

representative).¹⁸ Such allegations raise a systemic question as to the appropriate extent of adjudicators' discussions in WTO rulings, as the existing DSU mandate is not instructive enough on this point. For instance, the Appellate Body in the present case could have simply limited its analysis under Article XX(j) to the assessment of whether India was facing "general or local short supply" of the solar products concerned, without first elaborating on the right "legal standard" and "analytical framework" for the related legal defense, which is exactly what the panel did.

Some may argue that strictly sticking to the submitted inquiry would have sufficiently determined justifiability of the Indian measure and eventually contributed to the "prompt settlement" of the dispute and "the effective functioning of the WTO" within the meaning of Article 3.3 of the DSU. But others may well praise the Appellate Body's current approach for defining general parameters and clarifying the conditions for invocation of Article XX(j), which has never been interpreted before, and thereby providing more "security and predictability to the multilateral trading system" in the sense of Article 3.2 of the DSU. This obviously highlights the need for developing clearer guidance on this issue.

SHERZOD SHADIKHODJAEV*

KDI School of Public Policy and Management, Sejong City, Republic of Korea
doi:10.1017/ajil.2017.7

Rights of indigenous peoples—collective rights—recognition of legal personality—right to communal property—conflict between nature reserves and indigenous land—free, prior, and informed consultation—environmental impact—restitution and reparation

CASE OF THE KALIÑA AND LOKONO PEOPLES v. SURINAME. Series C, No. 309. Merits, Reparations and Costs. At <http://www.corteidh.or.cr>. Inter-American Court of Human Rights, November 25, 2015.

On November 25, 2015, the Inter-American Court of Human Rights (Court) held that the state of Suriname had violated the rights of two indigenous groups by denying recognition of their juridical personality and their entitlement to collective property and judicial protection. In *Kaliña and Lokono Peoples v. Suriname*,¹ the Court also considered the impact of nature reserves on indigenous land rights, as well as the legitimacy of private titling of property that encroaches on land for which collective title has not been attained. The decision pushes the Court's previous jurisprudence significantly—and somewhat controversially—by asserting that under the American Convention on Human Rights,² indigenous peoples are entitled,

¹⁸ See WTO Dispute Settlement Body, Oct. 14, 2016 Minutes, *supra* note 16, para. 1.8; WTO Dispute Settlement Body, Minutes of Meeting Held in the Center William Rappard on May 23, 2016, paras. 6.1–.49, WT/DSB/M/379 (Aug. 29, 2016).

* This work was supported by the Ministry of Education of the Republic of Korea and the National Research Foundation of Korea (NRF–2016S1A3A2925230).

¹ Case of the Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015), at http://www.corteidh.or.cr/docs/casos/articulos/serie_c_309_ing.pdf [hereinafter Merits].

² American Convention on Human Rights, Nov. 22, 1969, OASTS No. 36, 1144 UNTS 123, at https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.htm [hereinafter Convention]. Suriname became a party to the Convention on November 12, 1987.

as collective entities, to recognition of their legal personality. In so doing, the Court challenged ordinary assumptions about the individualized character of most adjudication regarding international human rights and made the possibility of enforcing collective rights more palpable.

Initially filed with the Inter-American Commission on Human Rights (Commission) in 2007,³ the case involved eight communities of the Kaliña and Lokono indigenous peoples of the Lower Marowijne River in Suriname. They claimed the state had not established a legal and regulatory framework recognizing their rights to collective ownership of their traditional lands and natural resources, but had instead issued individual property titles to non-indigenous persons, granted concessions and licenses to carry out mining operations, and established three separate nature reserves in part of their ancestral territory, without their consent and to their detriment. Moreover, they argued, the state's procedures for granting the mining concessions and licenses and establishing the nature reserves did not include mechanisms for consultation or obtaining their free, prior, and informed consent. Because they lacked legal personality, they contended, they were unable to exclude others from their ancestral lands, to challenge mining concessions, or to contest the creation of nature reserves in their traditional territories.

The Court's judgment rested not only on the parties' submissions, its own observations, and the Commission's findings, but also on its own prior jurisprudence, in particular its 2007 and 2008 judgments in *Saramaka People v. Suriname*.⁴

The Court began by recounting the relevant factual basis, including the traditional governance structures of the two indigenous peoples and their "special physical and spiritual relationship with their lands and natural resources," remarking that "[t]hey consider that all the animals, plants, fish, stones, streams and rivers are interconnected living beings that have protective spirits" (para. 33). It also discussed some of their history, such as during the civil war that followed Suriname's independence in 1975 from The Netherlands, and their clashes with Maroon communities (paras. 40–49), noting that this troubled relationship had created disincentives for titling and allowed encroachment from other directions.

The Court described the creation of three nature reserves, which, taken together, encompassed nearly 50 percent of the territory in dispute in the case (para. 70). The Court discussed restrictions imposed on the indigenous peoples by the state's creation of these reserves that were based on the following grounds: environmental protection; mining concessions; or private land title. Regarding environmental protection, the designation of certain land as reserves transformed it into state property upon which hunting and fishing were forbidden without exceptions for indigenous peoples (paras. 70–73), alongside other restrictions based on designation of one of the reserves as an environmental conservation area of international significance (para. 82). With respect to mining, the Court took note of the adverse environmental

³ The Kaliña and Lokono Peoples, Report on Merits, Inter-Am. Ct. H.R., Report No. 79/13, Case 12.639 (July 18, 2013).

⁴ Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 17 (Nov. 28, 2007) [hereinafter *Saramaka Merits*]; Case of the Saramaka People v. Suriname, Interpretation of the Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 185 (Aug. 12, 2008). The Court also relied on its decision in: Case of the Moiwana Community v. Suriname, Judgment on Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

consequences resulting from certain bauxite mining operations in the Wane Kreek reserve, pursuant to a 1958 concession agreement that also restricted use of the area for hunting and fishing (para. 90). The mining operations also impacted fishing and hunting stocks considerably (paras. 88–93). Regarding private land title, the Court observed that in 1975, the state began construction of an urban subdivision project, which included vacation homes for the wealthy (as well as a casino, gas station, and mall), resulting in the displacement of indigenous people from the area and restricting their direct access to certain parts of the Marowijne River, with which the local indigenous peoples have a strong spiritual relationship (paras. 96–99).

The Court then turned to a discussion of the first main area of dispute—namely, whether Suriname’s refusal to recognize the right of the indigenous peoples to collective juridical personality denied the Kaliña and Lokono peoples the ability to maintain, exercise, and seek the protection of their collective property and other rights under domestic law, in violation of Article 3 of the Convention. In *Saramaka*, the Court had held that recognizing the juridical personality of indigenous peoples is “one of the special measures that should be granted to the indigenous and tribal groups in order to ensure that they may enjoy their territories according to their traditions” (para. 107), while also observing that doing so is

one way, although not the only way, to ensure that the community as a whole may enjoy and exercise fully the right to property, in accordance with their system of communal ownership, as well as the right to equal judicial protection against any violation of this right.⁵ (Para. 109)

Here, however, the Court took a stronger position, observing that “it is an undisputed fact that, currently, the laws of Suriname do not recognize the legal personality of the indigenous peoples and, consequently, they are unable to hold collective property titles” (para. 112). Accordingly, it found that Suriname had violated Article 3 of the American Convention “to the detriment of the Kaliña and Lokono peoples” since the failure to recognize their juridical personality “has an impact on the violation of other rights” of the Kaliña and Lokono peoples (para. 114).

The Court proceeded to a discussion of the second main area of dispute and considered arguments set forth by the parties concerning whether Suriname had violated the right to property established in Article 21 by “failing to adopt effective measures to recognize their right to collective ownership of the lands, territories and natural resources that they had traditionally and ancestrally occupied and used” (para. 115). The Court determined that Article 21 requires recognition of

the right of the members of indigenous and tribal peoples to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied. (Para. 124)

The Court applied these criteria to the case and concluded that:

as indigenous peoples, the Kaliña and Lokono peoples are protected by international human rights law which guarantees the right to the collective territory they have used and occupied traditionally, derived from the use and occupation of the land and of the

⁵ See also, *Saramaka Merits*, *supra* note 4, para. 171.

resources necessary for their physical and cultural survival and, also, that the State has the obligation to adopt special measures to recognize, respect, protect and guarantee to their members the right to communal ownership of this territory. (Para. 125)

Based upon this analysis and the arguments of the parties, the Court found that this area of dispute involved four main issues:

(a) the failure to recognize the right to collective property and the absence of delimitation, demarcation and land-titling of the ancestral lands of the Kaliña and Lokono indigenous peoples; (b) the granting of land titles and leases to non-indigenous persons within the territory claimed by the Kaliña and Lokono peoples; (c) the adverse effects on use and enjoyment of the parts of the nature reserves that fall within the alleged traditional territories; and (d) the absence of effective participation, by means of a consultation process, with regard to the mining concessions within one of the nature reserves in the ancestral territory. (Para. 127)

Regarding title, the Court reviewed its established case law related to recognition of title (paras. 131–32) and found that certain demarcation criteria (para. 139) were not met in the case and that Article 21 of the American Convention had thus been violated (para. 142). The Court discussed the issue of granting title to third parties and articulated a proportionality test to resolve conflicts between indigenous traditional title and the title of third parties (para. 155), while acknowledging that indigenous title does not necessarily prevail over the title of other stakeholders (para. 158). That said, the Court found that the state's failure to hear the complaints of the Kaliña and Lokono communities violated their right to property (Article 21), in conjunction with the general obligation to protect human rights (Article 1(1)) (para. 160).

With respect to the nature reserves, the Court considered, *inter alia*, the existence of environmental legal obligations, as well as its previous case law in which it said the creation of a park for environmental protection reasons was a legitimate restriction on the right to property (para. 171). In the case of indigenous lands, it stated that sociocultural (as well as biological) dimensions needed to be considered; therefore, it broadened the scope of the term “environment” to include other considerations, particularly indigenous interests (para. 173). The Court took note of the Convention on Biological Diversity, the Ramsar Convention on Wetlands, the World Heritage Convention, and the United Nations Framework Convention on Climate Change, all of which affect the reserves in question and have been ratified by Suriname (para. 176). It concluded that the lack of mechanisms to ensure the access, use, and effective participation of the Kaliña and Lokono indigenous peoples in the conservation of the reserves and the benefits they yield constituted a violation not only of the right to property (Article 21), but also the right to political participation (Article 23), and the obligation to enact domestic law giving effect to those rights (Article 2) (paras. 197–98).

On the mining concessions, the Court welcomed Suriname's attempt to create a Commission on the Law on Traditional Authorities and to enshrine the requirement of consultation in the context of mining concessions (para. 210). But it also said that the state failed to ensure effective participation in the consultation process prior to granting the concessions (para. 212). The Court concluded that since Suriname neither undertook an “independent social and environmental impact assessment . . . prior to the start-up of bauxite mining,” nor supervised the assessment that was eventually conducted, it failed to comply with this safeguard (para. 226).

The third area of dispute involved the right to judicial protection set forth in Article 25. The Court articulated a set of criteria against which the procedural guarantees and right of access to justice of indigenous peoples must be considered, including not only clear rules on legal personality and standing for indigenous groups, but also cultural accommodation, assistance at all points in the litigation, and accommodation of indigenous customary law (para. 251). The guarantee of access to justice, it said, requires remedies that: (1) are accessible and understandable; (2) give indigenous and tribal peoples access to technical and legal assistance; and (3) facilitate physical access to the administrative or judicial institutions, or to the bodies responsible for ensuring the right to collective property of the indigenous and tribal peoples (*id.*). Those remedies must also facilitate the participation of indigenous groups in judicial, administrative, or any other proceedings, without entailing exaggerated or excessive efforts, due either to the distances or to the channels for accessing such institutions, or to the elevated cost of the proceedings (*id.*).

As a final matter, the Court discussed reparations and determined that Suriname must grant the Kaliña and Lokono peoples

legal recognition of the collective juridical personality corresponding to the community of which they are members in order to ensure them the exercise and full enjoyment of their right to property of a communal nature, as well as access to justice as a community in keeping with their customs and traditions. (Para. 279(i)(a))

Suriname must also “[d]elimit, demarcate, and grant collective title to the territory of the members of the Kaliña and Lokono peoples, guaranteeing the use and effective enjoyment . . . and by means of processes in which these peoples participate” (para. 279(i)(b)). The Court held that:

[i]n the case of the lands claimed that are in the hands of non-indigenous or non-tribal third parties, whether natural or legal persons, the State must, through its competent authorities, decide whether to purchase or expropriate the territory in favor of the indigenous peoples, by payment of compensation to those affected as established by domestic law. (Para. 280)

The Court also ordered the creation of a “community development fund” as compensation for the pecuniary and nonpecuniary damage suffered by the members of these peoples, “in addition to any other present or future benefit that might correspond to the Kaliña and Lokono peoples as a result of the State’s general development obligations” (para. 295). The purpose of the fund, it said, must be “to develop projects in the areas of health, education, food security, resource management, and others that the Kaliña and Lokono peoples consider pertinent for their development” (para. 296).

Judges Humberto Antonio Sierra Porto and Eduardo Ferrer Mac-Gregor Poisot appended a separate concurring opinion on two points: “(i) the guarantees of collective property in relation to the mining concession within the Wane Kreek Nature Reserve, particularly with regard to the right to effective participation through a consultation process, and (ii) the recognition of collective juridical personality.”⁶ Judge Alberto Pérez dissented from operative paragraphs 1 to 3 of the judgment, insofar as they refer to Articles 3, 23, and 13 of the Convention, on the ground that

⁶ Merits, Joint Concurring Opinion of Judges Humberto Antonio Sierra Porto and Eduardo Ferrer Mac-Gregor Poisot, para. 1 [hereinafter Joint Concurring Opinion].

the reasoning of the judgment conflicted with the evident meaning of those provisions, and the reasoning given by the majority was “totally insufficient.”⁷

* * * *

The most important aspect of this decision is the Court’s clear acknowledgment of the right of indigenous peoples to recognition of their collective legal personality. In its prior decisions, the Court often struggled with the issue of collective or group rights, but it generally defaulted to the protection of the rights of individual members of indigenous communities, even listing these individuals one by one in judgments. Until now, its reasoning on collective rights has for the most part been *obiter dicta*. The situation started to change with the *Saramaka* judgment, in which the Court for the first time identified the entire community as victims of a human rights violation entitled to reparations, as opposed to only its individual members.

In the present judgment, the Court took a significant step forward. It held that not only is the entire community entitled to reparations *as a community*, but also that indigenous peoples, as such, are entitled to recognition of their legal personality. Instead of pushing this reasoning in *obiter*, or in the judgment’s reparations section, the Court here made it a central part of the judgment—and in so doing, it significantly advanced the possibilities of recognition of collective human rights in international adjudication, an important development in international jurisprudence.

For the most part, international adjudicatory bodies in the area of human rights are only endowed with the competence to hear cases involving individuals, or at least individual rights. In fact, the United Nations Human Rights Committee, which oversees the International Covenant on Civil and Political Rights, declared that the collective right to self-determination set forth in Article 1 of the Covenant is nonjusticiable because of its collective nature.⁸ In *Kaliña and Lokono*, the Inter-American Court did not make a separate body of collective rights enforceable, but instead made individual rights collective—or at least some of them. The Court’s recognition of the collective dimension of individual rights is a welcome step in advancing indigenous and minority protection in the Americas and other systems.

However, this part of the Court’s decision was not unanimously embraced. In his strongly worded dissent, Judge Pérez contended that the Court misread the text of the American Convention, which in Article 3 articulates the right of “every person” to recognition before the law and defines “person” to mean “every human being,” and that the right does not apply to peoples or other collective entities.⁹ Notably, only a few months after this judgment, the Court declared in an Advisory Opinion that corporations are not entitled to human rights under the American Convention, based on a literal reading of Article 3.¹⁰ It is possible, therefore, that the finding of the Court in *Kaliña and Lokono* will not be broadly adopted.

Judge Pérez also criticized the Court’s declaration that the case raised political participation rights (under Article 23) and issues of freedom of expression (under Article 13). On both

⁷ Merits, Partially Dissenting Opinion of Judge Alberto Pérez, para. 1 [hereinafter Partially Dissenting Opinion].

⁸ See, e.g., *Apirana Mahuika v. New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (UN H.R. Comm. 2000) (concerning Maori fisheries); *A. B. v. Italy*, Communication No. 413/1990, UN Doc. CCPR/C/40/D/413/1990 (UN H.R. Comm. 1990) (concerning the German minority in South Tirol).

⁹ Partially Dissenting Opinion, paras. 3–5.

¹⁰ Entitlement of Legal Entities to Hold Rights Under the Inter-American Human Rights System, Advisory Opinion OC-22/16, Inter-Am. Ct. H.R. (ser. A) No. 22 (Feb. 26, 2016).

points, Judge Pérez highlighted the imprecision of the Court's technique and adopted a textual approach to interpretation that is incompatible with the Court's preferred teleological approach. Therefore, it seems that, even within the Court, its practice of expansive interpretations of international human rights law remains under scrutiny, and this attempt to enliven collective rights in human rights adjudication may be stillborn.

That said, it is clear that with respect to the technical aspects of titling, the Court has moved international jurisprudence in a very welcome direction. Its judgment emphasizes that the traditional title given to indigenous peoples (inalienable land, with title only persisting as long as sustainable and traditional practices are in place) is insufficient, even though it is endorsed by international law (para. 53). The Court seems to suggest that in order to comply adequately with human rights obligations, indigenous peoples must be allotted the full bundle of rights related to title—rights of use or title to land that is termed inalienable is no longer sufficient. That represents a significant development in the jurisprudence about indigenous land rights, which for the most part has assumed that the traditional attachment—the spiritual connection of indigenous peoples to their land—meant that inalienable title was sufficient. Here, the Court has gone one step further: while the spiritual connection is still needed to assert title, it should not be used to limit the extent of that title in a way that ultimately cripples the ability of indigenous peoples to utilize their land in a manner that pursues their own development.

Such a step, while welcome, is more conservative than the one with respect to Article 3 which recognized rights associated with the protection of collective property. This conservatism can also be observed in the Court's consideration of the clash between indigenous property rights and third parties' rights. In saying that the task falls to the state in domestic jurisdictions (para. 156), the Court seems to embrace subsidiarity in a way that it has seldom done before. Even though it has adopted a strict separation between the domestic and the international throughout its case law, this separation has been used as a means of advancing the Court's own jurisprudence, rather than to show deference to states. That the Court defers to states in resolving clashes in this area is also a significant development from an otherwise activist court, but one that still fits with the Court's teleological approach (the Court refers to this approach as *pro homine*, which loosely translates as "pro human"). After all, the discretion left to states here is in mediating between the human rights to property of indigenous peoples on the one hand, and the property rights of homeowners on the other.

The timidity in developing the case law in the area of encroachments on property rights by private parties can also be observed in the Court's use of the language of consultation (instead of the stronger term "consent") on the merits. An important debate exists about whether international standards require indigenous peoples to consent to the use or exploitation of their lands or simply to be consulted on the matter. The right to consent is obviously much stronger, as it essentially creates a veto for indigenous peoples. But international jurisprudence, particularly in the Inter-American Court, has focused more on the right to consultation. That approach is clearly reflected in this judgment, except that most of the Court's findings on the consultation prong focused not on actual consultation, but rather on environmental assessment. In other words, even with a lower threshold to work from (consultation instead of consent), the Court is still very tentative in its engagement with this right, and clearly protective of a state's prerogative to make decisions on the exploitation of natural resources within its territory. In spite of the Court's reference to the rights of peoples to economic self-determination enshrined

in common Article 1 to the human rights covenants (para. 122), the Court still defaults to the position that the exploitation of natural resources is a prerogative of the state.

The issue of consultation as a right was only properly explored and advanced in the concurring opinion by Judges Humberto Antonio Sierra Porto and Eduardo Ferrer Mac-Gregor Poisot.¹¹ They reviewed the Court's previous case law on the matter, which sets forth a clear test regarding whether such consultations can be considered effective, and whether they meet human rights standards.¹² The concurring judges see effective participation as requiring consultation.¹³ That said, they still fell short of pushing for a right of free, prior, and informed *consent*, and settled on the right to free, prior, and informed *consultation*. This position denies the possibility of the right to free, prior, and informed consent becoming the new right to self-determination, at least as far as international human rights adjudication is concerned.

An additional concern is how international environmental and human rights obligations are balanced. Two considerations arise from the Court's judgment, one factual and one legal. The factual issue is that in its judgment, the Court found that compatibility between the two bodies of law can be assumed in the indigenous context, because indigenous peoples are sustainable. Similarly, when speaking about the impact of the reserves, the Court assumed that indigenous practices help environmental conservation, in a way that unproductively essentializes indigenous identity and reinforces the myth of the "Noble Savage," meaning that indigenous people in their wisdom harmoniously engage with nature. While this connection has been exploited successfully by indigenous peoples, it also brings unintended consequences to indigenous peoples, who now can only use their land in sustainable ways and are excluded from certain forms of development that should otherwise accrue as a matter of human rights. In other words, as far as indigenous peoples are concerned, some of their rights come burdened with obligations that non-indigenous persons do not have, and it is unfortunate that the Inter-American Court's judgments in this area reinforce this viewpoint.

Regarding the legal issue, the main effect of the Court's discussion of the status of international environmental law vis-à-vis international human rights law speaks to the fragmentation of international law. By assuming the two bodies of rules to be compatible, the Court skirted the issue of hierarchy and put human rights at the top of the international legal order. This development assists the Court in gaining legitimacy toward international law at large, but it may not be replicable in non-indigenous contexts, at least to the extent reliance on (essentialized) indigenous identity may not always be available in considering possibly competing obligations arising from different areas of international legal obligation.

Overall, the Court seems to have been mindful of walking a tightrope between advancing human rights standards and its own mandate in the continent, while at the same time needing to remain relevant by being sensitive to other international legal issues and even state sovereignty in areas that do not squarely fall under its jurisdiction (such as sovereignty over natural resources).

LUCAS LIXINSKI
UNSW Sydney
doi:10.1017/ajil.2017.5

¹¹ Joint Concurring Opinion, paras. 4–16.

¹² *Id.*, para. 7.

¹³ *Id.*, para. 12.