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# Indigenous Peoples' Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by Sarayaku V; Ecuador and its Potential to Delegitimize the Belo Monte Dam

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# COMMENTS

# INDIGENOUS PEOPLES' RIGHT TO FREE, PRIOR, AND INFORMED CONSENT IN THE CONTEXT OF STATE-SPONSORED DEVELOPMENT: THE NEW STANDARD SET BY *SARAYAKU V. ECUADOR* AND ITS POTENTIAL TO DELEGITIMIZE THE BELO MONTE DAM

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# I. INTRODUCTION

In July 2012, the Inter-American Court of Human Rights issued a landmark decision in *Kichwa Indigenous People of Sarayaku v. Ecuador*,[1] an indigenous rights case that had been on the Inter-

1. *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2002), *available at* http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf

American system's docket for over eight years.[2] The Inter-American Court held that the state of Ecuador had violated both international and domestic law by allowing an Argentine oil company to drill on indigenous land without first consulting the resident Kichwa community.[3] Citing various sources of law, including the American Convention on Human Rights ("ACHR"),[4] the Indigenous and Tribal Peoples Convention ("ILO Convention 169"),[5] and the Ecuadorian Constitution, the Court found Ecuador in breach of the Kichwa's right to give or withhold their free, prior, and informed consent ("FPIC") on all decisions potentially affecting their property or rights.

*Sarayaku* represents a major victory for indigenous peoples throughout the Americas and perhaps the world. The decision sets a stricter standard than any preceding Inter-American decision or legal instrument on the rights to consultation and FPIC in the context of state-sponsored development. Brazil embodies a prime example of a state under the Court's jurisdiction that likely is affected by the *Sarayaku* decision.[6] In violation of its indigenous peoples' rights, Brazil approved the development of Belo Monte, a major hydroelectric complex whose construction currently is underway.[7]

[hereinafter *Sarayaku*].

2. *See id.* ¶ 1 (noting that the Association of the Kichwa People of Sarayaku and others filed the petition before the Commission on Dec. 19, 2003).

3. *See id.* ¶ 341, § 1–4 (finding that Ecuador's acts and omissions surrounding the Sarayaku Kichwa amounted to a violation of the indigenous people's rights to consultation, communal property, and cultural identity).

4. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

5. International Labour Organisation, Indigenous and Tribal Peoples Convention (No. 169) art. 16, June 27, 1989, 72 ILO Official Bull. 55 [hereinafter ILO Convention 169].

6. Although the Inter-American system does not possess a formal rule of *stare decisis*, the Commission and the Court regularly refer to past holdings to inform their applications of the ACHR and determine whether an OAS state has violated substantive provisions. *See, e.g.*, Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Cost, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 63 (Nov. 28, 2007) [hereinafter *Saramaka*] (relying on the Court's evidentiary analyses in *Awas Tingni* and five other cases to assess the documentary evidence in the case at hand and thereby assess Suriname's liability).

7. Elzio Barreto & Carolina Marcondes, *Brazil OKs Building of $17 bln Amazon Power Dam*, REUTERS, Jan. 26, 2011, *available at* http://www.reuters.com/article/2011/01/26/brazil-energy-amazon-idAFN2613167320110126.

This comment argues that the new FPIC standard set by *Sarayaku* has the potential to delegitimize Belo Monte's development, which Brazil authorized without first properly consulting the indigenous groups whose lands and livelihoods it will adversely affect. Part II provides a history of the dam and describes its projected impacts on local indigenous peoples. It then presents the legal underpinnings of Brazil's consultation and FPIC obligations, as provided by the ACHR, Brazilian law, and ILO Convention 169. Part II concludes by discussing how *Sarayaku* further expands the consultation and FPIC protections established by prior Inter-American case law.

Part III draws parallels between *Sarayaku* and the Belo Monte dispute to demonstrate the applicability of the *Sarayaku* standard to the latter. To achieve this, Part III analyzes Brazil's acts and omissions surrounding Belo Monte to illustrate that the state is in breach of the same legal instruments and FPIC standards that the Court found Ecuador had violated in *Sarayaku*.

Part IV offers recommendations on how Brazil should proceed with Belo Monte's development in light of *Sarayaku*. Part IV concludes by attempting to fill the gap in the existing international indigenous rights law by suggesting that ILO Convention 169 revise its text to reflect the *Sarayaku* standard.

# II. BACKGROUND

## A. THE BELO MONTE HYDROELECTRIC PROJECT

### *1. The Development of the Controversial Dam*

For over thirty years, the Xingu Basin of the Brazilian Amazon has been the site of an ongoing development dispute that has drawn intense reactions from the Brazilian public and the international community alike. Under the original 1970s plan, what was then known as the Altamira Complex would have consisted of six separate dams and five generating plants.[8] The highly controversial

8. *See* Jacquelyn Amour Jampolsky, Comment, *Activism Is the New Black! Demonstrating the Benefits of International Celebrity Activism Through James Cameron's Campaign Against the Belo Monte Dam*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 227, 243 (2012) (stating that the complex would have consisted of two dams whose sustained operation would have required the building of four additional dams).

proposal required flooding of over 20,000 square kilometers of land, including the entire Paquigamba indigenous reserve.[9] In response to severe criticism from the international community and violent dissent from indigenous groups—which led even the World Bank, the project's principal funder, to withdraw its backing—the government modified its proposal.[10] By 1998, the renamed "Belo Monte" complex had undergone a drastic makeover. The new design called for a single dam capable of producing eleven gigawatts of electricity and for the inundation of 500 square kilometers of land,[11] a third of the area that would have been flooded under the original scheme.[12] While smaller than the Altamira Complex, Belo Monte will still be the world's third largest dam and is expected to cost R$20 billion to develop.[13]

Despite its reduced scale, Belo Monte's development still threatens to wreak havoc on the ecological and social landscape of the Xingu Basin.[14] Nevertheless, Brazil continues to defend the project, claiming that it will create thousands of new jobs and is critical to meeting the country's growing energy needs.[15] Sitting

9. *See id.* (observing that the complex's construction and operation would have either displaced or directly affected twelve indigenous groups). *But see Cases Examined by the Special Rapporteur (June 2009 – July 2010)*, U.N. Doc, A/HRC/15/37/Add.1, 32 (Sept. 15, 2010) (by James Anaya) [hereinafter Anaya 2010 Report] (reporting that the Brazilian state claimed only 1500 square kilometers of land would have been flooded under the original scheme).

10. *See* Anthony L. Hall & Sue Branford, *Development, Dams and Dilma: The Saga of Belo Monte*, 38 CRIT. SOCIOL. 851, 852 (2012) (describing the "First Encounter of the Indigenous Nations of the Xingu" of 1989, a massive confrontation between indigenous protestors and developers that drew international attention to the dam and its destructive potential); Jampolsky, *supra* note 8, at 243 (describing the collaborative social movement that led to the World Bank's withdrawal from the project).

11. *See* Tom Phillips, *Brazil to Build Controversial Belo Monte Hydroelectric Dam in Amazon Rainforest*, GUARDIAN, Feb. 2, 2010, http://www.guardian.co.uk/environment/2010/feb/02/brazil-amazon-rainforest-hydroelectric-dam (noting that energy production is expected to start in 2015).

12. Anaya 2010 Report, *supra* note 9, at 32.

13. *See* Phillips, *supra* note 11 (reporting the Brazilian environmental ministry's claims that the consortium awarded the Belo Monte project will have to spend an additional $800 million to offset the project's environmental damage).

14. *See infra* Part II.A.2 (identifying the projected social and ecological impacts of Belo Monte on the Xingu Basin).

15. *See* Ministry of Mines and Energy, BELO MONTE HYDROELECTRIC DAM PROJECT: FREQUENTLY ASKED QUESTIONS 6, 10 (2011), *available at*

President Rousseff, who inherited Belo Monte from the Lula administration, has championed the dam as the cornerstone of her plans to expand Brazil's energy infrastructure and harvest the Amazon's hydropower potential.[16] The state has also promoted Belo Monte as a model of "green" energy that will allegedly help Brazil comply with its international environmental obligations.[17]

The state's firm backing of Belo Monte perhaps explains why the project has flourished despite glaring omissions and illegalities throughout its authorization and implementation processes. In fact, Brazil permitted its National Congress to hold a legislative vote to approve the dam without first consulting the numerous indigenous groups affected by its development.[18] According to a court decision that was later reversed, failure to consult the indigenous groups directly violated domestic law and, as such, the decree authorizing the dam is invalid and unenforceable.[19]

Furthermore, the government's issuance of a "partial installation

http://www.brasil.gov.br/para/press/files/faq-belo-monte-1 [hereinafter FAQs] (claiming that Belo Monte will provide abundant low-cost energy and directly create 19,000 jobs during the peak of its construction).

16. *See Brazil Court Reverses Amazon Monte Belo Dam Suspension*, BBC NEWS, Mar. 3, 2011, http://www.bbc.co.uk/news/world-latin-america-12643261 [hereinafter *Court Reverses*] ("The government says the dam is crucial for development and will create jobs, as well as provide electricity to 23 million homes.").

17. *See* Press Release, Int'l Rivers, Amazonian Communities Occupy the Belo Monte Dam Site (June 15, 2012), *available at* http://www.internationalrivers.org/resources/amazonian-communities-occupy-the-belo-monte-dam-site-7514 (discussing the government's claims that the dam is a "source of 'clean energy' for a 'Green Economy,'" but also noting that the dam will produce "an enormous amount of methane, a greenhouse gas 25–50 times more potent than carbon dioxide").

18. *See* Mariano Castillo, *Judge Halts Construction on Brazil's Belo Monte Dam*, CNN, Aug. 15, 2012, http://www.cnn.com/2012/08/15/world/americas/brazil-belo-monte-dam/index.html (reporting a federal court's decision to suspend construction on the dam until affected indigenous communities "get a say on the matter").

19. *See Brazilian Court Halts Belo Monte Hydroelectric Dam Project*, BBC NEWS, Aug. 14, 2012, http://www.bbc.co.uk/news/world-latin-america-19263675 [hereinafter *Court Halts Belo Monte Project*] (quoting Judge Souza Prudente as holding that legislators can only give the "go-ahead" to projects affecting indigenous rights if the communities concerned have provided their consent, and therefore, without such consent, the legislation to approve the dam was "flawed").

license" was not authorized under Brazilian law.[20] The Brazilian Institute of Environment and Renewable Natural Resources ("IBAMA"), the Ministry of the Environment's enforcement agency, granted Norte Energia the partial license in 2011 even though the consortium had not met twenty-nine environmental and social conditions.[21] These conditions, which the law requires developers to meet *before* construction, included regulations concerning health, education, sanitation infrastructure, and the protection of indigenous lands.[22]

The official environmental impact assessment ("EIA") and the processes surrounding the distribution of its findings also have been wrought with error and ineffectiveness. Eletrobras, a state-owned utilities company belonging to the Norte Energia consortium, carried out the study without involving the affected indigenous communities.[23] Furthermore, despite allegations that the study grossly understated the dam's socio-environmental impacts, IBAMA succumbed to political pressure and approved the faulty EIA in February 2010.[24] The state then failed to ensure that the public could adequately access the study to become properly informed about the dam and its projected impacts; in fact, the highly technical 20,000-page document became publicly available only two days before the Brazil Institute of the Environment ("BIE") held meetings with affected communities.[25] BIE also hosted the meetings in urban areas

20. Press Release, Amazon Watch, Int'l Rivers, Regional Judge Overturns Ban on Construction of Controversial Belo Monte Dam in the Brazilian Amazon (Mar. 5, 2011), *available at* http://amazonwatch.org/news/2011/0305-regional-judge-overturns-ban-on-construction-of-controversial-belo-monte-dam [hereinafter Construction Ban Overturned].

21. *See Brazil Judge Blocks Amazon Belo Monte Dam*, BBC NEWS, Feb. 25, 2011, http://www.bbc.co.uk/news/world-latin-america-12586170 (describing Judge Desterro's decision to suspend construction until Brazil ensured all the environmental and social conditions were met).

22. *See* Construction Ban Overturned, *supra* note 20 (reporting that a federal court subsequently overturned Desterro's holding).

23. *See* Press Release, Int'l Rivers, Belo Monte Dam Suspended by Brazilian Appeals Court (Aug. 15, 2012), *available at* http://www.internationalrivers.org/resources/belo-monte-dam-suspended-by-brazilian-appeals-court-7631 (explaining that this omission led the Regional Federal Tribunal to block the dam's construction, a decision that was subsequently overturned).

24. *See id.* (stating that IBAMA had approved the EIA in spite of objections from its own technical staff).

25. *See* Anaya 2010 Report, *supra* note 9, at 32 (explaining that it was thus

difficult to access from the remote rural sites where most of the affected indigenous groups reside.[26]

The public meetings held by Brazil and Norte Energia thus far have been highly contentious and ineffective. As such, they hardly qualify as the "consultations" Brazil is legally bound to hold.[27] Participants have described the meetings as "unequal" and "totally asymmetric," noting Norte Energia's persistent refusal to address indigenous demands.[28] Rather than fostering a climate conducive to collaboration, the company has fueled conflicts between different indigenous groups and within communities.[29]

Moreover, the meetings' participants have accused the company of attempting to "buy [them] off cheaply," by offering televisions, boats, and other perks while refusing to address the various legally-required social and environmental conditions the company has yet to fulfill.[30] Norte Energia evidently has even taken advantage of language barriers between its representatives and participating indigenous groups by allowing interpreters to misrepresent the

"impossible for [affected indigenous groups] to be fully acquainted with the very complex and highly technical project").

26. *See id.* (noting that the cost and difficulty of travel prevented some indigenous groups from attending the meetings).

27. *See infra* Part II.B (describing the legal underpinnings of the rights to consultation and to FPIC).

28. *See* Press Release, Amazon Watch, After 21 Days, Indigenous Occupation of Belo Monte Dam Ends in Discord (July 12, 2012), *available at* http://amazonwatch.org/news/2012/0712-after-21-days-indigenous-occupation-of-belo-monte-dam-ends-in-discord [hereinafter After 21 Days] (quoting Biviany Rojas, an attorney with the Brazilian organization Instituto Socioambiental, and describing the meetings between the multibillion-dollar corporation and the divided tribes of indigenous peoples).

29. *See Belo Monte Agrava Desarticulação Indígena* [Belo Monte Aggravates Indigenous Disarticulation], INSTITUTO HUMANITAS UNISINOS (June 29, 2012), http://www.ihu.unisinos.br/entrevistas/510983-barragem-agrava-desarticulacao-indigena-entrevista-especial-com-rodolfo-salm [hereinafter *Belo Monte Agrava*] (reporting that Norte Energia has taken advantage of ancient tensions between the Xikrin and the Kayapó to undermine collaboration between the groups in their joint campaign against the dam).

30. *See* After 21 Days, *supra* note 28 (stating that while Norte Energia repeatedly offered "trinkets" to the various participants, it refused to set a timetable for meeting the socio-environmental conditions as required by law or address the peoples' key concerns regarding navigability around the dam, loss of livelihoods, land demarcation, and education and health programs, among others).

statements of attendees with distorted translations.[31] During talks in July 2012, the Arara and Juruna communities in attendance became so frustrated with the consortium's refusal to cooperate that they non-violently detained three of its employees on tribal lands in protest.[32] Despite the communities' repeated efforts to engage developers in good faith dialogues, however, both Brazil and Norte Energia continue to disregard indigenous interests.

At present, construction of Belo Monte is already more than ten percent complete. Though the dam has survived numerous judicial efforts to shut it down, legal battles and protests rage on, spearheaded by everyone from local indigenous leaders to international celebrities.[33] As this comment will assess, the precedential value of *Sarayaku* may offer the Xingu Basin's indigenous peoples an effective path to recourse.

### *2. Projected Impacts of the Belo Monte Dam*

Belo Monte's operation will divert more than eighty percent of the Xingu River's flow.[34] The most apparent outcome of this will be the inundation of over 500 square kilometers of land, an area three times the size of Washington, D.C.[35] The Brazilian government estimates that large-scale flooding will displace around 20,000 people from the Xingu Basin, while NGOs place the number closer to 40,000–

31. *See id.* (explaining that the Xikrin only agreed to stop a twenty-one-day occupation of the dam site after a series of "confusing and poorly translated" sessions with Norte Energia representatives).

32. Press Release, Amazon Watch, Amidst Broken Promises, Indigenous Authorities Detain Belo Monte Dam Engineers (July 25, 2011), *available at* http://amazonwatch.org/news/2012/0725-amidst-broken-promises-indigenous-authorities-detain-belo-monte-dam-engineers [hereinafter Broken Promises] (stating that the tribal leaders vowed to keep the engineers "under detention until Norte Energia and government agencies have fully carried out promises to mitigate and compensate adverse impacts of Belo Monte").

33. *See, e.g.*, Jampolsky, *supra* note 8, at 229–30 (describing the anti-Belo Monte campaign launched by award-winning film director James Cameron).

34. *See* Bianca Jagger, *The Belo Monte Dam: An Environmental Crime*, HUFFINGTON POST, June 21, 2012, http://www.huffingtonpost.com/bianca-jagger/the-belo-monte-dam-an-env_b_1614057.html (reporting that Brazil will need to build as many as five additional dams upriver, directly flooding the territories).

35. *See* Barreto & Marcondes, *supra* note 7 (stating that dam operations will also partially desiccate a hundred-kilometer stretch of the Xingu River).

50,000.[36] Though the state insists that the project will not flood indigenous land,[37] studies reveal that local populations nonetheless face numerous calamities.[38]

Foremost, sections of the Xingu Basin that will not be underwater will be left in perpetual drought. Research reveals that Belo Monte's development will dry out the Big Bend, a sixty-two mile stretch of river that serves both as an ecological hotspot and a sacred "cradle of civilization" for the basin's indigenous groups.[39] Experts claim the destruction of the Xingu will constitute a huge spiritual loss for local peoples, for the basin's very name means "house of god" in native languages.[40]

In addition to the cultural implications, drought conditions will greatly diminish floral and faunal populations, jeopardize water access, and impede fluvial navigation.[41] Inhabitants of affected areas will become geographically isolated and unable to travel to the commercial centers, schools, and social service providers located in urban areas.[42] The loss of access to local markets and medical

36. *Compare* Ministério de Minas e Energia et al., RELATÓRIO DE IMPACTO AMBIENTAL: APROVEITAMENTO HIDRELÉTRICO BELO MONTE 85, 93 (2009) [hereinafter RIMA] (projecting that the dam will displace approximately 16,000 people from the Altamira area and another 2,000 from rural locations), *with Court Reverses*, *supra* note 16 (claiming that as many as 50,000 people will become homeless).

37. *See* Sheena Rossiter, *Brazil's New Dam Unleashes Flood of Anger and Hope: World View*, BLOOMBERG, June 17, 2011, http://www.bloomberg.com/news/2011-06-17/brazil-s-new-dam-unleashes-flood-of-anger-and-hope-world-view.html (quoting Energy and Mining Minister Edison Lobao as declaring that "[n]o indigenous person will have to leave where they are today").

38. *See, e.g.*, *Belo Monte Facts: 10 Myths the Brazilian Government Wants You to Believe About Belo Monte*, AMAZON WATCH, http://amazonwatch.org/work/belo-monte-facts (last visited July 26, 2013) [hereinafter *10 Myths*] (identifying decreased water quality, faunal habitat destruction, loss of biodiversity, and increased incidence of water-borne diseases as some of the dam's projected impacts).

39. *See* Sara Diamond & Christian Poirier, *Brazil's Native Peoples and the Belo Monte Dam: A Case Study*, 43 NACLA REPORT ON THE AMERICAS 25, 26–27 (2010) (explaining that it will become impossible for local peoples to continue to rely on the river as a channel for trade and a source of some fish species).

40. *Id.* at 27 (stating that the Xingu's destruction will be "nothing less than a cosmological catastrophe" for local peoples).

41. *See 10 Myths*, *supra* note 38.

42. *See* Diamond & Poirier, *supra* note 39, at 29 (claiming that dam developers have also threatened to actively cut off the indigenous communities' access to

facilities will become particularly problematic given the dam's projected effects on public health and rural food security.[43]

The Belo Monte Dam also threatens to substantially deplete the Xingu Basin's fish stock, impeding the communities' enjoyment of the river's resources and ability to subsist.[44] One study estimates that reduced water flow will result in the death of millions of fish along the Big Bend, an outcome that apparently no measure will be able to offset or mitigate.[45]

Studies reveal that communities are already witnessing the adverse effects of dam activities on local wildlife. In September 2012, fishermen from the basin reported that the construction of a cofferdam had reduced fisheries production by fifty percent.[46] Such an outcome will have strong implications for upstream communities like the Kayapó, whose dietary staples include migratory species.[47] Also at risk are ornamental fish, which groups like the Juruna collect

certain social services if they refuse to consent to the dam's development).

43. *See, e.g.*, Inter-Am. Comm'n H.R., *Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10, Apr. 1, 2011 (precautionary measures), ¶ 32 (noting the massive influx of migrants and dam activities will lead to the spread of communicable and water-borne diseases); *see also* RIMA, *supra* note 36, at 85 (affirming that the population boom will leave indigenous groups more exposed to alcoholism, drugs, and prostitution).

44. MINISTERIO PÚBLICO FEDERAL, TRF-1, No. 0028944-98.2011.4.01.3900, 17.08.2011, 11 (Brazil), *available at* http://www.prpa.mpf.gov.br/news/2011/BeloMonte_Remocao.pdf/view [hereinafter Juruna-Arara Action] (observing that Belo Monte's expected impacts on the Big Bend's ecosystem is particularly worrisome because certain species of fish, like *Hypancistrus zebra*, exist nowhere else in the world).

45. *Compare id.* at 11 (pointing out that the official EIA for Belo Monte fails to mention this particular "irreversible" impact), *with* RIMA, *supra* note 36, at 114–16 (affirming only that certain species of fish will "suffer," but failing to provide specific estimates of the expected damage). The EIA even downplays the threat by claiming that the species expected to flourish after the reservoir's construction will be of higher subsistence and economic value than those that will be wiped out. *Id.*

46. *See* Press Release, Int'l Rivers, Fishermen Paralyze Construction of the Belo Monte Dam (Sept. 20, 2012), *available at* http://www.internationalrivers.org/resources/fishermen-paralyze-construction-of-the-belo-monte-dam-7680 (describing how fifty fishermen set up a protest camp on the Xingu to prevent Belo Monte workers from accessing a cofferdam's construction site in response to the dam's impact on ecologically sensitive fish species).

47. *See* Diamond & Poirier, *supra* note 39, at 26–27 (attributing the expected losses of aquatic fauna in part to the significant decline in the Big Bend's water table that is projected to occur).

and sell to local markets and intermediaries as a primary means of generating income.[48] Thus, both Belo Monte's direct and indirect impacts threaten local communities' enjoyment and use of their lands and resources.

## B. THE RIGHT TO FREE, PRIOR, AND INFORMED CONSENT AND ITS LEGAL UNDERPINNINGS

As this comment will discuss, Brazil's endorsement of Belo Monte constitutes a violation of the state's consultation and FPIC duties under both domestic and international law. A growing number of international guidelines and legal instruments, both binding and non-binding, recognize the right of indigenous people to be consulted on policies and decisions affecting their rights and livelihoods.[49] The right of indigenous peoples to FPIC, where afforded, is intrinsically tied to this right to consultation. According to advanced indigenous rights regimes, consultations should aim to secure affected peoples' prior and informed consent,[50] which these peoples in turn may freely choose to give or withhold.[51]

48. *See* RIMA, *supra* note 36, at 114; *see also* Press Release, Int'l Rivers, Independent Review Highlights the True Costs of Belo Monte Dam (Oct. 12, 2009), *available at* http://www.internationalrivers.org/resources/independent-review-highlights-the-true-costs-of-belo-monte-dam-3783 (identifying the commercially valuable zebra pleco and the sheep pacu fish as facing possible extinction as a result of the dam).

49. *See, e.g.*, U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, 61st Sess. Supp. No. 49, U.N. Doc. A/RES/61/295, art. 19 (Oct. 2, 2007) [hereinafter UNDRIP] ("States shall consult with indigenous peoples in good faith and through their own representative institutions . . . before adopting any administrative or legislative measures that may affect them."); ILO Convention 169, *supra* note 5, art. 6 (requiring states to carry out consultations "with the objective of achieving agreement or consent to the proposed measures"); World Bank, Operational Policy (OP) 4.10 on Indigenous Peoples, para. 1 (adopted in May 2005, effective July 2005) (stating that the "Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples").

50. *See, e.g.*, ILO Convention 169, *supra* note 5, art. 6.

51. *See generally* Andrea Carmen, *The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress*, *in* REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE, AND ACTION 120, 120 (Jackie Hartley ed., 2010) (claiming the right of indigenous peoples to FPIC is crucial to their "ability to exert sovereignty over their lands," redress abuses of their rights, and "establish criteria for negotiations with states on matters affecting them").

### *1. The American Convention on Human Rights: Article 21 and Its Interpretive History*

The right to consultation evolved from international law's recognition of indigenous peoples' right to self-determination,[52] specifically with regard to their cultural use of ancestral lands.[53] The American Convention on Human Rights, which both Brazil and Ecuador have ratified, requires states to respect citizens' right to property.[54] While the ACHR does not expressly entitle indigenous peoples to consultations, Article 21's recognition that everyone is afforded "the use and enjoyment of his property" has become a key basis for the evolving right.[55] Four cases, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[56] *Mary and Carrie Dann v. United States*,[57] *Maya Indigenous Communities of Toledo District v. Belize*,[58] and *Saramaka People v. Suriname*,[59] have been particularly

52. *See* UNDRIP, *supra* note 49, art. 3 (defining the right to self-determination as providing peoples the liberty to "freely determine their political status and freely pursue their economic, social and cultural development").

53. *See* James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 8–9 (2005) (noting that the importance of land and resources to the survival of indigenous cultures is a "widely accepted tenet" of contemporary indigenous rights advocacy); *see also* Jeremy Firestone et. al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219, 262 (2005) (identifying an emerging "paradigmatic shift" with regard to the international commununity's increasing acknowledgment and some states' willingness to allow indigenous peoples' active involvement in the management of natural resources and the protection of their intellectual property rights).

54. *See* ACHR, *supra* note 4, art. 21 (declaring that no one shall be deprived of his property without "just compensation, which would include only the reasons of public utility or societal interest").

55. *See id.*; Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL'Y 16, 16-17 (2004) (asserting that collective ownership and self-governance strongly affect how indigenous peoples make decisions related to their property).

56. Judgment, Inter-Am. Ct. H.R., (ser. C) No. 79 (2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf [hereinafter *Awas Tingni*].

57. Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/1I. 117, doc.1 rev. 1 (2003), *available at* http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm.

58. Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004), *available at* http://www.cidh.org/annualrep/2004eng/Belize.

instrumental to expanding the scope of the right to property as applied to indigenous peoples, thereby contributing to the development of the right to FPIC.

Decided in 2001, *Awas Tingni* was the first internationally binding ruling to extend the right to property to indigenous land and resources.[60] The Inter-American Court found Nicaragua had violated Article 21 of the ACHR by granting logging concessions on lands traditionally used and occupied by the Awas Tingni without first obtaining the community's consent.[61] The decision was a watershed because it established the collective right of indigenous peoples to traditional lands even in the absence of official state-issued titles.[62]

Some indigenous rights advocates have lamented the fact that *Awas Tingni* did not clarify the extent of indigenous peoples' right to property and thereby leaves significant gaps in protection.[63] Still, others applaud the decision for holding that a state has an *affirmative* duty to protect indigenous peoples from third-party infringements on their land rights even when it is not directly responsible for the interference.[64]

12053eng.htm.

59. *Saramaka*, *supra* note 6.

60. *See generally Awas Tingni*, *supra* note 56 (holding that the Constitution of Nicaragua and Article 21 of the ACHR protects the property rights of indigenous community members "within the framework of communal property").

61. *See id.* ¶¶ 142–55 (noting that while Nicaragua had already formally recognized indigenous peoples' property rights, it had yet to "materialize that recognition" through a specific procedure to grant title deeds).

62. *See* Jennifer A. Amiott, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System:* Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 32 ENVTL. L. 873, 889 (2002) (declaring that the decision also establishes that states can no longer turn to their domestic laws to validate violations of indigenous peoples' rights).

63. David C. Baluarte, Comment, *Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169*, 4 SUSTAINABLE DEV. L. & POL'Y 9, 9 (2004) (pointing out that "at no point did the Court rule on the legitimacy of [the] administrative process" authorizing the concession at dispute, and thus "the Court's express denial of any reparations beyond the order to demarcate the [Awas Tingni's] lands leaves the question of where the line is drawn between the indigenous right to land and the State's right to develop").

64. *Awas Tingni*, *supra* note 56, ¶ 164 (ordering Nicaragua to abstain from and prevent any actions that might affect the "existence, value, use or enjoyment of the [Awas Tingni's] property," including those carried out by third parties).

*Mary and Carrie Dann v. United States*,[65] which arose from a land dispute between the U.S. government and members of the Western Shoshone Nation, expanded *Awas Tingni*'s precedent.[66] *Dann* provided that any state decisions affecting indigenous land rights must be based on the "fully informed and mutual consent on the part of the indigenous community as a whole."[67] Notably, *Dann* ruled that international law requires states to adopt "special measures" to ensure that nothing deprives indigenous peoples of their collective right to property without their consent.[68]

*Maya Indigenous Communities* expanded on *Dann*, holding that the duty to consult with the purpose of securing consent is a "fundamental" component of states' duty to respect indigenous land rights.[69] Belize's obligation to recognize Maya land rights through the delimitation, demarcation, and titling of traditional territory thus required the state to consult the communities and develop a system consistent with their customary land use practices.[70] However, while reaffirming the notion of informed consent, *Maya Indigenous Communities* declined to find "an independent basis for FPIC in international law protecting rights to consultation and self-determination."[71] As such, the decision left the rights of indigenous peoples to consultation intrinsically tied to their property rights.[72]

65. Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/1I. 117, doc.1 rev. 1 (2003).

66. *See generally id.* (adjudicating the Danns' allegations that the US violated their rights under the American Declaration of the Rights and Duties of Man by imposing use restrictions on Western Shoshone traditional lands).

67. *Id.* ¶ 165 (forbidding the exclusion of individual members of an indigenous community from decision-making processes affecting their collective property interests).

68. *See id.* ¶ 131 (requiring states to consult indigenous peoples on decisions affecting their lands "under conditions of equality," and providing "fair compensation" when appropriate).

69. *See generally* Press Release, Government Reviews Report of the Inter-American
Commission on Human Rights, (Jan. 19, 2004); Inter-Am. Ct. H.R. Preliminary Report No. 96/03, *Maya Indigenous Communities of the Toledo District*, ¶ 154 (Oct. 24, 2003) (observing that traditional lands play a central role in the "physical, cultural, and spiritual vitality" of indigenous peoples).

70. *See id.* ¶ 129 (explaining that Belize must fulfill this obligation "in full collaboration" with the Maya people).

71. Page, *supra* note 55, at 19.

72. *See id.* at 16, 19 (arguing that neither indigenous land rights nor FPIC can be properly understood without acknowledging the interrelationship between

The Inter-American Court addressed this potential gap in protection in its ruling for *Saramaka v. Belize*.[73] *Saramaka* noted that while Article 21 allows state laws to subordinate property rights to societal interests, such restrictions cannot deny an indigenous or tribal group's survival as a people.[74] The Court set specific safeguards to ensure indigenous peoples' effective participation in decision-making processes affecting their property. For instance, the Court defined states' consultation duty to include the task of disseminating information on the projected social and environmental impacts of a proposed measure to all communities that may be affected.[75] Also, for the first time, the Court specified that consultations must be carried out "in good faith, be culturally appropriate, and have the intent of reaching an agreement."[76] Importantly, *Saramaka* also held that when large-scale development may jeopardize the survival of a people, the state must not only consult the people but also actually "obtain their free, prior and informed *consent*."[77]

The four cases discussed not only contributed to the interpretative history of Article 21's right to property, but also laid the foundation for the rights of indigenous peoples to consultation and to FPIC. *Sarayaku* further extended the scope of protection for indigenous peoples by presenting a stricter, more detailed FPIC standard for Organization of American States ("OAS") states to follow.

indigenous self-determination and communal property ownership).

73. *See generally Saramaka*, *supra* note 6 (finding that Suriname had violated the tribal Saramaka people's rights to property and judicial protection by granting logging and mining concessions in their land without their consent).

74. *See id.* ¶¶ 127–28 (affirming that restrictions are only acceptable under the "interest of society" exception if they are: "a) previously established by law; b) necessary; c) proportional; and d) with the aim of achieving a legitimate objective in a democratic society").

75. *See id.* ¶ 133 (requiring a state to consult communities not only when it needs to obtain their approval, but also during the early stages of the project). The Court particularly observes the importance of early notice, which allows communities to carry out internal discussions and provide feedback in a timely manner. *Id.*

76. *Id.* (calling on states to maintain "constant" communication by means that take into account the "Saramaka people's traditional methods of decision-making").

77. *See id.* ¶ 134 (noting the need to further analyze the difference between "consultation" and "consent" in this context).

### *2. Sarayaku v. Ecuador: Setting a Higher Standard for the Right to FPIC*

*Sarayaku v. Ecuador* first entered the Inter-American system's docket in 2003, when the plaintiff Kichwa community of Sarayaku filed a petition before the Inter-American Commission for Human Rights ("IACHR").[78] According to the petition, Ecuador acted unlawfully by allowing a private company to develop on Kichwa lands without first consulting the resident community and obtaining its free and informed consent.[79] Finding a legal and substantive basis for the plaintiff's complaint, the IACHR referred the case to the Inter-American Court of Human Rights for adjudication.[80] In July 2012, eight years after the case first entered the Inter-American system, the Court issued a landmark decision, finding Ecuador in breach of both domestic and international human rights obligations.[81]

The Court concluded that Ecuador had violated the Kichwa's FPIC rights by examining several sources of law: the American Convention on Human Rights, the Ecuadorian Constitution, and ILO Convention 169. Foremost, the Court held that Ecuador had breached Article 21 of the ACHR by failing to consult the Kichwa on the execution of a project directly affecting their territory.[82] The Court noted that activities of the CGC, an Argentinian-based oil company, infringed on the Kichwa's right to use and enjoy their traditionally occupied property in several ways. Not only did the company physically occupy the territory without first obtaining the community's permission,[83] but the oil exploration also physically

78. *See* Kichwa Peoples of the Sarayaku Community v. Ecuador, Case 12.465, Inter-Am. Comm'n H.R., Report No. 64/04 (2004) (admissibility findings).

79. *See id.* ¶ 2 (alleging violations of specific articles of the ACHR and domestic law).

80. *See generally* Kichwa People of Sarayaku v. Ecuador, Case 12.465, Application to the Inter-American Court of Human Rights (Apr. 26, 2010), *available at* http://www.cidh.org/demandas/12.465%20Sarayaku%20Ecuador%2026abr2010%20ENG.pdf.

81. *See generally Sarayaku*, *supra* note 1.

82. *See id.* ¶ 232 (holding that Ecuador was obligated under both international and domestic law to take all measures necessary to ensure the Sarayaku people's participation in decision-making processes concerning measures that could affect their property rights and way of life).

83. *See id.* ¶ 124 (explaining that Ecuador acknowledged that it had granted CGC a contract for oil exploration on Sarayaku territory without first securing the community's consent).

altered the land. For example, CGC planted dangerous explosives in the ground, clear-cut nearly 200 kilometers of primary forest, and destroyed sites of cultural and spiritual value to the Kichwa.[84]

In addition to the ACHR, the Court considered Ecuador's violations of its own domestic laws. According to the Kichwa, Ecuador entered into a partnership contract with CGC in 1996 "without respect for the regulatory, constitutional, and conventional procedures set forth in domestic and international law."[85] Significantly, the CGC did not launch the exploration phase of seismic prospecting until 2002,[86] at which point the 1998 Constitution and the protections it afforded to indigenous peoples had already been in effect for four years.[87]

Additionally, by the time CGC unlawfully entered Sarayaku land, ILO Convention 169 had already entered into force in Ecuador and codified international standards for the rights to FPIC and consultation. Among these was the duty of party states to consult indigenous peoples "whenever consideration is being given to legislative or administrative measures which may affect them directly."[88] The commencement of seismic testing on indigenous land therefore constituted a direct breach of Ecuador's operative

84. *See id.* ¶ 248; *see also* Press Release, Center for Justice and International Law, Inter-American Court Condemns Ecuador for Violating Rights of Indigenous People of Sarayaku (July 25, 2012), *available at* http://cejil.org/en/comunicados/inter-american-court-condemns-ecuador-violating-rights-indigenous-people-sarayaku [hereinafter Court Condemns Ecuador] (reporting that CGC had abandoned 1400 kilos of highly dangerous explosives in an area covering 16,000 hectares, including zones used for hunting, fishing, and other traditional activities).

85. *See* The Kichwa Peoples of the Sarayaku Community and its Members v. Ecuador, Petition 167/03, Inter-Am. Comm'n H.R., Report No. 64/04 (Admissibility), ¶ 22 (Oct. 13, 2004).

86. *See id.* ¶ 23 (explaining that the exploration phase of seismic testing was actually set to commence in 1997, according to the original contract between Ecuador and CGC).

87. *See generally* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR [ECUADOR CONSTITUTION] 2008, art. 84 (Ecuador) (affording indigenous peoples the right to consultation on decisions affecting their property as well as their cultural and economic rights). *But see* Isabela Figueroa, *Indigenous Peoples Versus Oil Companies: Constitutional Control Within Resistance*, 4 SUR INT'L J. ON HUM. RTS. 51, 54-55 (2006) (identifying the conflict the 1998 Ecuadorian Constitution created by reserving the right to subsoil resources for the state even though most oil fields in the Ecuadorian Amazon are found on indigenous lands).

88. ILO Convention 169, *supra* note 5, art. 6.

obligation to respect the rights of the Kichwa to consultation, participation in decision-making processes, and free and informed consent *prior* to the initiation of activities affecting their rights.

An important outcome of *Sarayaku* was the Court's elaboration on what constituted adequate, good faith consultations under international standards. Although the Court had concluded in *Saramaka* that states had a duty to carry out consultations in good faith "with the object of reaching an agreement," it failed to elaborate on what exactly constituted "good faith."[89] In contrast, *Sarayaku* laid out specific conditions for fulfilling the good-faith requirement and thereby set a higher standard for states to meet when carrying out consultations. Importantly, the Court held that "good faith" necessitates an absence of any form of coercion, whether committed by the state or by third parties acting with the state's authorization or acquiescence.[90]

Applying this criterion, the Court found that CGC's various coercive measures amounted to a violation by Ecuador of its domestic and international consultation and FPIC duties. These measures included circumventing the political organization of the Sarayaku community by contacting individual members directly; paying community members to recruit others to support CGC's activities; and bribing individuals and groups with money, gifts, job offers, and other perks.[91] While CGC had committed these acts without the state's direct assistance, the Court held that Ecuador's failure to carry out its own consultation procedures by default "favored a climate of conflict, division and confrontation between the indigenous communities of the area."[92] The Court also noted that the state's provision of armed forces to CGC as a security measure was not conducive to fostering a climate of trust and mutual

89. *See Saramaka*, *supra* note 6, ¶ 133 (ordering states to hold consultations "in good faith, through culturally appropriate procedures and with the objective of reaching an agreement").

90. *See Sarayaku*, *supra* note 1, ¶ 186 (finding that states must treat the consultation requirement as more than "mere formality" and thereby aim to establish a "climate of mutual trust" when engaging in dialogues with indigenous groups).

91. *See id.* ¶¶ 73–74 (stating that the CGC lawyer offered the Sarayaku "US$60,000.00 for development projects and 500 jobs for the men of the community").

92. *Id.* ¶ 198.

respect.[93]

The Court's holding in *Sarayaku* was also a watershed decision because it marked the first opinion where the Court expressly asserted that the duty of states to consult indigenous peoples with the aim of obtaining FPIC is non-delegable. The Court observed that a state could not avoid its consultation duty by bestowing it upon a private or third party, particularly if that party is the same entity seeking to develop the land in dispute.[94] Applying this reasoning, the Court found that Ecuador had violated international and domestic law by seeking to endorse CGC's bad-faith attempts at "socializing" the Sarayaku people as adequate forms of consultation. The Court emphasized the inappropriateness of Ecuador's delegation of its consultation duty to an agent possessing an obvious conflict of interest, questioning the integrity of third party consultations.[95]

By setting these new conditions for states to apply when attempting to authorize development on indigenous land, *Sarayaku v. Ecuador* expands the protective scope of the right to FPIC. Notably, *Sarayaku* fills in several of the gaps in indigenous rights protection left by the prior Inter-American case law discussed above as well as in existing international legal instruments.

### *3. Brazilian Law: The 1988 Constitution and Brazil's Internalization of ILO Convention 169*

As in the case of Ecuador, Brazil's domestic consultation and FPIC duties to indigenous peoples are grounded partly in the state's own constitution. In addition to articles affording citizens equal protection, the right to life, the right to property, and other fundamental protections,[96] several provisions deal specifically with

93. *See id.* ¶¶ 190–93 (describing how Ecuador provided National Police and Ecuadorian Army forces to assist the CGC's activities, thereby intimidating members of the Sarayaku community opposed to the company's presence on their lands).

94. *See id.* ¶ 199 (noting that even a partial delegation is invalid, as it fails to comply with the good faith requirement and discourages a climate of respect).

95. *See id.* ¶ 188 (observing that CGC utilized its so-called consultations with the Kichwa as a one-sided, opportunistic attempt to negotiate its entry onto legally protected land).

96. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 5 (Braz.) [hereinafter BRAZILIAN CONSTITUTION] (stating that all persons residing in Brazil are equal before the law and "ensured of inviolability of the right to life, to liberty,

indigenous land. Article 231 of the 1988 Constitution expressly prohibits removing indigenous peoples from traditional lands except when epidemics or catastrophic events present imminent threats to the populations, or in the interest of national sovereignty.[97] Importantly, both the catastrophic event and national sovereignty exceptions authorize only the *temporary* removal of affected populations.[98]

According to one scholarly analysis, a situation that would actually reflect a sovereignty interest is the removal of an indigenous population during wartime as a means of facilitating the movement of military troops in a region.[99]

Additionally, Paragraph 3 of Article 231 states that hydric resources existing on indigenous land may be exploited only with legislative authorization and after affected communities have been allowed to voice their opinions on the matter.[100] These hydric resources include "energy potentials" such as the untapped hydropower potential of rivers like the Xingu.

Furthermore, by becoming a party to ILO Convention 169, Brazil internalized an internationally set standard for the right to consultation into its own domestic legal framework. ILO Convention 169 was ratified by Brazil in 2002 and enacted via presidential decree on April 19, 2004.[101] Although reservations to ILO

to equality, to security, and to property," subject to certain conditions).

97. *See id.* art. 231 ("The removal of Indian groups from their lands is forbidden, except *ad referendum* of the National Congress, in case of a catastrophe or an epidemic which represents a risk to their population, or in the interest of the sovereignty of the country, after decision by the National Congress, it being guaranteed that, under any circumstances, the return shall be immediate as soon as the risk ceases.").

98. Juruna-Arara Action, *supra* note 44, at 17 (quoting constitutional scholar dos Anjos Filho as asserting that it can be inferred from the constitutional text that the emergency displacement of an indigenous people should always be temporary and last the shortest possible amount of time).

99. *See id.* at 16 (arguing that in such an event, the national security interests of Brazil would arguably outweigh any temporary inconveniences the state may impose on the population by relocating it until the threat has passed).

100. BRAZILIAN CONSTITUTION, *supra* note 96, art. 231 ("Hydric resources, including energetic potentials, may only be exploited . . . after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.").

101. *See* Decreto No. 5.051, Diário Oficial da União (Braz.) (Apr. 19, 2004) (promulgating ILO Convention 169 in compliance with Legislative Decree No.

conventions are not permitted,[102] Article 34 allows state parties to determine the "nature and scope" of the measures necessary to give effect to the convention "in a flexible manner" that accounts for the specific conditions and circumstances of each country.[103] Despite the availability of this clause, the language of both the legislative decree adopting the convention and the enacting presidential decree suggests conformity with the treaty's original text.[104]

Domestic case law has affirmed Brazil's obligations under ILO Convention 169. In the 2007 case of *Joisael Alves v. General Director of the Alcântara Launch Centre*,[105] the court ordered an aerospace base to refrain from affecting a *quilombola* community's ability to subsist on their traditionally occupied lands.[106] The court reasoned that through its ratification of ILO Convention 169 and passage of Legislative Decree N° 43/2000, Brazil had "confirmed the intention to establish public policy to fight discrimination against the traditional ways of life of the indigenous and tribal peoples."[107]

*Joisael Alves* was significant not only because it was the first application of ILO Convention 169 in a Brazilian court, but also

143).

102. *See How International Labour Standards Are Created*, ILO, http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm (observing that although reservations to ILO conventions are not permitted, most of the standards set by the agreements "reflect the fact that countries have diverse cultural and historical backgrounds, legal systems, and levels of economic development," and, according to the ILO, these standards have thus been formulated with enough flexibility to be "translated into national law and practice with due consideration of these differences").

103. *See* ILO Convention 169, *supra* note 5, art. 34.

104. *See* Decreto Legislativo No. 143, art. 1, Senado Federal (Braz.) (June 20, 2002) (approving the text of the Convention and declaring that any acts to revise it are subject to the National Congress for approval); Decreto No. 5.051, *supra* note 101 (implementing Legislative Decree No. 143).

105. Judgment no. 027/2007/Jcm/Jf/mA, Case no. 2006.37.00.005222-7 (Feb. 13, 2007).

106. *See* INTERNATIONAL LABOUR ORGANIZATION, APPLICATION OF CONVENTION NO. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICAN: A CASEBOOK 61 (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_123946.pdf (explaining that *quilombolas* are African descendants who, like indigenous peoples, practice subsistence farming on traditional lands).

107. *Id.* (quoting *Joisael Alves v. General Director of the Alcântara Launch Centre*).

because it interpreted the convention's ratification as affirming Brazil's constitutional duty to promote "the well being of all" without discrimination.[108] Subsequent decisions have likewise cited Brazil's enactment of the Convention in granting indigenous groups protection over cultural rights and ancestral lands.[109] Brazil's internalization of ILO Convention 169 via legislative decisions, executive decrees, and supporting jurisprudence thus shows the operative status of the Convention under Brazil's domestic framework. As such, a violation by Brazil of its indigenous peoples' rights to consultation and FPIC constitutes a breach of both international and state law.

## III. ANALYSIS

Although the Inter-American system's case law may establish important legal precedents, the Court has refused to invoke its jurisprudence "as a criterion to be universally applied."[110] The Court instead relies on case-by-case analyses, giving consideration to the specific facts and circumstances at hand.[111]

In *Sarayaku*, the Court cited to several binding legal instruments in deciding that Ecuador had violated its consultation and FPIC obligations to the Sarayaku Kichwa: Ecuador's constitution, ILO Convention 169, and the American Convention on Human Rights. Applying the Inter-American system's case-specific approach, this analysis will look to parallel and, where applicable, the same authorities to determine whether Brazil's actions and omissions surrounding Belo Monte similarly violate international and domestic law.

108. *Id.* at 61 (referring to Article 3 of the Brazilian Constitution).

109. *See*, *e.g.*, Press Release, Supremo Tribuno Federal (Federal Supreme Court), STF Considera Nulos Títulos de Terra Localizados em Área Indígena no Sul da Bahia (May 2, 2012), http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=206458 (explaining that in deciding that the Pataxó Hã-Hã-Hãe Indians were entitled to live on their ancestral territory undisturbed, Brazil's Supreme Court invoked ILO Convention 169).

110. El Amparo v. Venezuela, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 28, ¶ 34 (Sept. 14, 1996) (conceding, however, that prior case decisions may have some precedential value).

111. *See id.* (comparing the fact pattern of *El Amparo* with those of the *Velásquez Rodríguez* and *Godínez Cruz* cases).

### A. THE BELO MONTE DAM'S DEVELOPMENT VIOLATES THE ACHR

Under both domestic and international law, Brazil must consult indigenous peoples residing within its territory on all decisions affecting their property and rights with the goal of obtaining their free, prior, and informed consent. Rather than providing an exhaustive overview of all of the environmental implications of Belo Monte, Part II.B. addresses the dam's implications for the Xingu Basin's indigenous inhabitants in relation to their traditional way of life and subsistence needs. Drawing from the presented facts, this section will assess how the Belo Monte's development, like CGC's activities on Sarayaku land, breaches Article 21 of the ACHR. By demonstrating that the dam jeopardizes the affected communities' use and enjoyment of traditional lands, this section shows that these groups are in fact entitled to the rights to consultation and FPIC.

Belo Monte's projected impact on lands traditionally used and occupied by several indigenous groups constitutes a violation of Article 21 of the ACHR.[112] Brazil may be held accountable for breaching its treaty obligations even though a private entity, rather than the state, is responsible for carrying out the construction and operation of the dam.[113] In *Sarayaku*, the Court held Ecuador accountable for violations of the Kichwa's land rights given the state's authorization of and acquiescence to CGC's actions.[114] Likewise, Brazil's endorsement of Belo Monte and involvement in its implementation makes it liable for any injuries to property stemming from the project.

The Court found Ecuador in breach of Article 21 for failing to consult the Sarayaku Kichwa on the execution of a project directly

112. *See* ACHR, *supra* note 4, art. 21 (holding that every person has the right to use and enjoy his or her property, but that the law may subordinate such use and enjoyment to societal interests).

113. *See, e.g.*, *Sarayaku*, *supra* note 1, ¶¶ 187–88 (implying that a state cannot delegate its consultation and FPIC duties to third parties, and noting that even if such delegation were acceptable, a state would still have the duty to supervise and monitor the consultation process to ensure the third party's compliance with international consultation standards).

114. *See, e.g.*, *id.* ¶ 134 (claiming Ecuador was "fully aware" that CGC was preventing the Kichwa from moving freely within their own land, yet did nothing to mitigate the problem).

affecting their territory.[115] CGC's extractive activities, which received both passive and active support from the state,[116] infringed on the people's land rights in various ways. Not only did the company enter Sarayaku territory without obtaining the community's consent,[117] but it also committed acts that directly harmed the physical landscape. These included planting dangerous explosives in the ground, clear-cutting vast stretches of primary forest, and destroying sites of cultural and spiritual value to the Kichwa.[118]

The Belo Monte Dam's anticipated implications for the Xingu communities' traditional lands are comparable in terms of its effects on local indigenous populations. On one hand, the Brazilian government insists that the dam will not directly flood any indigenous territories.[119] On the other hand, it has acknowledged the likelihood of outcomes that will nonetheless affect the communities' ability to maintain traditional lifestyles.[120] For instance, the dam's

115. *Sarayaku*, *supra* note 1, ¶ 232 (ruling that Ecuador was obligated under both international and domestic law to take all measures necessary to ensure the Sarayaku people's participation in decision-making processes concerning measures that could affect their property rights and way of life).

116. *Compare id.* ¶ 134 (June 27, 2012) (presenting the Commission's conclusion that Ecuador had passively assisted CGC in obstructing the Kichwa's freedom of movement by doing nothing to remedy the situation; the state was well aware that numerous obstructions were impeding the Sarayaku people's ability to move freely within their territory or to voluntarily leave it at will, including soldiers blocking the community's access to the river and placing explosives in areas used for subsistence activities), *with id.* ¶¶ 190–93 (describing how the Ecuadorian government *actively* assisted CGC by providing armed forces to protect CGC's personnel and facilities from Sarayaku opposition, and that Ecuador's provision of armed security to CGC was pursuant to a 2001 cooperation agreement between the state and oil companies operating in the country providing that the state would "guarantee the security of the oil facilities as well as of the persons working there").

117. *Sarayaku*, *supra* note 1, ¶ 124 (explaining that Ecuador itself acknowledged that it had granted CGC a contract for oil exploration on Sarayaku territory without securing the community's consent).

118. *See* Court Condemns Ecuador, *supra* note 84 (reporting that trees and plants sacred to the Sarayaku community were destroyed as a result of CGC's actions).

119. *See* FAQs, *supra* note 15, at 5 (claiming that Belo Monte's operation will not flood any of the *ten* indigenous communities located within the dam's project area). *But see* Anaya 2010 Report, *supra* note 9, at 31 (presenting a non-exhaustive list of *fifteen* indigenous groups projected to be adversely affected by the dam).

120. *See* FAQs, *supra* note 15, at 5–6 (implying that the dam will be an "interference" with the traditional fishing, hunting, and farming activities of local

construction is expected to substantially reduce stream flow and leave areas of the river in permanent drought.[121] Consequently, many communities along the river will lose access to fluvial navigation and become geographically isolated.[122] This in turn will prevent families from accessing urban centers for needed social services as well as areas used for hunting, fishing, and other subsistence activities.[123]

Furthermore, the influx of migrants into the region will also adversely affect the indigenous communities' enjoyment of their territories and natural resources.[124] The government concedes that the projected population boom will place a strain on the environment as existing populations are forced to compete with newcomers over fish and other resources essential to their way of life.[125] Moreover,

indigenous groups, and indicating that the state proposes to offset these impacts by implementing "social-environmental programs," including those addressing territorial security, basic sanitation, and economic sustainability).

121. RIMA, *supra* note 36, at 112–14.

122. *See* Press Release, Amazon Watch, Amazonian Indigenous Peoples Occupy Belo Monte Dam Site (June 23, 2012), *available at* http://amazonwatch.org/news/2012/0623-amazonian-indigenous-peoples-occupy-belo-monte-dam-site (reporting complaints that Norte Energia has thus far failed to fulfill its promise to implement a system that will facilitate the movement of boats near the cofferdams, whose construction is currently impeding fluvial travel, and that according to indigenous protestors, this persistent lack of access to navigable waterways will leave communities isolated unless they open up access roads to their villages, which will in turn expose their lands and resources to illegal loggers, squatter settlements, land speculators, and cattle ranchers).

123. *See id.* (pointing out that the city of Altamira, which is accessible only by river for many indigenous communities, serves as a market for goods and is the main source of healthcare and other essential social services); *see also* Press Release, International Rivers, Amazonian Indigenous Leaders Call for Suspension of Construction License for Belo Monte Dam (July 9, 2012), *available at* http://www.internationalrivers.org/resources/amazonian-indigenous-leaders-call-for-suspension-of-construction-license-for-belo-monte (explaining that loss of river navigation will impede access to Altamira's schools and medical facilities).

124. *See* Construction Ban Overturned, *supra* note 20 (arguing that the commencement of construction may "provoke chaos in terms of social infrastructure in the region of Altamira," considering that approximately 100,000 people are expected to migrate to the area to seek employment at the dam).

125. *See* RIMA, *supra* note 36, at 114–16 (predicting that the dam's construction will result in changes in the types of fish species available in the Xingu, and that because some of the species expected to flourish have high economic value, the government believes that conflicts between existing fishing communities and new, opportunistic fishermen may result); *see also id.* at 131–32 (observing the possibility that the Xingu Basin will experience increased gold mining activity, particularly along stretches of the river where the stream flow will

experts also claim that opportunistic settlers looking to exploit indigenous territories for gold and other valuable commodities may provoke violent land wars.[126] By exposing the Xingu's indigenous peoples to these very probable threats to their land rights, the Brazilian government is in breach of its duties under the ACHR.

Moreover, the Court interprets Article 21 to protect not only land claims, but also to protect indigenous peoples' cultural viability, including "the development and continuation of their worldview."[127] In fact, the Court has stated that the right to restitution in cases of expropriation is enforceable only so long as the indigenous group has retained spiritual and material ties to the land at issue. In *Sarayaku*, the Court found it important to consider the "profound cultural, intangible and spiritual ties" of the Kichwa to their territory to fully understand the damage Ecuador and CGC's actions caused.[128] According to the Court, Ecuador compromised the Kichwa's cultural integrity by passively supporting CGC's devastation of sacred sites and interference with ritual activities.

Likewise, Brazil's endorsement of Belo Monte threatens the Xingu indigenous groups' cultural and spiritual existence. Foremost, the dam's development and operation will interfere with the ability of local peoples to subsist. As discussed, some of the projected impacts include the decimation of local fish stocks, the inundation of lands used for agriculture and other subsistence activities, and the desiccation of large areas of the basin, including sites used for hunting and gathering.[129] By preventing indigenous groups from

be substantially lower, and that the Ministry of Mines and Energy posits that this may lead to tensions between the newcomers and existing indigenous groups, as well as increased environmental pressure on indigenous land).

126. *See, e.g.*, Christian Poirier, *Belo Sun Mining Sets Sights on Golden Opportunity in the Xingu*, AMAZON WATCH (Oct. 5, 2012), http://amazonwatch.org/news/2012/1005-belo-sun-mining-sets-sights-on-golden-opportunity-in-the-xingu (stating that Canadian corporation Belo Sun Mining is among the international mining companies already formulating plans to mine gold along the stretches of the Xingu that Belo Monte's development will leave desiccated; if permitted, "the Xingu would become a scavenger's feast" because these mining operations would further degrade water quality in the Xingu Basin and contaminate local fish stocks, which damming activities already threaten to substantially diminish).

127. *Sarayaku*, *supra* note 1, ¶ 146.

128. *Id.* ¶ 149 (noting the non-pecuniary costs of CGC's conduct).

129. *See supra* Part II.A.2 (noting the dam's impacts).

performing their traditional subsistence practices, Belo Monte infringes on their cultural and economic use of traditionally occupied lands. This violates Article 21 of the ACHR, according to its interpretative history as established by Awas Tingni and developed by subsequent cases.[130]

Furthermore, the region's native peoples regard the Xingu as the birthplace of civilization; its destruction would thus constitute a "cosmological catastrophe" for local groups like the Arara and the Juruna.[131] By supporting a project that poses an imminent threat to both the Xingu communities' physical and cultural enjoyment of lands they traditionally occupy or use, Brazil, like Ecuador, has violated Article 21.

## B. THE DEVELOPMENT OF THE BELO MONTE DAM VIOLATES THE FPIC STANDARD SET BY THE *SARAYAKU* DECISION

### *1. Belo Monte's Development and Operation Violates Sarayaku's Proscription Against the Use of Coercion*

Brazil's acts and omissions surrounding Belo Monte's development breach *Sarayaku*'s proscription against coercion. The Inter-American Court's requirement that consultations be carried out in "good faith" necessitates an absence of coercive measures by the state *or third parties acting with the state's authorization or acquiescence*.[132] The Brazilian state's passive tolerance of Norte Energia's deceptive and opportunistic tactics during so-called negotiations thus violates this condition.

130. *See supra* Part II.B.1.

131. Diamond and Poirier, *supra* note 39, at 30; *see also* BELO MONTE: MASSIVE DAM PROJECT STRIKES AT THE HEART OF THE AMAZON, INTERNATIONAL RIVERS 2 (2012), *available at* http://www.internationalrivers.org/files/attached-files/Belo_Monte_FactSheet_May2012.pdf (quoting José Carlos Arara, an indigenous Xingu resident, as telling former president Lula: "Our ancestors are there inside this land, our blood is inside the land, and we have to pass on this land with the story of our ancestors to our children. We don't want to fight, but we are ready to fight for our land if we are threatened. We want to live on our land in peace with all that we have there").

132. *Sarayaku*, *supra* note 1, ¶¶ 185–86 (invoking the language of Article 6 of ILO Convention 169, which also requires that the consultations be carried out in good faith with the goal of reaching an agreement or obtaining consent to the proposed measures).

Norte Energia's coercive practices during its apparently "asymmetric" talks with the Xingu Basin's indigenous communities are reminiscent of CGC's interactions with the Sarayaku Kichwa.[133] For example, during a public audience Norte Energia held in July 2012, the company evidently took advantage of attendees who spoke little Portuguese by allowing biased translations to distort their messages to the company's president.[134] In a similar manner, CGC defrauded the Kichwa when it obtained signatures for a letter of support to the company under false pretenses.[135]

Furthermore, Belo Monte developers have apparently taken advantage of old divisions between the indigenous groups of the Xingu Basin to aggravate already existing tensions.[136] This, in turn, has undermined the solidarity of the joint movement against the dam and made it more difficult for involved parties to reach an agreement.[137] Comparably, CGC deliberately fueled conflicts between the Kichwa and neighboring indigenous groups, as well as between Sarayaku families themselves, to further its development agenda. For instance, in order to break the Kichwa's social cohesion, CGC circumvented the political organization of the community by contacting individuals directly to offer them money bribes and other perks in exchange for their support.[138] As *Sarayaku* affirmed, such measures are inherently coercive and violate the good faith

133. After 21 Days, *supra* note 28 (stating that the talks were disillusioning and unbalanced, according to the attendees).

134. *Id.* (explaining that the Xikrin came into contact with nationalist society for the first time relatively recently, and consequently speak very little Portuguese.) Apparently, the Xikrin only agreed to stop occupying the dam site after a series of "confusing and poorly translated" sessions with Norte Energia's president. The influential Xikrin warriors' withdrawal from the protest subsequently put an end to the occupation. *Id.*

135. *Sarayaku*, *supra* note 1, ¶¶ 73, 194 (describing how CGC had members of the Sarayaku communities sign a list to indicate interest in the company's offer to send a medical team to the villages free of cost. CGC evidently then misrepresented the list as a letter of support indicating the communities' consent to CGC's presence and oil exploration activities on the communities' lands).

136. *See Belo Monte Agrava*, *supra* note 29 (quoting Belo Monte expert Rodolfo Salm as claiming that dam developers are using a colonial-era tactic of pitting "Indian against Indian" in order to undermine their solidarity).

137. *See id.* (describing the conflicting goals of the Xikrin and the Kayapo).

138. *See Sarayaku*, *supra* note 1, ¶ 74 (noting that the state of Ecuador has not disputed these allegations of bribery).

requirement of the consultation duty.[139]

The fact that Norte Energia, as opposed to state officials, carried out these coercive acts does not relieve Brazil of liability. Although CGC had defrauded the Kichwa unilaterally without the direct assistance of Ecuador, the Court in *Sarayaku* noted that the state's failure to carry out its own consultation procedures by default favored a climate of "conflict, division and confrontation between the indigenous communities of the area."[140] Likewise, the Brazilian government's failure to host state-sponsored consultations conforming to international FPIC standards denied the Xingu communities a better alternative forum to Norte Energia's unbalanced, coercive negotiations.

### *2. Belo Monte's Development and Operation Violates Sarayaku's Requirement of the Duty to Consult*

The Brazilian government's conspicuous absence from decisive stages of the dialogues between Belo Monte developers and affected communities constitutes a violation of the *Sarayaku* standard. The Court's holding in *Sarayaku* stressed the fact that the duty to consult indigenous peoples belongs *exclusively* to the state.[141] A state therefore cannot delegate the duty of planning and carrying out adequate consultations to a third, non-state party, particularly if that party is the same entity seeking to develop the land at dispute. In the Court's view, even a partial delegation is invalid, as it both fails to comply with the good faith requirement and discourages a climate of respect.[142]

Ecuador conceded that CGC, as opposed to state representatives, took measures to reach an "understanding" with the Kichwa.[143] This process of socializing community members not only included the use

139. *Id.* ¶ 194 (stating that the actions taken in an attempt to legitimize oil exploration activities "failed to respect the established structures of authority and representation within and outside the communities").

140. *Id.* ¶ 198 (observing that the evident disconnect between CGC's public meetings and "a clear determination to seek consensus" contributed to conflict).

141. *Sarayaku*, *supra* note 1, ¶ 199 (holding that the state had acted "inappropriately" by trying to delegate this duty).

142. *See id.* (finding the state's partial delegation to be a violation of the people's right to participation).

143. *See id.* ¶ 203 (stating that CGC attempted to directly negotiate with the Kichwa using measures that did not respect the Kichwa's political organization).

of the coercive tactics mentioned above, but also was conducted without state supervision.[144] Accordingly, the talks were not so much a balanced, collaborative exchange as a one-sided attempt by a self-interested company to haggle its way into entering legally protected land. As such, the Court held that CGC's actions did not amount to the "appropriate and accessible consultation" required by law.[145]

Brazil's absence during crucial junctures of the talks between Norte Energia and the Xingu communities likewise violates the state's consultation duties under *Sarayaku*.[146] The decision affords indigenous peoples the rights to participation and consultation at *all* stages of a project's planning and implementation. Norte Energia's commercial stakes in the hydroelectric project, however, creates a conflict of interest that undermines the affected communities' exercise of these rights. As in the case of CGC and the Sarayaku Kichwa, dialogues between Norte Energia representatives and the Xingu indigenous groups have been unbalanced and highly contentious.[147] In fact, during the July 2012 talks, the communities became so dissatisfied with Norte Energia's lack of cooperation that they detained three of the company's engineers on tribal lands.[148]

Finally, *Sarayaku* holds that even when indigenous groups independently reach agreements with third parties, the state must play a supervisory role to ensure that the groups' rights are being respected.[149] The lack of state representatives at multiple meetings

144. *See id.* ¶ 189 (asserting that Ecuador therefore could not ensure that CGC had respected the rights of the community).

145. *Id.* ¶ 203 (noting the obvious conflict of interest).

146. *See* After 21 Days, *supra* note 28 (explaining that FUNAI and IBAMA were "conspicuously absent" from the series of talks between Norte Energia and the affected communities held during the occupation of the dam site in July 2012, despite both organizations being present that very month at Brasilia-based discussions authorizing the final diversion of Xingu's flow).

147. *See id.* (describing the asymmetric negotiating process and the views of indigenous and non-indigenous opponents of the dam who had attended the public dialogues which Norte Energia held in July 2012).

148. *See* Broken Promises, *supra* note 32 (explaining that the incident occurred after a series of fruitless negotiations, during which Norte Energia proposed a system that would allow indigenous vessels to navigate sections of the river that the dam will dry out; however, the communities shot down the "ludicrous" plan, attempting instead to address the various socio-environmental safeguards Norte Energia has thus far failed to implement).

149. *See Sarayaku*, *supra* note 1, ¶ 167 (providing that the state must protect indigenous peoples from infringements on their rights by monitoring and

held between Norte Energia and the Xingu communities is thus unacceptable under the *Sarayaku* standard.

### *3. Belo Monte's Development and Operation Violates Sarayaku's Requirement that Consultations be Informed*

Brazil's failure to adequately educate the Xingu communities about Belo Monte and its projected impact violates *Sarayaku*'s information requirement for the right to FPIC. With regard to development schemes, in order to be fully informed, indigenous peoples must be aware of all of the potential risks associated with the proposed project. As both *Saramaka* and *Sarayaku* provide, these risks include not only objective measures of the project's physical effect on the land, but also potential cultural and health risks.[150] *Sarayaku* reiterated that the state must actively provide relevant information to affected communities and maintain *constant* communication throughout the project's life cycle.[151] Only through such measures can a state verify that the indigenous group can make decisions regarding the project "knowingly and voluntarily."[152]

In *Sarayaku*, the Court held that CGC's "socialization" of the Kichwa did not constitute an informed consultation process.[153] The Court observed that there was no evidence that CGC's actions served to educate locals about the advantages and disadvantages of the oil exploration on their way of life.[154] Also, because a state cannot delegate its consultation duty to third parties, CGC's failure to adequately inform amounted to a violation by Ecuador of its FPIC

supervising third-party or public sector measures, deploying "effective means to safeguard those rights through the corresponding judicial organs").

150. *See Saramaka*, *supra* note 6, ¶ 133 (affirming that Suriname should have given the Saramakas early notice of all of the potential risks associated with the planned development, including environmental and health risks, "in order that the proposed development or investment plan is accepted knowingly and voluntarily"); *Sarayaku*, *supra* note 2, ¶ 205 (citing *Saramaka* and thereby affirming the criteria set).

151. *See Sarayaku*, *supra* note 1, ¶ 208 (holding that the duty of constant communication requires states to both receive and provide information).

152. *Id.* ¶ 205.

153. *Id.* ¶ 209 (stating that the "socialization" process did not include an environmental impact assessment, allow for active participation, or inform the Kichwa about the benefits and drawbacks of the project).

154. *See id.* (asserting that CGC had not thoroughly presented the findings of its EIA to the community).

obligations.

Likewise, the Brazilian state has not taken effective measures to ensure that the Xingu communities are fully aware of Belo Monte's possible impacts. Foremost, in 2009, the state made its very technical, 20,000-page EIA publicly available only two days before holding public meetings.[155] This made it virtually impossible for attendees to become properly acquainted with the highly complex project before engaging in the dialogues. Furthermore, these meetings were held in urban areas difficult to access by the affected communities, who reside in more remote locations.[156] Indigenous groups were dissuaded from attending given the costs and inconvenience of travel and thus were unable to access information essential to their understanding of Belo Monte. Finally, reports of mediocre and biased translators shed doubt on the ability of Norte Energia to effectively communicate with the meetings' participants and convey information to them in a neutral, non-coercive manner.[157] Accordingly, under *Sarayaku*, Brazil has not adequately complied with the crucial information component of its FPIC duty.

### C. THE DEVELOPMENT OF THE BELO MONTE DAM VIOLATES THE BRAZILIAN CONSTITUTION

Just as Ecuador violated its own constitution by authorizing and assisting CGC's activities,[158] Brazil's endorsement of Belo Monte violates several Brazilian constitutional provisions. Foremost, the hydroelectric project fails to meet Article 231's exception to the bar

155. *See* Anaya 2010 Report, *supra* note 9, at 32 (noting that the lengthy study comprised 36 different volumes).

156. *See id.* (noting that the talks were held in urban areas, even though the dam will not directly affect urban dwellers).

157. *See, e.g.*, After 21 Days, *supra* note 28 (reporting that the Xikrin only consented to withdrawing from an inter-community protest of the dam after participating in a series of "confusing and poorly translated" sessions with Norte Energia's president). The Xikrin are known to have a very small grasp of the Portuguese language given their limited contact with nationalist society, which allowed Norte Energia representatives to easily influence the dialogues by using biased translators. *Id.*

158. *See Sarayaku*, *supra* note 1, ¶ 168 (noting that the Article 57 "comprehensively" protects the rights of indigenous peoples, including by affording them the right to free, prior, and informed consultation on development activities which could potentially have an environmental or cultural impact on them).

against removing indigenous peoples from their lands.[159] The catastrophic event and national sovereignty exceptions authorize only the *temporary* removal of affected populations.[160] Belo Monte's development, however, will cause *irreversible* environmental damage that will render human habitation in large stretches of the Xingu Basin virtually "impossible."[161]

For example, scientists expect the dam's development to leave formerly fertile sections of the Xingu Basin in perpetual drought, threatening food and water security for indigenous groups living in the area.[162] The dam's effects on the flow of the Xingu will also lead to the deterioration of water quality and the growth of aquatic plants harmful to humans and the fish they consume.[163] Thus, even areas of the basin that are not flooded will experience stresses that will render them unfit for human habitation for an indeterminate period of time. While Brazil has not explicitly ordered the removal of any indigenous groups,[164] the dam's adverse effects on indigenous lands and livelihoods nonetheless will likely cause populations to relocate

159. *See* BRAZILIAN CONSTITUTION, *supra* note 96, art. 231 (forbidding the removal of Indians from their lands "except *ad referendum* of the National Congress, in case of a catastrophe or an epidemic which represents a risk to their population, or in the interest of the sovereignty of the country").

160. *See id.* (declaring the state's return of displaced peoples to their land "shall be immediate as soon as the risk ceases").

161. Juruna-Arara Action, *supra* note 44, at 6–8 (stating that the areas of the Big Bend currently occupied by the Juruna and Arara will not be able to sustain the populations once Belo Monte is built due to the projected environmental stresses of the dam); *see also* RIMA, *supra* note 36, at 16, 111–14 (describing how the Belo Monte's mandatory inundation of over 500 square kilometers of the basin will permanently alter vast stretches of land, flooding some areas while drying out others).

162. *See, e.g.*, *10 Myths*, *supra* note 38 (postulating that the dam will lead to "immeasurable environmental harm").

163. *See* RIMA, *supra* note 36, at 116–17 (noting that the rotting of inundated vegetation following the formation of reservoirs may contribute to the proliferation of harmful plant life).

164. *Compare* FAQs, *supra* note 15, at 5 (asserting that dam operations will not flood any of the indigenous communities falling within the project area) *and* Phillips, *supra* note 11 (quoting Carlos Minc, Brazil's environment minister, as claiming that "[n]ot a single Indian will be displaced," while conceding that some indigenous communities will be "indirectly affected"), *with 10 Myths*, *supra* note 38 (explaining that the state considers only areas which will be flooded by dams as being *directly affected*, but even so-called "indirect" impacts, such as loss of river access and decimation of faunal species, will "undoubtedly" displace indigenous populations from their traditional lands).

to more habitable areas.[165] Because Article 231 does not expressly define "removal" as an active measure, Brazil's authorization of a project very likely to displace several indigenous groups is still unconstitutional as a *passive* act of removal.[166]

Moreover, Belo Monte's direct and indirect displacement of entire populations fails to satisfy Article 231's national sovereignty exception to the bar against forcible removal.[167] As discussed, the phrase, "in the interest of the sovereignty of the country," must be interpreted narrowly to prevent deliberate and opportunistic manipulation of the constitutional text.[168] Accordingly, only critical situations of national security would justify Brazil's temporary violation of indigenous land rights.[169] In contrast, the major costs and inefficiencies associated with Belo Monte shed doubt on Brazil's claim that the dam is crucial for the country's development.[170] Therefore, the national sovereignty exception does not apply.

Additionally, Brazil's authorization of Belo Monte violates Article

165. *See, e.g.*, E.L. LA ROVERE & F.E. MENDES, WORLD COMMISSION ON DAMS, TUCURUÍ HYDROPOWER COMPLEX BRAZIL xv (2000) (describing how an outbreak of *Mansonia* mosquitoes following the construction of the Tucuruí Hydropower Complex created such a public health risk and general nuisance that some residents were forced to abandon daily farming activities and eventually relocate to unaffected areas); *see also* Jampolsky, *supra* note 8, at 245 (stating that between 20,000 and 40,000 people will be displaced by large-scale flooding, degradation of fisheries, loss of river access, and other impacts).

166. BRAZILIAN CONSTITUTION, *supra* note 96, art. 231 (providing that the displacement of indigenous populations in general is lawful pursuant only to limited exceptions, none of which condone passive removal).

167. *Id.* (permitting removal pursuant to sovereignty interests).

168. Juruna-Arara Action, *supra* note 44, at 16.

169. *See, e.g.*, *id.* (offering the example of the state removing an indigenous population during wartime to facilitate the movement of troops). According to scholar dos Anjos Filho, in such an event, the national security interests of Brazil would arguably outweigh any temporary inconveniences the state may impose on the population by relocating it until the threat has passed. *Id.*

170. *See, e.g.*, Wilson Cabral de Sousa Júnior & John Reid, *Uncertainties in Amazon Hydropower Development: Risk Scenarios and Environmental Issues around the Belo Monte Dam*, *in* 3 WATER ALTERNATIVES 249, 258 (2010) (assessing the environmental impacts of the dam to calculate the project's total costs, which the study concludes are seventy-two percent likely to outweigh the benefits); *see also 10 Myths*, *supra* note 38 (arguing that while the state claims that Belo Monte is essential to meeting the country's energy needs, as much as thirty percent of the hydropower generated will actually go to inefficient industrial operations, such as mining).

231's legislative requirement. Even if the dam's development does in fact constitute a "relevant public interest of the Union," the state's infringement on indigenous property rights pursuant to this interest is only valid with the passage of a supplementary law.[171] According to public prosecutors and multiple court decisions, the National Congress's vote in favor of Belo Monte and enactment of Legislative Decree 788/2005 was invalid and thus does not satisfy this requirement.[172]

In *Sarayaku*, the Court cited Ecuador's constitution to demonstrate that the state fully recognized the right of indigenous peoples to consultation, even in its own state laws.[173] Specifically, the Court referred to Article 57, which provides that Ecuador must carry out "free, prior, and informed consultation" with indigenous peoples on any project that may have an environmental or cultural impact on them.[174] While the Brazilian constitution does not contain as express a provision on the right to consultation,[175] it does recognize that international treaties to which Brazil is a party provide

171. BRAZILIAN CONSTITUTION, *supra* note 96, art. 231 ("Acts with a view to occupation, domain and possession of [Indian] lands . . . are null and void, producing no legal effects, except in case of relevant public interest of the Union, as provided by a supplementary law . . . .").

172. *See, e.g.*, *Court Halts Belo Monte Project*, *supra* note 19 (reporting Judge Prudente as affirming that Congress can only authorize development that may affect indigenous lands and rights after consulting the relevant communities, but the National Congress held its legislative vote concerning Belo Monte's authorization before ensuring any consultations with the Xingu Basin's indigenous peoples were carried out).

173. *See Sarayaku*, *supra* note 1, ¶ 168 (observing that Ecuador's 2008 constitution "comprehensively" protects indigenous peoples, and that James Anaya, the U.N. Special Rapporteur on the Rights of Indigenous Peoples, even called the Constitution one of the most "advanced" and "exemplary" in terms of recognizing indigenous rights).

174. *Id.* at 46 n.219 (citing Article 57 of the 2008 Constitution, which holds if the state is unable to obtain the consent of the consulted people on the proposed measure, it must then refer to the steps provided for by the Constitution and the law to determine its next plan of action).

175. *But see* BRAZILIAN CONSTITUTION, *supra* note 96, art. 231 (stipulating that the state may allow the exploitation of hydric resources and "mineral riches" located in indigenous land only after receiving congressional authorization and "hearing the communities involved"). While this provision seems to imply that the state must hold some form of prior *consultation* with the indigenous peoples whose lands are to be exploited, there is no explicit *consent* requirement. *Id.*

supplementary protections enforceable under domestic law.[176]

Thus, because Brazil has failed to satisfy any of the constitutional criteria that would validate Belo Monte's infringement on indigenous rights, it is bound to uphold the additional rights recognized by the ACHR and ILO Convention 169. These protections, the rights to consultation and FPIC, attach to the indigenous property and cultural rights already recognized in Article 231 of the constitution. Accordingly, Brazil, like Ecuador, has violated its own laws by endorsing a project without first consulting the affected indigenous groups and securing their free, prior, and informed consent.

### D. THE DEVELOPMENT OF THE BELO MONTE DAM VIOLATES ILO CONVENTION 169

Brazil's authorization of Belo Monte violates ILO Convention 169's consultation and FPIC provisions,[177] thereby undermining Brazil's internalization of the treaty.[178] By the time CGC unlawfully entered Kichwa land, ILO Convention 169 had already entered into force in Ecuador and codified an internationally agreed-upon set of protections to indigenous peoples.[179] Brazil's congressional approval of Belo Monte likewise occurred one year after a presidential decree officially incorporated the treaty into Brazilian law.[180] Like Ecuador,

176. *Id.* art. 5 (LXXVII) (declaring that rights holders may derive additional protections that the Constitution does not expressly provide from international treaties to which Brazil is a party).

177. *See generally* ILO Convention 169, *supra* note 5, arts. 6–8 (affording indigenous peoples the rights to consultation and to free, prior, and informed consent on matters affecting their social, economic, and cultural development).

178. *See* Press Release, Amazon Watch, ILO Says Brazil Violated Convention 169 in Belo Monte Case (Mar. 7, 2012), *available at* http://amazonwatch.org/news/2012/0307-ilo-says-brazil-violated-convention-169-in-belo-monte-case (summarizing an ILO report claiming that Brazil had violated Article 15 of ILO Convention 169 by failing to hold hearings in the villages of the indigenous groups affected by Belo Monte's development).

179. *See Sarayaku*, *supra* note 1, ¶ 172 (asserting that Ecuador assumed an international commitment to guarantee its indigenous peoples the right to consultation upon ratifying ILO Convention 169 in 1998).

180. *Compare* Decreto No. 5.051, *supra* note 101 (promulgating ILO Convention 169 in 2004, thereby officially incorporating the treaty's provisions into domestic law), *with* Decreto Legislativo No. 788, Diário Oficial da União (Braz.) (July 13, 2005) (authorizing the Executive to implement the Belo Monte Dam's development in 2005, one year after Brazil's presidential enactment of ILO Convention 169).

Brazil ratified the Convention without modifying the original text or conditioning its provisions, despite the availability of a flexibility clause.[181] Accordingly, as in the case of Ecuador, Brazil's violation of ILO Convention 169 directly breaches both domestic and international law.

By permitting construction on Belo Monte to commence without first attempting to secure the willful and informed consent of affected indigenous groups, Brazil violated the plain language of ILO Convention 169. Article 6 requires that states undertake consultations "in good faith and in a form appropriate to the circumstances," with the goal of achieving consent or agreement on the proposed measures.[182] As argued, both Ecuador and Brazil have failed to meet the good faith criterion due to their acquiescence to third parties' inherently coercive measures during so-called consultations. CGC, for example, obtained signatures of support for its seismic activities under false pretenses.[183] Comparably, Norte Energia allowed translators to distort the messages indigenous community members had them relay to the company's president.[184]

Moreover, like Ecuador, Brazil has demonstrated a lack of a good faith commitment to reaching a consensus with the Xingu Basin's indigenous groups. Indeed, the limited dialogues that the state and Norte Energia held with some of the affected communities did not offer conditions conducive to cooperation and mutual exchange. In a recent meeting, members of the Juruna and Arara communities became so dissatisfied with Norte Energia's persistent evasion of their demands that they detained three company employees in protest.[185] Norte Energia's public meetings have also included

181. *See* Decreto Legislativo No. 143, *supra* note 104 (approving the text of the Convention without proposing any modifications or conditions).

182. ILO Convention 169, *supra* note 5, art. 6.

183. *See Sarayaku*, *supra* note 1, ¶ 194 (presenting the Commission's undisputed allegations that CGC employees fraudulently obtained the signatures by instructing individuals to sign a list to indicate their interest in the CGC's offer to send free medical teams to their communities).

184. *See* After 21 Days, *supra* note 28 (arguing that the Xikrin were especially vulnerable given their limited Portuguese skills).

185. *See* Broken Promises, *supra* note 32 (explaining that the Juruna and Arara communities who carried out the non-violent detention were frustrated by Norte Energia's failure to present practical proposals for mitigating the dam's imminent social and environmental impacts on their communities and lands).

attempts to buy the attendees' complacence in order to avoid addressing indigenous demands. For example, during talks in July 2012, the consortium offered communities various perks while refusing to set a timetable for meeting legally mandated environmental and social conditions.[186] Comparably, CGC tried to buy members of the Sarayaku community's consent by offering bribes and paying individuals to rally support for its unlawful presence on Kichwa lands.

Additionally, by failing to consult the Xingu Basin's indigenous peoples during the planning and evaluation phases of Belo Monte's development, Brazil violated Article 7 of Convention 169. Article 7 requires states to ensure that studies assessing the social, spiritual, cultural, and environmental impact of planned development projects are carried out "in cooperation with the peoples concerned."[187] In *Sarayaku*, the Court found Ecuador in breach of its Article 7 duty by failing to ensure the Sarayaku people's participation in the study CGC subcontracted a private agency to carry out.[188]

Similarly, not only did Eletrobras conduct its EIA for Belo Monte without engaging local indigenous groups, but it also failed to adequately communicate its findings to affected communities after the fact.[189] Thus, groups like the Juruna and the Arara, who experts claim will face significant hardships as a result of the dam's development, have had no influence over any stages of the planning process—neither those preceding the EIA nor those following its completion. Indeed, as Brazilian courts have indicated, the

186. *See* Diamond & Poirier, *supra* note 39, at 29 (stating that some of the "compensation" packages Norte Energia offered simply included social services the constitution already guarantees to indigenous peoples, but the consortium and the media were able to treat these services as handouts because of lack of information on part of the communities, many of which have very limited contact with nationalist society).

187. ILO Convention 169, *supra* note 5, art. 7 (stipulating that during the consultation processes surrounding a development scheme, states should refer to the findings of impact studies as "fundamental criteria" for implementing the proposed project).

188. *See Sarayaku*, *supra* note 1, ¶ 207.

189. *See*, *e.g.*, Anaya 2010 Report, *supra* note 9, at 32 (observing that the official EIA for Belo Monte, which consisted of 36 volumes and 20,000 pages, was not publicly available until two days before Norte Energia's public audiences, making it virtually impossible for communities to become familiar with the highly technical scheme before attending the meetings).

government did not even consult the affected indigenous peoples before authorizing a legislative vote on the dam.[190] This is in direct breach of the ILO's requirement that states involve affected indigenous groups "in the [decision-making] process as soon as possible" and at all phases of the process of drafting legislation.[191]

# IV. RECOMMENDATIONS

## A. BRAZIL SHOULD SUSPEND WORK ON BELO MONTE UNTIL IT RECEIVES THE AFFECTED INDIGENOUS COMMUNITIES' CONSENT FOLLOWING GOOD-FAITH CONSULTATIONS CONFORMING TO THE *SARAYAKU* STANDARD

Although *Sarayaku* formally binds only on Ecuador,[192] Brazil should nonetheless conform to the standard set and suspend Belo Monte's development until it fulfills its consultation and FPIC duties. The Xingu communities already filed a complaint against Brazil before the IACHR and a case before the Court is likely imminent.[193] Given the strong factual and legal parallels between the Sarayaku and Belo Monte disputes, it is highly likely that the Court would find Brazil also in violation of international and domestic law for its acts and omissions surrounding Belo Monte.[194] Both parties, the Brazilian government and the Xingu communities, could thus benefit greatly by avoiding the costs and inconveniences of litigation by reaching a balanced agreement conforming to *Sarayaku*'s FPIC standard, before

190. *See Court Halts Belo Monte Project*, *supra* note 19 (explaining that one of Judge Prudente's reasons for halting Belo Monte's construction was because the government had yet to fulfill this legally-mandated condition).

191. *Sarayaku*, *supra* note 1, ¶ 181; *see also* Report of the Committee Established to Examine the Claim Alleging Non-Compliance by Colombia of the Convention on Indigenous and Tribal Peoples, 1989 (No. 169), filed under Article 24 of the ILO Constitution by the Central Unitaria de Trabajadores, GB.276/17/1; GB.282/14/3 (1999), ¶ 90 (responding to a complaint alleging Colombia's non-compliance with Convention 169).

192. *See* ACHR, *supra* note 4, art. 68 (providing that states shall comply with the judgment of the Court "in any case *to which they are parties*").

193. *See* Inter-Am. Comm'n H.R., *Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10, Apr. 1, 2011 (precautionary measures) (finding for the Xingu communities and recommending that Brazil halt Belo Monte's construction until it fulfills its consultation and FPIC obligations).

194. *See supra* Part III (demonstrating that Brazil and Ecuador violated parallel as well as the same legal instruments through their acts and omissions surrounding Belo Monte and CGC's exploration activities, respectively).

a lawsuit is necessary.

### B. THE INTER-AMERICAN SYSTEM SHOULD FURTHER EXTEND THE RIGHTS TO CONSULTATION AND FPIC BY REQUIRING THE PRESENCE OF NEUTRAL THIRD-PARTY MEDIATORS DURING STATE CONSULTATIONS

As Ecuador and Brazil have both demonstrated, states cannot always be trusted to act in the interest of groups theoretically under their protection, particularly when economic interests are involved. In the case of Belo Monte, for instance, the Brazilian state has been the driving force behind the dam's development, allowing the project to survive several challenges to its legitimacy and to circumvent domestic and international law.[195] Likewise, Ecuador permitted CGC's presence on Kichwa land despite its awareness of the company's unlawful conduct.[196]

By requiring a neutral third party to monitor and mediate consultations, the OAS can ensure that a state's biased interests do not prevent indigenous peoples affected by government-sponsored development from realizing their rights. The IACHR's Special Rapporteur on the Rights of Indigenous Populations could potentially serve as a mediator, using his or her observations of the consultations to assist the Court in determining the state's liability in the event of litigation.[197] Conversely, the Rapporteur could offer recommendations directly to the state during the course of the consultations themselves, helping affected parties avoid litigation. Whether such recommendations could be immediately binding would be for the Inter-American system's legal organs and OAS states to decide.

195. *See* Background, *supra* Part II.A.1 (discussing the various procedural illegalities Brazil tolerated in order to facilitate Belo Monte's authorization).

196. *See, e.g.*, *Sarayaku*, *supra* note 1, ¶ 134 (noting that Ecuador was "fully aware" that CGC was obstructing the Sarayaku Kichwa's freedom of movement and other guaranteed rights).

197. Such a task would be consistent with the Rapporteur's mandate to "support onsite visits to OAS member countries in order to delve more deeply into the observation of the general situation or to investigate particular situations involving indigenous peoples . . . ." *Mandate*, OAS, http://www.oas.org/en/iachr/indigenous/mandate/Functions.asp (last visited July 26, 2013).

### C. ILO CONVENTION 169 SHOULD BE REVISED TO ENDORSE THE *SARAYAKU* STANDARD

*Sarayaku* sets a higher standard for the right to free, prior, and informed consent than ILO Convention 169 and other existing international documents concerning indigenous rights.[198] For instance, whereas Article 6 of the convention merely states that consultations must be undertaken "in good faith and in a form appropriate to the circumstances,"[199] *Sarayaku* clearly articulates that "good faith" requires the absence of any coercive measures, including actions targeted at breaking the social cohesion of the community in question.[200] Furthermore, while the convention is silent on whether a state may transfer its consultation duties to a third party, *Sarayaku* explicitly holds that the duty to consult is entirely a state responsibility. Thus, a state cannot avoid properly planning and carrying out good faith, culturally appropriate dialogues by delegating the task to a non-state third party.[201]

Because several non-OAS states have ratified ILO Convention 169, revising the agreement to include these new, more stringent standards could result in increased indigenous rights protection in a greater geographic area than solely states falling within the Inter-American system's jurisdiction.[202] Repeated evocation of the norms

198. *See, e.g.*, UNDRIP, *supra* note 49, art. 19 (providing that states must carry out consultations in "good faith," but failing to qualify what exactly constitutes a good faith dialogue).

199. ILO Convention 169, *supra* note 5, art. 6.

200. *Sarayaku*, *supra* note 1, ¶ 186 (proclaiming that consultations should be conducted in a "climate of mutual trust" and that "good faith" is incompatible with attempts to break the social cohesion of communities, which contradicts international standards calling for collective decision-making).

201. *See id.* ¶ 187 (emphasizing that it is counterintuitive for a state to delegate its consultation duties to the very party interested in developing the land at dispute).

202. Denmark, Nepal, Spain, Norway, the Netherlands, and the Central African Republic all have ratified the Convention. While neither Spain nor the Netherlands have indigenous peoples traditionally residing within their territories, the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") has expressed its support of Spain's ratification of ILO Convention 169 and its belief that such ratifications could "contribute positively towards the ratification of the Convention by other countries, even those that do not have indigenous and tribal peoples." Direct Request (CEACR), adopted 2010, 100th Session, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_N

enshrined in *Sarayaku* could lead to their eventual standardization and universal acceptance. While stricter than ILO Convention 169's current consultation requirements, the *Sarayaku* standard would not necessarily impose a greater burden on parties to the convention if adopted into a revised version. Therefore, the risk that current parties will decline to become signatories to a slightly modified Convention is likely minimal.[203]

## V. CONCLUSION

Given the strong factual and legal parallels between the Belo Monte and Sarayaku disputes, the *Sarayaku* holding has the potential to delegitimize the Belo Monte Dam. Through its acts and omissions supporting the project, Brazil has breached the same international legal standards that the Inter-American Court held Ecuador had violated by authorizing CGC's presence and unlawful activities on Kichwa land. The Inter-American system should therefore apply *Sarayaku*'s new consultation and FPIC standard to denounce Belo Monte's development, formally via court decision or through other advisory mechanisms, thereby ordering Brazil to halt construction until it complies with the standard's numerous safeguards.

AME,P11110_COMMENT_YEAR:2337401,102847,Spain,2010 (expressing the CEACR's); *see also* Survival International, *ILO 169*, http://assets.survivalinternational.org/static/files/tribes/bulletin_ilo169.pdf (last visited July 26, 2013) (implying that ratification commits states to "basic consultation requirements" even for the development projects it funds outside of its national territory).

203. *See* ILO Convention 169, *supra* note 5, art. 43 (stipulating that in the event of revision, a party state's ratification of the revised Convention shall involve the "immediate denunciation" of the agreement in its preceding form).