maya Indigenous Communities Case*, *supra* note 25, para. 28.

⁵⁴ *Ibid.*, para. 124.

⁵⁵ *Ibid.*, paras 130-131, 151.

⁵⁶ *Ibid.*, para. 132. The report did not cite authority for this proposition, presumably because none existed at the time within the Inter-American system.

concessions in those lands, but that they did not affect the environment or communities located in those lands, so their granting did not violate the petitioners' rights.⁵⁷ The Commission rejected the State's argument, and held that a process to grant concessions to exploit natural resources in indigenous territories, "requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives".⁵⁸ As will be seen below, this pronouncement started to give content to the right of indigenous peoples to be consulted when projects affect their territories and natural resources.

III. The Right to Consultation Defined: From *Yakye Axa* to *Saramaka*

After *Toledo District*, a series of cases from the Inter-American Court reiterated, albeit tangentially, the right of indigenous peoples over their lands and territories. Although some did not address the right to consultation directly, they each reinforced the rights of indigenous peoples over their territories, which has been a precursor to the right to consultation. *Moiwana v. Suriname*, for instance, related to the 1986 massacre of members of a Maroon village in rural Suriname and the displacement of the survivors.⁵⁹ The Court found that Suriname violated the property rights of the survivors by displacing them and maintaining their displacement from their traditional lands, and ordered that their lands be demarcated following a process "with the participation and informed consent of the victims [...]".⁶⁰

Two days after *Moiwana*, the Inter-American Court decided *Yakye Axa Indigenous Community v. Paraguay*.⁶¹ In the late 19th century, the government of Paraguay sold approximately two-thirds of the Paraguayan Chaco in the London stock exchange to raise funds to pay for the debt incurred following the so-called War of the Triple Alliance.⁶² Perhaps not surprisingly, the indigenous peoples who inhabited the Chaco at the time were not aware of this sale or of the sales

⁵⁷ *Ibid.*, para. 137.

⁵⁸ *Ibid.*, para. 142.

⁵⁹ *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124, 2, para. 3.

⁶⁰ *Ibid.*, 81 & 55, paras 210, 135 & 209.

⁶¹ *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125 [Yakye Axa Case].

⁶² *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214, 15, para. 58 [Xákmok Kásek Case].

and transfers that followed among private, non-indigenous individuals and missionaries.⁶³ Among these indigenous peoples was the Yakye Axa indigenous community, part of the Enxet-Lengua people, which had traditionally occupied the Paraguayan Chaco for centuries.⁶⁴ As of 2002, the Yakye Axa community had approximately 319 members, who derive their livelihood mostly from hunting, fishing, and gathering.⁶⁵

In the case before the Inter-American Court, the Yakye Axa community alleged that as a result of these sales and the State's failure to respect the community's ancestral claims over their lands and territories, the members of the Yakye Axa community lived in terrible conditions, in violation of their rights to life (Article 4), property (Article 21), and judicial protection (Article 25), among others. With respect to the right to property, the Court noted that Paraguay has ratified *ILO Convention No. 169*, and highlighted the special relationship that the Yakye Axa community and its members have with their land and territories.⁶⁶

The State of Paraguay acknowledged the rights of the Yakye Axa over their traditional lands; what was in dispute was whether and to what extent the State had ensured that the Yakye Axa community and its members effectively enjoyed this right in practice.⁶⁷ The Court agreed with the State's position that Article 21 protects the ancestral rights of indigenous peoples as well as the property rights of the non-indigenous persons who had bought parts of these lands, but noted that "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established".⁶⁸ When the rights of indigenous peoples are in conflict with the property rights of private individuals,

"the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society".⁶⁹

⁶³ *Yakye Axa Case*, *supra* note 61, 27, 50 (10).

⁶⁴ *Ibid.*, 24-25, para. 50 (1).

⁶⁵ *Ibid.*, 25-26, paras 50 (3) & 50 (7).

⁶⁶ *Ibid.*, 75-76, paras 130-135. Paraguay ratified *ILO Convention No. 169* in 1993.

⁶⁷ *Ibid.*, 77, paras 140-141.

⁶⁸ *Ibid.*, 77, para. 143.

⁶⁹ *Ibid.*, 77, para. 144.

These four factors would gain relevance in subsequent cases, as indigenous peoples' rights over their territories and natural resources are often in "conflict" with the interests of other rights-holders, such as extractive companies. The Court expanded on the specific content of these four factors to consider:

"The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right."⁷⁰

The Court also emphasized that States must take into account the collective nature of indigenous peoples' ancestral ownership of their lands, and the importance of land and territory to ensure survival of a community as a whole. The Court found that, although Paraguay recognized the right to communal property in its legislation, it had not taken the necessary domestic legal steps to ensure the effective use and enjoyment of the Yakye Axa's traditional lands.⁷¹ Accordingly, the Court found that Paraguay had violated Article 21 ACHR and ordered Paraguay, among other things, to identify the traditional territory of the Yakye Axa community and grant it to them free of cost.⁷²

In another case involving largely similar facts, *Sawhoyamaxa v. Paraguay*,⁷³ the Court echoed the reasoning of *Awás Tingni* and *Yakye Axa*. It again confirmed that the indigenous peoples' collective "notion of ownership and possession

⁷⁰ *Ibid.*, 78, para. 145.

⁷¹ *Ibid.*, 79, para. 155.

⁷² *Ibid.*, 104, para. 242 (6). In an interpretation of the Judgment, the Inter-American Court explained that in the process of identifying these territories, "Paraguay must comply with the provisions in the Court's judgment, giving careful consideration to the values, uses, customs and customary laws of the members of the Community, which bind them to an specific territory." *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 6 February 2006 (Interpretation of the Judgment of 17 June 2005), IACtHR Series C, No. 142, 9, para. 26.

⁷³ *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146.

of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention⁷⁴. As in *Yakye Axa*, the Court found that Paraguay had violated Article 21 to the detriment of the Sawhoyamaxa community by failing to secure effective use and enjoyment of their ancestral lands, including their physical delimitation and actual conveyance.⁷⁵ The Court also ordered Paraguay to enact into its domestic legislation a mechanism so that the community could reclaim their ancestral lands within a reasonable time.⁷⁶

Although it is difficult to pinpoint a case that by itself crystallizes indigenous peoples' right to consultation, *Saramaka v. Suriname* is close to being such a case.⁷⁷ The case involved the Saramaka, a tribal community in Suriname.⁷⁸ The Saramaka argued, among other things, that Suriname did not recognize their ancestral rights over their lands, territories, and natural resources, and that the State had authorized concessions for the extraction and exploitation of natural resources in their territories without consulting them.⁷⁹ The petitioners alleged that Suriname had violated the property rights of the Saramaka enshrined in Article 21 ACHR, in connection with Articles 1 (1) and 2 of that Convention.⁸⁰

The Court first recognized the internal organization of the Saramaka according to their customs, in which matriarchal clans (called *lös*) were the land-owning entities.⁸¹ It then evaluated the Surinamese domestic legislation with respect to collective land-ownership, and found that it did not adequately

⁷⁴ *Ibid.*, 71, para. 120.

⁷⁵ *Ibid.*, 77, para. 143.

⁷⁶ *Ibid.*, 103 & 106, paras 235 & 248 (12).

⁷⁷ *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172 [Saramaka Case].

⁷⁸ As explained by the Court, tribal communities, unlike indigenous peoples, are not indigenous to (i.e., originally from) the region they inhabit; rather, it was brought there at some point (in this case during the colonization of Suriname). Like indigenous peoples, tribal communities have social, cultural, and economic traditions different from other sections of the national community, identify themselves with their ancestral territories and regulate themselves according to their own norms, customs, and traditions. *Ibid.*, 23, para. 79. Under international law, tribal communities and indigenous people enjoy similar rights and protection.

⁷⁹ *Ibid.*, 2, para. 2.

⁸⁰ Art. 1 (1) ACHR establishes the obligation to respect the human rights established in the Convention, while article 2 establishes the obligation to give domestic legal effect to give effects to those rights.

⁸¹ *Ibid.*, 30, para. 100.

safeguard the Saramaka's property rights, as it did not provide an adequate recourse to protect collective land ownership by indigenous and tribal peoples.⁸²

The Court then conducted an extensive analysis of the scope of the Article 21 property rights with respect to natural resources located in ancestral lands of the Saramaka. Noting that the protection of indigenous peoples' collective property rights is aimed at guaranteeing their very survival as a people, the Court noted that the right to use and enjoy their territory would be meaningless for indigenous peoples if it were not connected to the natural resources located in their territory.

“[T]he demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. *This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention* in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property.”⁸³

Based on this reasoning, the Court concluded that natural resources found in indigenous territories are protected by Article 21, and then examined which natural resources found in Saramaka territory were essential for the survival of their way of life.

Suriname had granted forestry and mining concessions on Saramaka territory. The petitioners claimed that it did so without a full and effective consultation, thus violating their property rights, while the State argued that all land ownership, including natural resources, is vested in the State, and thus it can grant concessions at its discretion, albeit respecting Saramaka customs as much as possible.⁸⁴ The Court first noted that, although not *every* natural resource is essential for the way of life of the Saramaka, those that are essential are “likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka people”.⁸⁵

⁸² *Ibid.*, 31-35, paras 104-117.

⁸³ *Ibid.*, 36, para. 122 (emphasis added).

⁸⁴ *Ibid.*, 37, para. 124.

⁸⁵ *Ibid.*, 37, para. 126. The Court explained, for instance, that water is an essential natural resource likely to be affected by mineral extractive activities, even if those activities are

The Court restated the four factors enunciated in *Yakye Axa* and stated that a State may interfere with an indigenous peoples' right over natural resources located in their territories only when it complies with those four factors and, "additionally, when it does not deny their survival as a tribal people [...]".⁸⁶ In order for restrictions on indigenous or tribal peoples' rights over their natural resources not to "deny their survival" as a people, they must comply with the following requirements, as stated by the Court:

"First, the State must ensure the effective participation of the members of the [indigenous or tribal] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan [...] within [their] territory. Second, the State must guarantee that the [indigenous or tribal people] will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within [indigenous or tribal] territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment."⁸⁷

The Court elaborated on the first point, noting that effective participation of the community in question must be through a consultation process done in good faith, and through culturally appropriate procedures that take into account the indigenous people's traditions and customs, with the objective of obtaining their consent.⁸⁸ In addition, the consultation must be conducted early on in the initial stages of the development or extractive project, so that the consulted community may carry out internal discussions, and it must be

aimed at extracting other non-essential natural resources. This would hinder the Saramaka's ability to carry out fishing activities, which are essential to their way of life. Similarly, although trees per se may not be essential to the way of life of the Saramaka, forestry concessions are likely to affect negatively the environment where the fauna of the region live, thus preventing the Saramaka from conducting hunting, another essential activity to their traditional way of life. *Ibid.*

⁸⁶ *Ibid.*, 38, para. 128.

⁸⁷ *Ibid.*, 38, para. 129. The Court also cited observations by the Human Rights Committee and Art. 32 of the *Declaration on the Rights of Indigenous Peoples* (*supra* note 13) in support of this proposition.

⁸⁸ *Ibid.*, 40, para. 133.

informed regarding potential health, environmental or other risks.⁸⁹ Lastly, the consultation must respect the community's own decision-making processes.⁹⁰

Moreover, the Court stated that, in addition to consultation, the indigenous or tribal people's consent is required in certain cases: "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions".⁹¹ In other words, while a consultation process as outlined by the Court is required whenever a proposed project affects the territories and/or natural resources of indigenous peoples, free, prior and informed consent is required when the project in question "may have a profound impact on the property rights" of the indigenous or tribal people over their territory and/or natural resources.⁹²

In an interpretation of the *Saramaka* Judgment, the Court explained that who should be the specific person or persons to be consulted is a decision that should be made by the indigenous people involved, in accordance with their customs and traditions.⁹³ Similarly, the structure of any benefit-sharing program among the indigenous or tribal people must be decided through consultation with the indigenous or tribal people, and not unilaterally by the State.⁹⁴ The interpretation also provided additional details regarding the required environmental and social impact assessments, such as the need for these assessments to take into account the collective survival of the indigenous people as such (in addition to the physical survival of its individual members).⁹⁵

Following *Saramaka* and the standard it set, the Inter-American Court confirmed the requirement that States conduct consultation processes when projects affect indigenous territories. For instance, in *Xákmok Kásek v. Paraguay* – which was also based on essentially the same historical facts as *Yakye Axa* and *Sawhoyamasa* – the Court found that Paraguay had violated the Xákmok

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, 40, para. 134.

⁹² *Ibid.*, 41, para. 137.

⁹³ *Saramaka People v. Suriname*, Judgment of 12 August 2008 (Interpretation of the Judgment of 28 November 2007), IACtHR Series C, No. 185, 6-7, paras 18-19 [*Saramaka Case*, Interpretation of the Judgment].

⁹⁴ *Ibid.*, 8, para. 25.

⁹⁵ *Ibid.*, 10, paras 37-38. For an additional, extensive discussion of the rights of indigenous peoples over their lands and natural resources, see IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 26.

Kásek's property rights when it declared part of their territory a nature reserve without consulting the community, as required by the *American Convention* and Inter-American jurisprudence.⁹⁶

IV. Consultation in the Precautionary Measures System

In the years after *Saramaka*, the Inter-American Commission received requests for precautionary measures related to indigenous peoples and their rights over natural resources located in their ancestral lands. While the scope and analysis for granting precautionary measures is markedly different from that undertaken in the petition and case system, precautionary measures illustrate how the rights of indigenous peoples over their natural resources often clash with significant economic interests in practice. For instance, on 1 April 2011, the Inter-American Commission granted precautionary measures for the members of the indigenous communities of the Xingu River Basin in Pará, Brazil.⁹⁷ The request for precautionary measures alleged that the life and physical integrity of the applicants was at risk due to the impact of the construction of the Belo Monte hydroelectric power plant.

The Inter-American Commission requested that the State of Brazil immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until certain minimum conditions were met.⁹⁸ However, after the State and the applicants presented additional information, the Inter-American Commission modified the original aim of the measure. On 29 July 2011, the Commission requested Brazil to, among other things: (1) adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous

⁹⁶ *Xákmok Kásek Case*, *supra* note 62, 37-38, paras 155-162.

⁹⁷ IACHR, 'PM 382/10', available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp> (last visited 20 May 2013) [PM 382/10].

⁹⁸ The original conditions were that Brazil had to: (1) conduct consultation processes in accordance with international standards – meaning prior consultations that are free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement – in relation to each of the affected indigenous communities; (2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to the social and environmental impact study related to the project, including translations into the respective indigenous languages; (3) adopt measures to protect the life and physical integrity of the members of the indigenous peoples in voluntary isolation of the Xingu Basin, and to prevent the spread of diseases and epidemics among the indigenous communities as a consequence of the construction of the Belo Monte hydropower plant. See *ibid.*

communities in voluntary isolation, and implement specific measures to mitigate the effects that the construction of the Belo Monte dam would have on the territory and life of these communities; (2) adopt measures to protect the health of the members of the indigenous communities affected by the Belo Monte project, including guaranteeing that the processes to regularize their ancestral lands would be finalized promptly, and protect those ancestral lands against intrusion and occupation by non-indigenous people and against the exploitation or deterioration of their natural resources. Of particular interest for this article, the Inter-American Commission also decided that the debate between the parties regarding prior consultation and informed consent related to the Belo Monte project had evolved into a discussion on the merits of the matter, which was beyond the scope of precautionary measures.⁹⁹ According to public information, a group of NGO's and indigenous communities affected by the Belo Monte project presented a petition regarding this matter to the Inter-American Commission on 16 June 2011.¹⁰⁰

In another example, the Inter-American Commission granted precautionary measures in favor of the members of 18 communities of the Maya indigenous people of Guatemala.¹⁰¹ The applicants alleged that, in 2003, the State of Guatemala granted a license to a private company to mine gold and silver in an area of 20 square kilometers within their territories. As alleged, the concession's environmental and hydrological impact area would encompass the territories of at least 18 communities of the Maya people. The petitioners alleged that the mining concession was issued and mining began without the prior, complete, free, and informed consultation of the affected communities. The concessionaire reportedly began constructing the Marlin I Mine in 2003 and extracting gold and silver in 2005. The petitioners maintained that the mining had grave consequences for the life, personal integrity, environment, and property of the affected indigenous people. According to the request, a number of water wells and springs dried up, and metals were present in the water as a result of the mining activity, which had harmful effects on the health of members of the community.

⁹⁹ See *ibid.*

¹⁰⁰ See Amazon Watch, 'Belo Monte Dam May Lead Brazil to OAS High Court' 16 June 2011, available at <http://amazonwatch.org/news/2011/0616-belo-monte-dam-may-lead-to-oas-high-court> (last visited 15 June 2013).

¹⁰¹ IACHR, 'PM 260/07', available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>. (last visited 15 June 2013).

On 20 May 2010, the Inter-American Commission asked the State of Guatemala to suspend mining of the Marlin I project and other activities related to the concession granted to *Goldcorp/Montana Exploradora de Guatemala S.A.* It also requested, among other things, that the State implement effective measures to prevent environmental contamination, and to adopt the necessary measures to decontaminate, as much as possible, the water sources of the 18 beneficiary communities and to ensure their members access to water fit for human consumption. However, after the parties provided additional information, the Inter-American Commission modified the aim of the precautionary measures. On 7 December 2011, it requested Guatemala adopt measures to ensure that the 18 communities involved had access to drinking water safe for human consumption, and, particularly, to adopt measures to ensure that the water sources of the 18 communities are not contaminated by mining activities.

As the *Belo Monte* and *Marlin Mine* precautionary measures reflect, when the rights of indigenous peoples over their natural resources come in direct conflict with the interests of extractive companies, resolving them can become a very difficult and delicate process.

V. After *Saramaka*: *Sarayaku* and the Question of Consent

The most recent pronouncement by the Inter-American Court on the issue of indigenous peoples and natural resources came in August 2012, with the judgment in the case of *Sarayaku v. Ecuador*.¹⁰² There, the Court analyzed, among other things, whether the State of Ecuador had violated the property rights of the Kichwa people of Sarayaku by awarding an oil exploration and exploitation concession to a private company partially in lands claimed by the Kichwa people of Sarayaku as their ancestral lands, without having conducted a consultation process or having obtained their free, prior, and informed consent.

Sarayaku is one of the largest communities of Kichwa indigenous people in the Amazon, and the territory they occupy is one of the most biodiverse in the world.¹⁰³ Unlike in *Saramaka*, in *Sarayaku* the petitioners actually had legal title to their lands, as these had been awarded by the State in 1992.¹⁰⁴ Also unlike in *Saramaka*, in *Sarayaku* the private oil company, *Compañía General de Combustibles, S.A.* ("CGC"), commissioned an environmental impact

¹⁰² *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245 [Sarayaku Case].

¹⁰³ *Ibid.*, 16-17, para. 52.

¹⁰⁴ *Ibid.*, 18-19, para. 61.

assessment, which was approved by the Ecuadoran authorities (although not implemented in practice).¹⁰⁵ The petitioners alleged – and the State did not dispute – that CGC attempted to obtain the “consent” of the members of the Sarayaku people by offering them gifts, employing some people to recruit others who might support the exploration activities, medical assistance (conditioned on signing a letter supporting CGC’s activities), and cash in some instances, among other measures.¹⁰⁶ CGC allegedly was able to form a group of “independent” Sarayaku members who supported its incursion into the territory.¹⁰⁷

After the approval of a second, updated environmental management plan, the project finally started in 2002.¹⁰⁸ In the first year, CGC placed over 1,400 kg of explosives in wells located throughout Sarayaku territory, where they remain to this day.¹⁰⁹ CGC was also accused of destroying sites spiritually significant for the Sarayaku, as well as caves, water sources, and fauna that were culturally and environmentally important, as well as a source of food for the Sarayaku people.¹¹⁰ The Sarayaku were consistently opposed to the project: social conflict and tension were constant in the exploration zone in the late 1990’s, and the Sarayaku even sent a letter to the Ecuadoran government expressing their opposition to the project in their ancestral territories.¹¹¹

The Court began its analysis by noting that the right of the Sarayaku people to their ancestral lands was not in dispute, and what was under discussion was whether Ecuador had respected their right to be consulted.¹¹² By way of introduction, the Court stated unequivocally that Article 21 ACHR “protects the close relationship between indigenous peoples and their lands, and with the natural resources of their ancestral territories and intangible elements arising from these”.¹¹³ The Court continued and noted that although the communitarian tradition of collective land tenure, common among most indigenous peoples, does not conform to the “classic” concept of property, it deserves protection

¹⁰⁵ *Ibid.*, 20, para. 69.

¹⁰⁶ *Ibid.*, 21, para. 73.

¹⁰⁷ *Ibid.*, 21, para. 74. The State did not dispute this allegation either. However, in April 2002, the people of Sarayaku sent a letter to the Minister of Energy and Mines expressing their opposition to the incursion of oil companies into their ancestral territory.

¹⁰⁸ *Ibid.*, 23, para. 81.

¹⁰⁹ *Ibid.*, 26, para. 101.

¹¹⁰ *Ibid.*, 26-27, paras 102 & 105.

¹¹¹ *Ibid.*, 21, 23, paras 72, 74 & 80.

¹¹² *Ibid.*, 31-32, para. 124.

¹¹³ *Ibid.*, 36, para. 145.

under Article 21 ACHR, and that holding otherwise would render the property rights illusory for millions of people.¹¹⁴

The Court cited *Saramaka* and *Yakye Axa* as it outlined the conditions that must be met in order to restrict indigenous peoples' property rights over their territories and natural resources. Since no arguments were presented regarding the adequacy or inadequacy of such restrictions in this case, the Court then examined the right to consultation. The Court noted that in democratic, pluralistic societies, every individual is guaranteed the right to effective participation in public acts that affect his or her rights; in the case of indigenous peoples and, particularly, in the context of projects that affect their collective right to communal property, their right to consultation is "one of the fundamental guarantees to ensure [their] participation".¹¹⁵ *Sarayaku* cited a series of decisions by international bodies and domestic tribunals that reflect that the right of indigenous peoples to consultation has become a tenet of international human rights law.¹¹⁶ The Court emphasized that the consultation process must involve all relevant State agencies at an early stage of the project planning, in order to create a "process of dialogue and consensus-building" in which indigenous peoples "can truly participate in and influence the decision-making process".¹¹⁷

Ecuador ratified *ILO Convention No. 169* in 1998, i.e., after the contract with CGC was signed, but before the project operations commenced.¹¹⁸ The Court reasoned that Ecuador was under an obligation to consult with the Sarayaku "at least since May 1999", when *ILO Convention No. 169* entered into force.¹¹⁹ Therefore, the international legal obligation to consult stemming from *ILO Convention No. 169* arose before project operations commenced in 2002.

The Court then conducted a meticulous analysis of the consultation process, focused on the following five components: (i) the prior nature of the consultation; (ii) good faith and attempts to reach agreement; (iii) appropriate and accessible consultation; (iv) environmental impact assessments; and (v)

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 40, para. 160.

¹¹⁶ *Ibid.*, 40-45, paras 161-166.

¹¹⁷ *Ibid.*, 46, para. 167.

¹¹⁸ *Ibid.*, 20, para. 70.

¹¹⁹ *Ibid.*, 50, para. 176. The Court also noted that, in accordance with the *Vienna Convention on the Law of Treaties* (Article 18), Ecuador had an obligation, since the moment it signed *ILO Convention No. 169*, to act in good faith in accordance with the object and purpose of that Convention, and to refrain from acts that would defeat its object and purpose. *Ibid.* (note 235).

informed consultation.¹²⁰ The Court found, based on the evidence submitted, that Ecuador did not carry out an effective and appropriate consultation process: (i) the “consultation” was not conducted prior to commencing the project; (ii) it was not done in good faith, as there were repeated attempts to corrupt indigenous leaders; (iii) the process did not respect the traditional decision-making processes of the Sarayaku; (iv) the environmental impact assessments which were conducted by CGC and not by State agencies – did not take into account the cultural and social impacts of the project on the Sarayaku people; and (v) the Sarayaku did not receive adequate information about the proposal. Importantly, the Court also stated that the obligation to consult cannot be delegated to a private actor, as it was done in this case, “much less [...] to the very company that is interested in exploiting the resources in the territory of the community” that is the subject of the consultation.¹²¹

The Court found that Ecuador had violated Article 21 ACHR, and its analysis of the right to consultation ended there. It did not discuss explicitly the requirement that, in large-scale projects that impact the territory of the indigenous community, the State must not only consult with the indigenous community, but actually obtain its consent. Nonetheless, a comprehensive reading of *Sarayaku* leads one to conclude that this requirement must also be met. First of all, in paragraph 177, which lists the characteristics of a proper consultation process, the Court cited paragraph 134 of *Saramaka*, which is specifically about the requirement to obtain consent.¹²² Moreover, *Sarayaku* repeatedly refers to a process of dialogue,¹²³ the indigenous peoples’ ability to “truly [...] influence the decision-making process”,¹²⁴ the need to reach agreement¹²⁵ and “reach [...] consensus between the parties”,¹²⁶ and quotes Article 6 (2) of *ILO Convention No. 169*, stating that “consultations must be ‘carried out [...] in good faith and

¹²⁰ *Ibid.*, 51-60, paras 180-211.

¹²¹ *Ibid.*, 53, para. 187.

¹²² *Ibid.*, 50, para. 177 (citing *Saramaka Case*, *supra* note 77, 40, para. 134. That paragraph of the *Saramaka* decision states in full: “Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions. The Court considers that the difference between ‘consultation’ and ‘consent’ in this context requires further analysis.”). The *Sarayaku* judgment also cited para. 134 of *Saramaka* (*Sarayaku Case*, *supra* note 102, 52, para. 185 (note 242)).

¹²³ *Ibid.*, 46, para. 167.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 52, para. 185.

¹²⁶ *Ibid.*, 52-53, para. 186.

in a manner appropriate to the circumstances, with the aim of **reaching an agreement or obtaining consent** regarding the proposed measures.”¹²⁷

All these references, and the emphasis on “effective participation” as the bedrock principle underlying the right to consultation,¹²⁸ support the view that States must obtain the consent of indigenous peoples before approving large-scale development projects in their territories that may significantly affect their way of life.¹²⁹ A consultation process in which the indigenous peoples do not have the right to withhold their consent would be nearly meaningless. A reasonable reading of *Sarayaku*'s silence on the question of consent may be that the Court, having determined that the obligation to conduct a consultation process had been breached, did not find it necessary to examine whether consent had been obtained, as no consent could be obtained when the consultation process itself was insufficient.

D. The Contents of the Right to Consultation in Summary

In short, as the foregoing case law reflects, a State can only restrict the property rights of indigenous peoples over their lands, territories, and natural resources if such restrictions are established by law, necessary, proportional, and their purpose is to attain a legitimate goal in a democratic society. Secondly, when a State is considering approving projects in territories traditionally occupied by indigenous or tribal peoples in the Americas, and which may affect their rights over natural resources essential to their way of life, it is required to: (1) ensure the effective participation of the members of the indigenous or tribal people, in conformity with their customs and traditions, in the approval of the development, exploration or extraction plan; (2) guarantee that the indigenous or tribal people will receive a reasonable benefit from any such project; and

¹²⁷ *Ibid.*, 52, para. 185 (emphasis added). In note 242, the *Sarayaku* judgment also cites Arts 19 and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which refer specifically to the need to obtain the prior, free, and informed consent of indigenous peoples before the State can approve legislative or administrative measures (Article 19) or extractive projects (Article 32) in their territories.

¹²⁸ *Ibid.*, 41-45, paras 163-165. See also *Saramaka Case*, *supra* note 77, 38, para. 129.

¹²⁹ See also L. Brunner & K. Quintana, *The Duty to Consult in the Inter-American System: Legal Standards After Sarayaku*, 16 *ASIL Insights* No. 35 (2012), 3-4. In addition, Art. 6 of *ILO Convention No. 169* explicitly establishes the obligation to obtain the free, prior, and informed consent of the indigenous people in question.

(3) ensure that no project is approved within indigenous or tribal territory until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.

With respect to (1) above, a proper consultation process must meet the following requirements: (a) the consultation process must be conducted prior to the approval of the project, and in the early stages of planning; (b) it must be conducted in good faith and with the aim of reaching consensus; (c) it must employ appropriate consultation methods that take into account the customs and traditions of the indigenous people, respecting their own decision-making methods; (d) it must be accompanied by culturally adequate environmental and social impact assessments; and (e) it must be a transparent and informed process. In addition, when a proposed large-scale project is likely to have a profound impact within the indigenous territory, the State has a duty to obtain the free, prior, and informed consent of the indigenous people affected, according to its customs and traditions.

E. Conclusion

As discussed in this paper, the right of indigenous peoples to be consulted when extractive projects are planned in their territories is well established in Inter-American law. While some fine aspects and details remain to be clarified, the Inter-American Court has been consistent in holding that Article 21 ACHR protects the collective right of indigenous peoples over the natural resources located in their ancestral lands.

As more cases come through the system, specific details are likely to be fleshed out. For instance, the Inter-American Commission has approved at least two admissibility reports that touch on the issue.¹³⁰ In the near future, these cases are likely to either be heard by the Inter-American Court or lead to a public report on the merits by the Inter-American Commission. As these and other cases make their way through the Inter-American system, they will likely clarify the scope of the rights of indigenous peoples over their lands, territories, and natural resources.

¹³⁰ *Kalina and Lokono Peoples v. Suriname*, IACHR Petition 198/07, Report No. 76/07, 15 October 2007. This case deals with, among other things, alleged sand mining and logging concessions granted in the ancestral territories of the Kaliña and Lokono peoples of Suriname. *Diaguíta Agricultural Communities of the Huascoaltinos and Their Members v. Chile*, IACHR Petition 415/07, Report 141/09, 30 December 2009. This case deals with, among other things, the Pascua Lama mining project, a bi-national gold and silver mining project located high in the Andes on the border between Chile and Argentina.