

Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association (ILA)

Case Study: *Burlington Resources Inc. v Ecuador/Kichwa Indigenous People of Sarayaku v Ecuador*

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1. Introduction

The following case study is a unique example for the triangular relationship between investors, states and indigenous communities, and has been investigated both from an investment law and human rights perspective. It thus bears particular relevance in delineating the scope of the rights and obligations of the respective parties in the context of resource development projects/foreign investments which have an impact on indigenous communities.

Moreover, it also constitutes an example for the overlapping of different judicial bodies and non-judicial forums regarding a particular set of facts. While in theory this could contribute to the level of protection offered to the affected (indigenous) communities, difficulties arise due to the specific mandates of the respective bodies and their treatment of the absent third party as an ‘externality’ to the proceedings. While the *Burlington Resources* award by an ICSID arbitral tribunal¹ in the end dismissed Burlington Resources’ claims that Ecuador had failed to

¹ *Burlington Resources Inc. v Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 [*Burlington v Ecuador*].

provide full protection and security to its investment against the violent resistance by the affected indigenous groups on procedural grounds and thus did not assess whether indigenous interests had any role to play on substantive issues, the Inter-American Court of Human Rights reached a landmark judgment in 2012 with regard to the rights of indigenous peoples in the context of resource exploitation projects (*Kichwa Indigenous People of Sarayaku v Ecuador*).² In particular, the case highlighted requirements of a truly genuine participation process in fulfillment of the principle of free, prior and informed consultation, and picked up on common concerns arising in the context of large-scale development projects where economic interests of the private corporation directly engaging in negotiations might distort the objective of achieving a true dialogue between the parties.

As so often, its implementation has proved troublesome, in particular regarding the remedy issued by the Inter-American Court on Ecuador's obligation to ensure with legislative or other measures that the international standard of the right to consultation is put into effect. At the same time, Ecuador has shown some good faith and complied with other parts of the judgment, paying compensation and issuing an official apology.

The following will first address the institutional and normative interplay applicable in the case at hand before turning to an overview of the factual background underpinning both decisions. Next, the contribution will examine the main findings with regard to the affected community interests. This will highlight particularly those parts of the judgment by the Inter-American Court of Human Rights which touch upon the right to consultation and its necessary elements in order to constitute a genuine participation process. Finally, the effects of the two overlapping judicial bodies regarding the same set of facts will be assessed with a particular focus on the impact on the Sarayaku community. Here special regard will be had to the implementation of and compliance with the judgment of the Inter-American Court, especially in light of Ecuador's recently announced official signing of new oil exploration contracts with the Chinese state oil company, Andes Petroleum, and plans to further extend the bidding process to other regions in the Amazon.³

2. Interplay of Institutions, Instruments and Multi-Layered Protection

The issues arising on the basis of the factual settings of the conflict occur in the common context of resource development policies by a host state seeking to boost its economic sector by inviting foreign investors to participate in its energy production sector, often in areas which particularly affect indigenous or other vulnerable communities as they inhabit territories in threat of being considered 'open for development'. In light of this setting, the applicable law regulating the conduct of the involved state can be found both in investment and human rights law, with a particular focus on indigenous rights.

Both fields have, however, distinct mandates and jurisdictional reach. It is therefore difficult for either of the involved institutions to reconcile the competing rights and interests

² *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations), Inter-Am.Ct.H.R. (Judgment, 27 June 2012) [*Sarayaku v Ecuador*].

³ 'Ecuador Signs Contracts for Two Oil Blocks in the Amazon to Chinese Oil Giant', 1 February 2016, available at <http://www.pachamama.org/news/ecuador-signs-contracts-two-oil-blocks-amazon-chinese-oil-giant> (last visited 14 April 2016).

concerning the lands, territories, and resources of the indigenous peoples affected by the implementation of resource development policies.

As the ILA Committee pointed out in its Report from February 2015 regarding the applicable law with regard to the rights of indigenous peoples, the protection stems from an interplay between the domestic, national, regional and international level. The relevance of this multilayered legal framework can also be seen in the present case study.

Hence, even though the concession in question was granted to the private company in 1996, prior to Ecuador's ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples on 15 May 1998, project operations did not commence until 2002. The Inter-American Court therefore based its analysis in parts strongly on the right to consultation as incorporated in ILO Convention No. 169 as it was 'clear that at least since May 1999 [...] the State was under an obligation to guarantee the Sarayaku People's right to prior consultation'.⁴ Additionally, as pointed out previously by the Inter-American Court, human rights treaties are living instruments, thus making resort to newly evolving standards, such as contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007⁵)⁶ (which Ecuador had voted in favor of), domestic legislation⁷, or even more current legislative amendments in the state concerned⁸, a common practice.

Thus, in the case of Ecuador, the Inter-American Court also drew upon its newly amended 2008 Constitution to understand the scope of the right to consultation. The Constitution accords a broad range of rights to indigenous peoples, including a right to 'free, prior and informed consultation within a reasonable period of time, on the plans and programs for prospecting, producing and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them'.⁹

⁴ *Sarayaku v Ecuador*, para. 176.

⁵ UNGA Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, 61 UN GAOR (vol. III), Supp. No. 49, p. 15, UN Doc. A/61/49.

⁶ *Sarayaku v Ecuador*, para. 160.

⁷ *Sarayaku v Ecuador*, para. 161.

⁸ *Sarayaku v Ecuador*, para. 168.

⁹ Constitution of the Republic of Ecuador, 20 October 2008:

Article 57. Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments, the following collective rights:

[...]

4. To keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible. These lands shall be exempt from paying fees or taxes.

5. To keep ownership of ancestral lands and territories and to obtain free awarding of these lands.

6. To participate in the use, usufruct, administration and conservation of natural renewable resources located on their lands.

7. To free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation that must be conducted by the competent authorities shall be mandatory and in due time. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken.

However, even though the 2008 Constitution was recognized by former Special Rapporteur S. James Anaya as an ‘important precedent in Latin America and at the international level’, a number of problems persist with regard to the implementation of the constitutionally guaranteed rights into domestic legislation.¹⁰ Hence, disparities continue to exist particularly with regard to the right to free, prior and informed consultation in the context of hydrocarbons, which has been implemented through Executive Decree 1247¹¹ – issued in the temporal proximity of the judgment by the Inter-American Court – , understanding the goal of the consultation process to be participation and not consent. A further concern relates to the matter of drafting of said decree, as indigenous communities were not consulted about the law itself, and to the envisioned outcome as ‘any agreements which may be reached must be based on pre-existing public policy measures’.¹²

3. *Burlington Resources Inc. v Ecuador / Kichwa Indigenous People of Sarayaku v Ecuador*

3.1. Factual Setting

In 1996 Ecuador’s State Oil Company (Petroecuador) entered into an exploration and exploitation contract with the CGC¹³ oil consortium regarding hydrocarbons located in a territory in the Amazonian region (also called Blocks No. 23 and No. 24) inhabited by several indigenous associations, communities and peoples, *inter alia* the Sarayaku as the largest of these settlements.¹⁴ The Sarayaku people, a community of approximately 1200 people, had been awarded the official title to their land by Ecuador in 1992.¹⁵

In light of the incursions on their ancestral lands, the affected indigenous communities set up ‘Camps for Peace and Life’ throughout their territory and organized (partly violent) protests, claiming that their consent had not been obtained prior to the authorization of the project. As a consequence, the government of Ecuador, which had since the authorization of the project

[...]

Translation available at <http://pdpa.georgetown.edu/Constitutions/Ecuador/english08.html> (last visited 20 March 2016).

¹⁰ See *inter alia*, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, ‘Observations on the progress made and challenges faced in the implementation of the constitutional guarantees of the rights of indigenous peoples in Ecuador’, 17 September 2010, UN Doc. A/HRC/15/37/Add.7.

¹¹ Reglamenta para la ejecución de la consulta previa libre e informada en los procesos de licitación y asignación de áreas y bloques hidrocarbúferos, 19 July 2012.

¹² CESCR, Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session (14-30 November 2012), 13 December 2012, UN Doc. E/C.12/ECU/CO/3, para. 9; CA Baquero Díaz, ‘Regulating Prior Consultation in South America’, *Dejusticia*, 25 March 2014, available at <https://dejusticiablog.com/2014/03/25/regulating-prior-consultation-in-south-america/> (last visited 10 April 2016).

¹³ Compañía General de Combustibles S.A (Argentina). Beginning in 2000, Burlington Resources Inc. acquired 50% ownership interests in the production sharing contract regarding Block 23, with CGC owning the remaining interest, and 100% regarding Block 24. See *Burlington v Ecuador*, paras. 14-17.

¹⁴ *Sarayaku v Ecuador*, paras. 63-65.

¹⁵ *Sarayaku v Ecuador*, para. 61.

ratified ILO Convention No. 169¹⁶ and adopted the 1998 Constitution (recognizing the collective rights of indigenous and Afro-Ecuadorian Peoples)¹⁷, suspended the project in order to develop community relations.

In this period, CGC continued to negotiate with the Sarayaku, offering monetary payments and other benefits, all which was however continuously rejected by the Sarayaku. Nevertheless, after CGC issued an updated environmental impact study, and despite objections by the Sarayaku, the oil consortium was allowed to proceed with their operations and by mid-2003 had planted multiple explosives within the Sarayaku territory, destroyed a spiritual site, caves, water resources and underground rivers, and cut down trees and plants of great environmental and cultural value.¹⁸ The decision by Ecuador to allow the resumption of activities was *inter alia* met with precautionary measures issued by the Inter-American Commission in 2003 and the provisional measures ordered by the Inter-American Court in 2004.¹⁹ While the activities of the CGC oil consortium were halted again, the explosives remained on the territory and a number of further incidents of alleged threats, harassments and attacks were reported.²⁰

These facts were investigated by, first, an arbitral tribunal in *Burlington Resources Inc. v Ecuador* and, subsequently, the Inter-American Court of Human Rights. Each of the proceedings approached the dispute from its respective viewpoints and in light of the applicable law. Hence, on the one hand, the conflict was assessed from the perspective of a foreign investor and in application of a bilateral investment treaty, and on the other hand, in consideration of the collective rights of the affected indigenous communities accorded under human rights law.

3.2. *Burlington Resources Inc. v Ecuador*

In the arbitral proceedings, Burlington Resources argued *inter alia* that Ecuador had failed to provide ‘full protection and security’ to its investment as set out in Art. II(3)(a) of the US-

¹⁶ Ecuador ratified ILO Convention No. 169 on 15 May 1998, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102616 (last visited on 13 April 2016).

¹⁷ Articles 83 and 84(5) of the 1998 Constitution (Decreto Legislativo No. 000. RO/1 de 11 de Agosto de 1998) were particularly relevant:

Artículo 83.- Los pueblos indígenas, que se autodefinen como nacionalidades de raíces ancestrales, y los pueblos negros o afroecuatorianos, forman parte del Estado ecuatoriano, único e indivisible.

Artículo 84.- El Estado reconocerá y garantizará a los pueblos indígenas, de conformidad con esta Constitución y la ley, el respeto al orden público y a los derechos humanos, los siguientes derechos colectivos:

5. Ser consultados sobre planes y programas de prospección y explotación de recursos no renovables que se hallen en sus tierras y que puedan afectarlos ambiental o culturalmente; participar en los beneficios que esos proyectos reporten, en cuanto sea posible y recibir indemnizaciones por los perjuicios socio-ambientales que les causen.

¹⁸ *Sarayaku v Ecuador*, paras. 104-105.

¹⁹ *Precautionary Measures in Sarayaku v Ecuador*, Inter-American Commission on Human Rights, 5 May 2003, OEA/Ser.L/V/II.118, doc. 5 rev. 2; *Provisional Measures regarding Ecuador – Matter of Pueblo Indígena Sarayaku*, Order of the Inter-American Court of Human Rights, 6 July 2004.

²⁰ *Sarayaku v Ecuador*, paras. 107-108.

Ecuador BIT²¹ in light of the continuing violent attacks by the indigenous opposition against their operations, installations and personnel.²² They claimed that their concerns had long been known and recognized by Ecuador, since the Blocks had been declared in *force majeure* by 15 May 2001 due to the violent attacks and death threats by the indigenous opposition, thereby suspending Burlington Resources' performance obligations under the production-sharing contract.²³ However, the tribunal dismissed the claim on full protection and security on procedural grounds.²⁴ While the tribunal concluded on the merits that Ecuador had unlawfully expropriated Burlington Resources' investments in other Blocks, Block 23 and Block 24, both subjected to indigenous opposition, were not touched upon at this stage.²⁵

3.3. Kichwa Indigenous People of Sarayaku v Ecuador

In contrast, in *Kichwa Indigenous People of Sarayaku v Ecuador*²⁶, the Sarayaku community argued that Ecuador failed to adhere to its obligation to consult with the Sarayaku, amounting to a violation of particularly Article 21 ACHR (right to property). In this context, the Inter-American Court recalled that Article 21 ACHR protected the close relationship between indigenous peoples and their lands, including the natural resources of their ancestral territories as well as intangible elements stemming from land and resources. The protection of this relationship was necessary to ensure the survival of indigenous peoples, thus, 'the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected with the protection of natural resources in the territory.'²⁷

As Ecuador acknowledged that it failed to conduct prior consultations with the affected communities on its own, a particular focus was laid on whether this obligation could have been or was satisfied by the CGC consortium.²⁸ In its final 2012 judgment the Inter-American

²¹ 'Investment shall at all times...enjoy full protection and security.'

²² *Burlington v Ecuador*, paras. 27-31.

²³ *Ibid.*

²⁴ The parties disagreed whether Burlington had waited six months from the date on which the 'dispute' arose as required by Article VI of the Treaty. A letter which had been sent by Burlington to the government of Ecuador indicating its problems with regard to the indigenous opposition was at the center of this analysis. However, from the wording of the letter the tribunal concluded that, firstly, Ecuador had assisted Burlington 'in some form or another in dealing with the indigenous opposition'. Secondly, that the letter ended 'on an optimistic note, with Claimant expressing confidence that a final agreement with the indigenous communities could be reached'. And thirdly, that the expectation that Ecuador should 'take action and [...] proceed emphatically and [...] solve these matters' was 'insufficient to rise to the requisite level of "dispute" within the meaning of Article VI(3) of the Treaty.' (*Burlington v Ecuador*, para. 296) The tribunal therefore found that while the letter amounted to a 'diplomatic request' for further assistance, it was not express disagreement with the manner in which Ecuador had fulfilled its obligation to provide protection and security. On this basis, the tribunal concluded that the procedural requirements of Article VI were not fulfilled.

²⁵ *Burlington Resources Inc. v Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 546.

²⁶ The initial petition to the Inter-American Commission on Human Rights was filed in 2003, shortly after the operations had commenced on the ancestral lands of the affected communities.

²⁷ *Sarayaku v Ecuador*, para. 146.

²⁸ *Sarayaku v Ecuador*, para. 124.

Court refrained, in contrast to its earlier *Twelve Saramaka Clans v Suriname* judgment²⁹, from considering whether a right to consent might be accorded in the given circumstances³⁰, but instead elaborated at great length on the participatory process which ‘guarantees the right to consultation’.³¹ It began by recalling the elements of the process as established in its previous case-law (consultation in an active and informed manner, in accordance with the customs and conditions of the affected community; consultations in good faith, using culturally-appropriate procedures; aimed at reaching an agreement; during the early stages of the development or investment plan; information must include information on possible risks (such as environmental or health risks); and respect for the traditional methods of decision-making of the affected community³²).

In application of these elements, the Inter-American Court emphasized that in order for the requirement of effective participation to establish a true dialogue between the parties and be based on mutual trust, it was essential to remember that consultations had to be carried out in good faith, *i.e.* in ‘absence of any form of coercion by the State or by agents or third parties that act with its authority or acquiescence.’³³ It also pointed out that this meant that practices which attempted to ‘undermine the social cohesion of the affected communities, either through corruption of community leaders or by establishing parallel leaders, or through negotiations with individual members of the community that are contrary to international standards’³⁴ were incompatible with good faith requirements.

Finally, it reminded the parties that ‘the obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the same company that is interested in exploiting the resources in the territory of the community that is the subject of the consultation.’³⁵

On this basis, the Inter-American Court concluded that Ecuador had violated rights recognized in the American Convention on Human Rights, the 1998 Ecuadorian Constitution and ILO Convention No. 169³⁶. In particular, Ecuador’s conduct amounted to a violation of the rights to consultation, to indigenous communal property and to cultural identity (Article 21 ACHR) as the project has directly affected the territory of the Kichwa. In light of its findings, the Inter-American Court ordered that the state should pay \$1.4 million compensation for pecuniary and non-pecuniary damages, and consult with the Sarayaku people on the removal of the remaining explosives on the territory of the Sarayaku as well as on any type of investment or development plan with potential repercussions for their territory or affect

²⁹ *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Inter-Am.Ct.H.R. (Judgment, 28 November 2007).

³⁰ One might argue that on the facts of the case it was so apparent that Ecuador had not consulted the affected indigenous community that it was not necessary to proceed to assess whether consent would have been required. However, one might also argue that the Court in fact was attempting to soften its previous statement made in *Saramaka*.

³¹ *Sarayaku v Ecuador*, para. 157.

³² *Sarayaku v Ecuador*, para. 177.

³³ *Sarayaku v Ecuador*, para. 186.

³⁴ *Ibid.*

³⁵ *Sarayaku v Ecuador*, para. 187.

³⁶ *Sarayaku v Ecuador*, para. 176.

essential aspects of their worldview or life, integrity or cultural identity. Moreover, Ecuador was to adopt legislative or other measures to give full effect to the right to prior consultation of indigenous peoples as well as make a public acknowledgement of its international responsibility.

4. Concluding Remarks

4.1. General Remarks on the Institutional Interplay

The difficulties associated with the triangle of parties and overlapping judicial bodies becomes apparent in light of both decisions considering the absent third party as an ‘externality’ to the proceedings.³⁷ As noted by commentators, coordination and cooperation between these two distinct fields is thus difficult to achieve³⁸ which poses certain challenges to the legitimacy of proceedings’ outcome from the perspective of the affected but absent third party.

In the arbitral proceedings, the tribunal accepted the classification by Burlington Resources and Ecuador of the indigenous resistance led by the Sarayaku as a *force majeure* element which prevented it from fulfilling its contract terms but did not attach any further significance thereto and did not assess whether the potential violations of the rights of the indigenous community played a role in the proceedings.³⁹ Likewise, before the Inter-American Court of Human Rights, the negotiations conducted by Burlington Resources were viewed as problematic and as interfering with the social cohesion of the Sarayaku people. However, these allegations were accepted as factual occurrences without taking further evidence or statements by the private company.⁴⁰ In legal terms, Burlington Resources – despite having failed to adhere to its responsibility to respect human rights⁴¹ – was therefore not found responsible for the violations occurring.

4.2. Contribution to the Protection of Indigenous Rights

The *Sarayaku* proceedings serve as yardsticks for the protection of indigenous rights in several aspects. This can be seen both in some of the procedural specifics of the proceedings before the Inter-American Court and with regard to the Court’s findings.

³⁷ JG Prieto Muñoz, ‘International Investment Disputes in South America: Rethinking Legitimacy in the Context of Global Pluralism’ in A Tanzi/A Asteriti/R Polanco Lazo/Paolo Turrini (eds.), *International Investment Law in Latin America / Derecho Internacional de las Inversiones en América Latina – Problems and Prospects / Problemas y Perspectivas* (2016) 130, 153-154.

³⁸ *Ibid.*

³⁹ *Burlington v Ecuador*, para. 34.

⁴⁰ See list of evidence in *Sarayaku v Ecuador*, paras. 31ff.

⁴¹ See, e.g., Principles 11, 12, Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’, 21 March 2011, UN Doc. A/HRC/17/31.

The inclusive procedure exemplified in this case has been noted as a promising example for future proceedings dealing with indigenous rights.⁴² For example, the Inter-American Court conducted its first ever on-site visit at the site of the events of a contentious case in April 2012.⁴³ The Court had been invited by both sides to the dispute, for varying reasons.⁴⁴ During its visit, statements by both parties were heard, and the Legal Secretary of the Presidency of the Republic formally acknowledged the responsibility of Ecuador and offered to sit down with the Sarayaku people to discuss reparations. Despite this acknowledgement, the community however announced that they would wait for the final judgment by the Inter-American Court.⁴⁵

Furthermore, despite a series of further attacks occurring after the issuance of the provisional measures, the exploration activities, including the seismic exploration work, was halted preventing further significant damage and destructions of sites of spiritual importance.⁴⁶ The success thereof has been remarked as a particularly essential feature of the case and should serve as an example for other similar conflicts that threaten the livelihood of a specific community.⁴⁷ Similarly, the participation of victims throughout the proceedings, both through testimonies provided at the official public hearing in front of the Inter-American Court, as well as during the on-site village, constitutes an essential factor in achieving effective redress.

On a substantive level, the Inter-American Court's observations with regard to the content of the consultation process, especially its detailing of the good faith requirement and its emphasis on clarifying that the obligation is a direct responsibility of the state which cannot be delegated to private parties interested in resource exploitation activities, are particularly noteworthy. This comes not only as a direct response to the facts at hand but as a general response to the common problems arising in the context of operationalizing the principle of free, prior and informed consultation/consent.⁴⁸

The Inter-American Court also reiterated its previous case law, e.g., *Mayagna (Sumo) Awas Tingni Community v Nicaragua* and *Twelve Saramaka Clans v Suriname*, concerning the importance of the recognition of land and resource rights of indigenous peoples, understood

⁴² S Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap Between Legal Victories and Social Change', *Revue Québécoise de Droit International, Hors-série: L'État de droit en Amérique Latine et au Canada* (2015) 201-202.

⁴³ *Sarayaku v Ecuador*, para. 21.

⁴⁴ *Case of the Kichwa Indigenous Peoples of Sarayaku v Ecuador*, Inter-Am.Ct.H.R., Order of the President of the Inter-American Court of Human Rights, 20 January 2012.

⁴⁵ *Sarayaku v Ecuador*, paras. 21, 23-24.

⁴⁶ However, as explained in Section 4.3. below, the majority of the explosives still remain buried throughout the territory, posing a continuous threat to the inhabitants.

⁴⁷ S Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap Between Legal Victories and Social Change', *Revue Québécoise de Droit International, Hors-série: L'État de droit en Amérique Latine et au Canada* (2015) 212.

⁴⁸ See, e.g., Memorandum by former Bank President James Wolfensohn to the Executive Directors, Operational Policy on Involuntary Resettlement, Draft OP/BP 4.12, 28 September 2011, para. 18: The reasons for not including such a provision [FPIC] are the following: the concept of prior, informed consent is very difficult to operationalize; it is not reflected in the legal framework of any country, whether developing or developed; it is contrary to the principle of eminent domain in effect in most countries.'; cf. JR Owen/D Kemp, "Free prior and informed consent", social complexity and the mining industry: Establishing a knowledge base', 41 *Resources Policy* (2014) 91.

as inherently linked to their survival, thereby reinforcing its reputation as an institution playing a particularly significant role for the development and protection of indigenous rights.⁴⁹

4.3. Implementation and Compliance

The landmark ruling in *Kichwa Indigenous People of Sarayaku v Ecuador* by the Inter-American Court in 2012 goes back to concerted efforts by the affected communities as well as supporting civil society institutions (*inter alia* the Centre for Economic and Social Rights (CDES) and the Centre for Justice and International Law (CEJIL)), and a decade-long resistance against oil, logging and mining throughout the Amazon.⁵⁰ Nevertheless, despite their success before the Inter-American system, especially the effective implementation of the consultation standards as recognized by the judgment has remained an issue that is still unresolved and will require further political will.

In light of the detail of the Inter-American Court's judgment, compliance and giving full effect to the listed remedies constitutes a particularly interesting aspect. Thus, the judgment ordered Ecuador *inter alia* to pay compensation, remove the remaining explosives, issue an official apology and adopt legislative or other measures to give effect to the right to prior consultation of indigenous peoples in Ecuador.

Having announced in advance that it acknowledged full international responsibility for the human rights violations which the Sarayaku had become victim of, Ecuador reaffirmed in the aftermath of the judgment that it would act in full compliance with the ordered remedies.⁵¹ However, so far, the government of Ecuador has only complied with the obligation to pay compensation and to make a public apology. The latter was made during an official ceremony on the territory of the Sarayaku people on 1 October 2014, recognizing

'the international responsibility of the Ecuadorian State for human rights violations suffered by the Kichwa Indigenous People of Sarayaku. These include: violation of communal indigenous property, violation of cultural identity, violation of the right to consultation, having put at serious risk their lives and personal integrity, and for violation of the right to judicial guarantee and judicial protections.

We ratify our firm commitment to the force of human rights in our country and, in a special manner, to the rights afforded to indigenous peoples and communities according to international law and the treaties ratified by our country.

⁴⁹ See also F Piovesan, 'The Inter-American Court of Human Rights and Social Rights' in C Binder/JA Hofbauer/F Piovesan/A Steiner/E Steiner (eds.), *Social Rights in the Case Law of Regional Human Rights Monitoring Institutions* (2016), 303, 313-314.

⁵⁰ See also S Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap Between Legal Victories and Social Change', *Revue Québécoise de Droit International, Hors-série: L'État de droit en Amérique Latine et au Canada* (2015) 199.

⁵¹ CERD, Concluding observations on the combined 20th to 22nd periodic reports of Ecuador, adopted by the Committee at its eighty-first session (6-31 August 2012), 24 October 2012, UN Doc. CERD/C/ECU/CO/20-22, para. 8.

To conclude, for all the violations of human rights suffered by the Kichwa Indigenous People of Sarayaku, the Ecuadorian State offered our most heart-felt apologies for these threats brought to pass by previous governments'.⁵²

The Sarayaku people welcomed the apology and noted *inter alia* that the act was the 'ratification that we were always justified in opposing the entry of the oil industry into our territory'.⁵³

At the same time, the affected communities and parts of civil society voiced some concern that the apology did not contain any assurances that in future the right to consultation would be put into effect in according with current regional or international standards. Thus, while the Executive Decree presently in force (No. 1247) requires the government to carry out consultations, the results are not binding and the decision whether to authorize a project remains with the state.⁵⁴ The threat of continuing disregard of the right to consultation⁵⁵ is also more than a merely abstract scenario in light of the recent plans of Ecuador to further extend the bidding process for oil exploration contracts to parts of the Amazon, amidst assertions of affected communities that the consultations were made with false representatives of the community and not in accordance with the law, thereby rejecting the legitimacy of the process.⁵⁶

Moreover, to date the majority of the explosives have not been removed.⁵⁷ More than 1.5 tons remain spread over hundreds of locations (placed both on the surface and sub-surface) which were placed by the CGC oil consortium between 2002 and 2003. An Inter-Institutional Cooperation Agreement signed in 2007 in 2009 between the National Police and the Ministry of Mines and Oil and Ministry of Natural and Non-Renewable Resources, respectively, which aimed at safely removing the remaining explosives, failed to so far achieve this task, also because the precise location of the explosives are not known.⁵⁸ In line with Article 29 UNDRIP (regarding the storage of hazardous materials), the measures to complete this task 'shall be chosen after a process of prior, free and informed consultations with the Sarayaku Community'.⁵⁹

⁵² Available at <http://amazonwatch.org/news/2014/1001-ecuadorian-government-apologizes-to-sarayaku-indigenous-people> (last visited 13 April 2016).

⁵³ Comment by Félix Santi, the community's *Tayak Apu* (President), available at <https://eyeonlatinamerica.com/2014/10/03/ecuador-apology-sarayaku-oil/> (last visited 13 April 2016).

⁵⁴ See also above note 11; CERD, Concluding observations on the combined 20th to 22nd periodic reports of Ecuador, adopted by the Committee at its eighty-first session (6-31 August 2012), 24 October 2012, UN Doc. CERD/C/ECU/CO/20-22, para. 17.

⁵⁵ IWGIA, 'Ecuador', *The Indigenous World* (2013) 130ff.

⁵⁶ B Acuesta, 'Ecuador to Sell One Third of Pristine Rainforest to Chinese Oil Companies', 12 February 2016, available at <http://www.mintpressnews.com/213663-2/213663/> (last visited 14 April 2016); 'Ecuador Signs Contracts for Two Oil Blocks in the Amazon to Chinese Oil Giant', 1 February 2016, available at <http://www.pachamama.org/news/ecuador-signs-contracts-two-oil-blocks-amazon-chinese-oil-giant> (last visited 14 April 2016).

⁵⁷ I Riofrio, 'Oil Extraction Threatens to Expand Further Into Ecuadorean Rainforest Under New 20-Year Contract', 3 February 2016, available at <http://news.mongabay.com/2016/02/oil-extraction-threatens-to-expand-further-into-ecuadorean-rainforest-under-new-20-year-contract/> (last visited 14 April 2016).

⁵⁸ *Sarayaku v Ecuador*, paras. 121, 289ff.

⁵⁹ *Sarayaku v Ecuador*, para. 293.