differently to the Appellate Body itself, as opposed to panels? Note that the Appellate Body refers to “an adjudicatory body”—in the singular—perhaps implying that only the Appellate Body may depart from prior rulings on the basis of “cogent reasons.” Alternatively, the “adjudicatory body” it mentions may be the Dispute Settlement Body, which would thus include panels. Since there are several ongoing zeroing disputes, the panels in question may have the opportunity to test the boundaries of the Appellate Body’s new standard.

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Indigenous and tribal peoples’ rights—land, territory, and natural resources—consultations and prior informed consent—environmental and social impact assessment—concessions and foreign direct investment—environmental damage


The case of the Saramaka People v. Suriname,1 decided by the Inter-American Court of Human Rights on November 28, 2007, concerned logging and mining concessions awarded by Suriname on territory possessed by the Saramaka people, without their full and effective consultation. The Court examined the rights of tribal peoples in international law and concluded that the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory and that are necessary for their survival. The Court also declared that Suriname may restrict this right by granting concessions for the exploration and extraction of natural resources only when such restriction does not deny the Saramaka’s survival as a tribal people. In this respect, the state must abide by three safeguards: first, effective consultations in every event, as well as free, prior, and informed consent in connection with development and investment projects having major impacts; second, a sharing of benefits derived from development plans; and third, prior and independent environmental and social impact assessment (EIA). In the end, the Court found that Suriname had violated the rights, under the American Convention on Human Rights,2 to juridical personality, property, and judicial protection of the Saramaka people living in the Upper Suriname River Region, in relation to the obligations to respect, ensure, and give domestic legal effect to those rights.

In its judgment, the Court disposed of all issues relating to the Saramaka People case—namely, preliminary objections, merits (including evidence), reparations, and costs. Both the Inter-American Commission on Human Rights (Commission) and the “representatives” of the alleged victims submitted written briefs containing pleadings, motions, and evidence. This

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2 Opened for signature Nov. 22, 1969, 1144 UNTS 123.
duality of “applicants” raised a question concerning the Court’s competence in relation to allegations by the victims’ representatives concerning the ongoing effects of the Afobaka Dam, a hydroelectric project in proximity to the Saramaka people. The Court considered that the Commission’s application defined the factual scope of the litigation, and found that it did not include detailed factual assertions on the dam (paras. 13, 16).

The Court then turned to preliminary objections; three of which are reported here. First, the state argued that the petitioners had no authorization from the chief leader of the Saramakas (the Gaa’man) to petition on behalf of the whole Saramaka community. In accordance with the principle of effectiveness (effet utile), the Court noted that the American Convention permits any group of persons to lodge petitions, including persons other than the alleged victims, and dismissed the objection (paras. 19–24).

Suriname also argued the non-exhaustion of domestic remedies. The Court noted that for this objection to be timely, it must be pleaded in the state’s first submission before the Commission; otherwise, it is presumed to be tacitly waived. Further, the state must specify the available remedies that remain to be exhausted and demonstrate their applicability and effectiveness. Since Suriname argued non-exhaustion only in its fourth submission, and since it did not specify which remedies had not been pursued, the Court dismissed the objection (paras. 41–44).

Finally, the state challenged the petition’s admissibility, arguing that petitioners had filed requests with the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination (CERD). The Court focused its examination on the object, purpose, and nature of those actions to determine whether the cases were substantially the same. The Court concluded that the reporting procedures of the universal, treaty-based bodies and the CERD’s early warning and urgent procedure could not be equated with its adjudicatory jurisdiction (para. 54).

After addressing (and dismissing) the state’s preliminary objections, the Court assessed the available evidence and then analyzed the merits in a single section. First, the Court addressed the question whether the members of the Saramaka people make up a tribal community; of central importance in this context were the social, cultural, and economic characteristics of the Saramakas. Instead of being indigenous to the region that they inhabit, the Saramakas are one of six Maroon groups in Suriname whose ancestors were enslaved during the European colonization in the seventeenth century but escaped to the interior regions of the country. The Saramakas’ social structure is organized in matrilineal clans, and they regulate themselves, at least partially, by their own customs and traditions. Culturally, the members of the Saramaka people maintain a strong spiritual relationship with the ancestral territory that they have traditionally used and occupied. In this regard, “land is more than merely a source of subsistence; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people” (para. 82). The Court observed that their economy can also be characterized as tribal.

Having established that the Saramaka people make up a tribal community, the Court then asked whether its members require special measures that guarantee the full exercise of their rights. In this regard, the Court declared that its jurisprudence regarding indigenous peoples’

3 Namely, the Association of Saramaka Authorities and the twelve Saramaka captains.

4 One submission was a “shadow report” to the Human Rights Committee on Suriname’s compliance with the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR]; other submissions were to the CERD’s “early warning measures and urgent action procedure.”
right to property is also applicable to tribal peoples because both share similar characteristics, such as having distinct social, cultural, and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.

The second issue addressed by the Court was whether Article 21 of the American Convention protects the right of the members of tribal peoples to the use and enjoyment of communal property. Recalling its jurisprudence on indigenous peoples’ rights, “both the private property of individuals and communal property of the members of...indigenous communities are protected by Article 21 of the Convention” (para. 89). The Court explicitly observed that its jurisprudence is “based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples” (para. 90).

The Court recognized that its interpretation of Article 21 in previous cases reflected Article 29(b) of the American Convention—in connection with legislation in the respondent countries—as well as the International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (para. 92).6 An interpretative obstacle thus arose: Suriname had not ratified ILO Convention No. 169, and its legislation did not recognize a right to communal property of tribal communities. The Court utilized systemic interpretation techniques to overcome this hurdle; in particular, the Court referred to Articles 1 and 27 of the International Covenant on Civil and Political Rights7 and Article 1 of the International Covenant on Economic, Social and Cultural Rights,8 in connection with reports by the treaty-based bodies overseeing their implementation (paras. 93–94).9 In conclusion, by virtue of Article 29(b) of the American Convention, the Court held that Article 21 grants the members of the Saramaka community the right to enjoy property in accordance with their communal tradition (para. 95).

Having recognized this whether Suriname had adopted an appropriate framework to give it domestic legal effect. After scrutinizing Suriname’s internal legal framework, including its constitution and laws concerning “land policy,” mining, and forestry, the Court concluded that Suriname merely grants the members of the Saramaka people a privilege to use land and that this grant does not guarantee the right to control their territory without outside interference. Suriname also argued, however, that it would be discriminatory to the rest of the population to pass legislation recognizing communal forms of land ownership. The

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5 “[Article 29(b)] prohibits an interpretation of any provision of the Convention in a manner that restricts its enjoyment to a lesser degree than what is recognized in the domestic laws of the State in question or in another treaty to which the State is a party” (para. 92).


7 See supra note 4.


9 Common Article 1 of both Covenants has been interpreted as applying to indigenous peoples; accordingly, by virtue of their right of self-determination, they may freely pursue their economic, social, and cultural development and may freely dispose of their natural wealth and resources so as not to be deprived of their own means of subsistence. Similarly, under Article 27 of the ICCPR, the UN Human Rights Committee has observed that “minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, which may consist in a way of life which is closely associated with territory and use of its resources” (para. 94, quoting UN Human Rights Committee, General Comment No. 23, The Rights of Minorities, UN Doc. CCPR/C/21Rev.1/Add.5 (1994)).
Court observed that “it is a well-established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination” (para. 103) and reiterated the need for special measures to ensure the survival of indigenous and tribal peoples, in accordance with their traditions and customs.

The fourth and fifth issues addressed by the Court go to the heart of this case—namely, whether, and to what extent, members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory, and whether, and to what extent, the state may grant concessions for exploring and extracting such natural resources. In approaching these questions the Court recalled its jurisprudence on indigenous peoples’ rights:

Members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. (Para. 121)\textsuperscript{10}

The Court further reasoned that for indigenous and tribal communities, the right to territory would be meaningless if said right was not connected to the natural resources that lie on and within the land (para. 122). Having established this connection, the Court elaborated on the right’s scope, reasoning that what needs to be protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development, and continuation of indigenous and tribal peoples’ ways of life. In this regard, the Court further noted that all exploration activity could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas. For example, clean natural water essential for subsistence is likely to be affected by extraction activities of other natural resources not essential to the survival of the Saramaka. The Court considered, however, that Article 21 “should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within Saramaka territory” (para. 126).

Reasoning that the right to property is not absolute, but subject to certain limitations and restrictions, the Court declared that “the State will be able to restrict, under certain circumstances, the Saramakas’ property rights, including their rights to natural resources found on and within the territory” (para. 127). In this respect the Court recalled that a permissible restriction of the right to property must comply with the requirements established in its case law,\textsuperscript{11} and that, in addition, any restriction on the Saramakas’ right to use and enjoy their traditional lands and natural resources cannot “deny their survival as a tribal people” (para. 128).


\textsuperscript{11} The restriction must (1) have been previously established by law; (2) be necessary; (3) be proportional, and (4) have the aim of achieving a legitimate objective in a democratic society (paras. 127–28).
effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter “development or investment plan”) within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people. (Para. 129)

The Court further clarified the scope of the guarantees concerning consultations and the sharing of benefits. Consultations must be culturally appropriate, taking into account traditional methods of decision making, and in order to enable internal discussion within communities, must take place at the early stages of an investment plan. The state must ensure that communities are aware of environmental and health risks. Additionally, the Court distinguished between “consultations” and “consent”: “Regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions” (para. 134). On benefit sharing, the Court reasoned that the right of compensation recognized under Article 21(2) “extends not only to the total deprivation of property title by way of expropriation by the State, . . . but also to the deprivation of the regular use and enjoyment of such property” (para. 139). In this sense, the right to obtain just compensation translates into a right “to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival” (id.).

In light of these interpretations, the Court assessed whether the concessions already made by Suriname within Saramaka territory complied with the safeguards established under international law. Finding that they did not, the Court further observed that the logging concessions had left a “legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems” (para. 153) and that the Saramaka people received no benefit from the logging in their territory.

In the ambit of reparations, the Court considered the members of the Saramaka people as the injured party, without having to name them individually. The Court determined several measures to guarantee nonrepetition, including: demarcating territories; recognizing collective juridical capacity; and perfecting internal laws on consultations, EIAs, and judicial protection. As measures of satisfaction, the Court ordered the state to translate its judgment into Dutch and to finance two radio broadcasts, in the Saramaka language, of the decision’s key paragraphs. Then, in relation to compensation, the Court considered that the Saramaka people had obtained no benefit from the timber extracted from their territory and that the logging concessions had resulted in environmental damage; Suriname was therefore ordered to pay U.S.$75,000 in compensation for such material damage. The Court also considered that the immaterial damage caused to the Saramaka people by “alterations to the very fabric of their society”—including the impact of the environmental damage on their spiritual connection with their territory, as well as the suffering and distress endured as a result of the long struggle...
for legal recognition—entitled them to a just compensation. Finally, on equitable grounds, the Court ordered the state to allocate U.S.$600,000 to a community development fund to finance, among other things, educational, housing, agricultural, and health projects.

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The Saramaka People case presented the Inter-American Court with the challenge of addressing structural tensions between traditional international law principles, such as that of permanent sovereignty over natural resources, on the one hand, and human rights law guarantees, such as the right of indigenous peoples to property over their lands and territories, on the other. Where both the state and indigenous peoples claim interests regarding the same territory and natural resources, those tensions are magnified.

The Court in Saramaka People strengthened its jurisprudence on indigenous and tribal peoples’ rights by emphasizing the importance of the linkages between land, territory, and natural resources, in connection with collective property rights. In this respect, systemic interpretation techniques anchored in Article 29(b) of the American Convention allowed the Court to enrich its reading of land rights and self-determination with analytical work undertaken in other human rights forums.

The Court proposed an interpretation of Article 21 of the American Convention that would not preclude the issuance of concessions for the exploration and exploitation of natural resources in indigenous and tribal territories, but would subject such concessions to stringent safeguards. To a large degree, this interpretation comports with the legal and political realities in many states in the Americas, where natural resources, especially minerals, oil, and gas, are vested in the state, regardless of surface land ownership. This interpretation is also consonant with the Court’s case law on permissible restrictions of rights, as well as with developments in other international human rights forums.

The Court’s approach shows the limitations, however, of framing indigenous rights to land and territory as an issue of property rights under Article 21. While the Court observed that certain natural resources are indispensable to the survival of the indigenous or tribal group, it nevertheless found that concessions over such natural resources may be permissible because, inter alia, the right to property is not absolute but admits of restrictions. The Court elaborated a framework of safeguards to ensure that such concessions would not result in threats to the survival of indigenous and tribal communities, including consultations (and consent in regard to projects involving major impacts), EIAs, and benefit sharing.

This construct raises several questions regarding its effective operationalization that are left open by the Court. First, what criteria determine the natural resources indispensable to the survival of the group? Second, does benefit sharing cover only those natural resources necessary for survival, or all natural resources within the group’s territory? Third, what standards determine when a project has a “major impact,” thereby triggering the free and prior consent requirement? Fourth, and more generally, is the framework of safeguards capable of achieving its objective, given its internal logic? In this regard, allowing a restriction or deprivation of the right to use and enjoy traditional lands and the natural resources necessary for survival—even after consultations, EIAs and compensation—is inconsistent with the recognition that interfering with natural resources necessary for survival imposes a threat to the survival of the group; only free and prior informed consent could ensure that this risk is not imposed but voluntarily
assumed. Stated bluntly, if the natural resource affected is essential for survival, then payment of compensation quantifies the price of the group’s existence.

To avoid this (unintended) consequence, the interlinkages between indigenous and tribal peoples’ right to exist and the natural resources necessary for their survival could be approached under a right-to-life analysis. Within such vocabulary, the need to ensure the survival of the group would preclude concessions that negatively affected natural resources necessary for survival. While this approach could intensify the tension between human rights law and the sovereignty of the state—even when states are not prepared to abandon claims over natural resources considered of strategic or vital importance—it may nevertheless guide the preventive role of human rights law in safeguarding the right to exist of indigenous and tribal peoples.

Yet another question concerning the Court’s decision in Saramaka People relates to the decision’s impact on international investment law. For example, if a country’s administration were to nullify a hydroelectric concession involving resettlement and flooding of cemeteries and sacred sites because it was established without free and prior informed consent of affected indigenous or tribal communities, would an arbitral tribunal constituted under an investment treaty grant protection to the (foreign) concessionaire? The analogy with corruption appears apposite, as such tribunals have declined to hear cases in relation to investments procured by corruption. If human rights law is considered essential to the international public order, then an investment established in breach of human rights law is arguably not an investment under international investment law. If so, the rescission of concessions for oil and gas exploration in territories traditionally occupied by isolated indigenous peoples in the Amazon—which threatens them with forced contact and significant environmental consequences—would not give way to viable arbitral claims. Admittedly, the questions that surface in the dialogue between these two spheres of international law are complex and require further research.

A final point worth highlighting concerns the valuation of environmental damage. The Court was prepared to consider that the environmental destruction resulting from the logging concession constituted compensable material damage. The judgment lacks detailed analysis on valuation, however, and the level of compensation appears low in regard to what experts described as “severe and traumatic” damage, as “among the worst planned, most damaging and wasteful logging possible,” and as rendering the “forest incapable of producing traditional Saramaka agricultural crops” (paras. 150–52). The practice of other international courts and mechanisms demonstrates the methodological difficulties associated with environmental valuation. Nonetheless, the Court’s decision to compensate for environmental damage highlights the inextricable connection between human rights and the environment, particularly in respect of lands and natural resources upon which indigenous and tribal peoples rely for subsistence and development.

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12 See World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).