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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 132/99; Case 12.135
Session:	Hundred and Fifth Special Session (19 – 21 November 1999)
Title/Style of Cause:	Election of National Senators for the Province of El Chaco v. Argentina
Doc. Type:	Decision
Decided by:	Chairman: Professor Robert K. Goldman; First Vice-Chairman: Dr. Helio Bicudo; Second-Vice Chairman: Dean Claudio Grossman; Members: Prof. Carlos Ayala Corao, Dr. Jean Joseph Exume, Dr. Alvaro Tirado Mejia.
Dated:	19 November 1999
Citation:	Election of National Senators v. Argentina, Case 12.135, Inter-Am. C.H.R., Report No. 132/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999)
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## I. SUMMARY

1. On January 25, 1999, Angel Rozas, Eduardo Aníbal Moro, Carlos Angel Pavicich, Leandro Despouy, Olinda Montenegro, and María Teresa Flores (hereinafter "the petitioners"), lodged a petition with the Inter-American Commission on Human Rights (hereinafter "the Commission", the "Inter-American Commission" or the "IACHR") alleging violation by the Argentine Republic (hereinafter the "State", the "Argentine State" or "Argentina") of the rights to a fair trial (Article 8), to participate in government (Article 23), to equal protection (Article 24), and to judicial protection (Article 25), and of the obligation of the states parties to respect rights without any discrimination (Article 1(1)), provided for in the American Convention on Human Rights (hereinafter "the Convention", or the "American Convention").

2. The petition alleges that the Argentine State violated the rights of Angel Pavicich and Olinda Montenegro inasmuch as the Senate, despite the fact that they fulfilled the requirements for occupying the positions of Senators for the Province of El Chaco, issued Resolution 1083/98 whereby it dismissed their claims and instated in those positions Mr. Hugo Abel Sager and Mrs. Lidia Beatriz Ayala. The petition further asserts that the State violated the rights to a fair trial and to effective recourse as a result of the decisions rendered by the Supreme Court and the National Electoral Chamber.

3. The State affirms that the requirements set forth in Article 46 of the American Convention had been met. However, the State alleged that the complaint does not satisfy the requirement established in Article 47(b) of the Convention and requested that the Commission declare the case inadmissible.

4. The Commission decided to declare the instant case admissible as it fulfills the requirements provided for in Articles 46 and 47 of the Convention.

## II. PROCESSING BY THE COMMISSION

5. The Commission received the petition on January 25, 1999. The petitioners also requested a hearing before the Commission. On March 4, 1999, during the 102nd regular session of the IACHR, the Commission held a hearing that was attended by the representatives both of the petitioners and of the State in order to set out their positions with respect to the admissibility of the case. The Commission opened the instant case on April 19, 1999, and sent the pertinent portions to the State, granting it a period of 90 days in which to reply counted from the date said communication was received: April 26, 1999. On July 23, 1999, the State was granted an extension of 45 days in which to submit its observations on the instant case. On September 20 the State was accorded an additional extension until October 18, 1999. The Commission received the State's observations on October 15 and forwarded them to the petitioners on October 26, 1999, giving them a period of fifteen days in which to respond. The petitioners submitted their observations on November 12, 1999, attaching, among other elements, a decision of the Inter-Parliamentary Union referring to the instant case, dated October 16, 1999.

## III. POSITIONS OF THE PARTIES

6. For the purposes of the instant report, which addresses the admissibility of the case, the positions of the parties may be summed as follows:

### A. The petitioners

7. By virtue of Article 54 of the Argentine Constitution of 1994, each province is represented by three senators who sit in the Senate. According to the transitory regime that governs the elections of 1995 and 1998, provinces have the exclusive power, via their Legislatures, to elect their representatives in the Senate under an indirect system until 2001, from which point senators shall be elected by direct vote of the citizens of each province. The instant case deals with the procedure applied for the election and appointment of senators for the Province of El Chaco in 1998 and the decisions of the judicial organs upon taking cognizance of the various remedies sought by the petitioners under domestic jurisdiction.

8. The petitioners allege that Carlos Angel Pavicich and Olinda Montenegro met all the requirements set out in the Constitution in order to be elected senators. First, the political parties, Unión Cívica Radical, Socialista, Intransigente, Autonomía de Bases, and Principios, all from El Chaco District and members of the political alliance, Alianza Frente de Todos, which won the provincial elections in 1997, agreed to put forward Mr. Carlos Angel Pavicich and Mrs. Olinda Montenegro as candidates for senator and alternate, respectively, in order to fill the seat of the second senator for the majority. By the same token, on September 21, 1998, the other parties making up the above alliance, namely the partido Demócrata Cristiano, Movimiento de Izquierda and Nuevo Espacio (in process of formation), formally endorsed the aforementioned candidates.

9. Second, the candidates satisfy the legal and statutory conditions, since on that same date the representatives of Alianza Frente de Todos requested the Federal Judge with competence over electoral matters to issue a certification of fulfillment of legal and statutory requirements by the aforementioned candidates. This certification was issued by the National Electoral Chamber on September 23, 1998. Third, they were appointed on September 25, 1998 by the Chamber of Deputies, and the Senate was notified on October 2, 1998.

10. The petitioners say that the majority party membership of Alianza Frente de Todos in the Provincial Legislature is composed of 16 deputies and that the party membership of the Justicialista party of El Chaco is made up of 13 deputies. The latter objected to the appointment of Mr. Pavicich and Mrs. Montenegro in the Senate, alleging that the Justicialista party was the political party with the largest number of members in the Legislature at the time of the election. The parties attended a public hearing in the Senate on October 13, 1998 to present their positions. On October 21, 1998 the Senate decided to approve the objection presented by the Justicialista party and to dismiss the claims of Mr. Pavicich and Mrs. Montenegro because the electoral alliance that had put them forward as candidates did not hold a majority of seats in the Provincial Legislature. Furthermore, the Senate appointed Mr. Sager and Mrs. Ayala of the Justicialista party as Senator and alternate for the Province of El Chaco.

11. In accordance with Article 64 of the Constitution, Provinces elect senators and the only power that the Senate has is to declare that the person elected does not satisfy the conditions for holding the post; it cannot, however, act as an elector.[FN1] The petitioners allege that the Senate exceeded its authority because in the instant case no “titles” were granted by the competent authority to Mr. Sager and Mrs. Ayala of the Justicialista party.

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[FN1] The petitioners cite Articles 1, 5, and 121 of the Constitution.  
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12. The petitioners also state that Article 4 of the Rules of Procedure of the Senate provides that “when any of the senators-elect is rejected, the Speaker of the Senate shall communicate that fact to the Executive Branch and to the provincial governments in order to hold a new election”. In such cases, then, the only admissible course of action would be nullification and to inform the provincial legislatures of those facts in order that they proceed to hold a new election.[FN2]

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[FN2] The petitioners cite the experts on constitutional law, Daniel Sabsay and Germán Bidart Campos.  
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13. As to fulfillment of the requirements of admissibility, the petitioners allege that the domestic remedies available to them have been exhausted. On November 12, 1998, the Governor of the Province of El Chaco requested the Supreme Court of Justice to declare the decision of the Senate unconstitutional and to pass a motion not to innovate in order to prevent the senators allegedly appointed in an irregular manner from being sworn in.

14. On November 24, 1998, the Supreme Court of Justice rejected the petition not to innovate and the complaint because it considered that they involved a political matter not subject to jurisdiction. The following day the senators appointed by the Senate proceeded to be sworn in and instated in their posts.

15. Carlos Angel Pavicich and Olinda Montenegro filed an amparo proceeding with a federal judge with competency over electoral matters against Senate Resolution DR-1083/98 for violation of the rights to participate in government of the senators elected in accordance with the rules. In addition to that amparo proceeding they sought precautionary measures designed to prevent the swearing in of the senators appointed in an irregular manner.

16. On November 23, 1998, the National Electoral Chamber approved the precautionary measure "informing the H[onorable] Senate, personified by its speaker, that it must forbear from carrying out Resolution DR-1083/98 of that H[onorable] Body, which provides the incorporation of Mr. Hugo Abel Sager as titular Senator for the Province of El Chaco and Mrs. Lidia Beatriz Ayala as alternate Senator for that same province for the period 1998-2001, until such time as a final judgement is rendered on the principal cause". The final judgement of December 18, 1998 found that the decision of the Supreme Court of Justice must be obeyed.

17. The Supreme Court of Justice decided not to pronounce judgement on the case, invoking the doctrine on political matters not subject to jurisdiction. The petitioners allege that this is an arbitrary judgement and that the State has violated Articles 8 and 25 of the Convention by infringing upon the rights to due process and to effective judicial protection.

#### B. The State

18. The State recognizes that domestic remedies have effectively been exhausted by the judgement of the Supreme Court of Justice of November 24, 1998, and that the deadline provided for in Article 46(1)(b) of the Convention had been met, and that the matter is not pending in another international proceeding for settlement. However, it requests, on the basis of Article 47(b) that the petitioners' complaint be declared inadmissible because it does not state facts that tend to establish a violation of the rights guaranteed by the Convention and advised that, should the Commission pronounce a decision on the matter, it would be acting as a fourth instance.

19. The State says that in the instant case, both the Alianza Frente de Todos party and the Justicialista Party claimed to have the majority in the Legislature. The Senate decided that the senator's seat for the period 1998-2001 in representation of the Province of El Chaco corresponded to the Justicialista party on grounds of it being the party that had the most number of seats in the Provincial Legislature at the time of the senatorial election and that Alianza Frente de Todos did not have the right to have its candidate appointed.

20. The State alleges that, at the time of the election, the Provincial Legislature had 13 deputies from the Justicialista party, 10 from Alianza Frente de Todos, five from the Unión Cívica Radical (U.C.R.) party, and four from the Acción Chaqueña party. The electoral alliance Frente de Todos is one thing, and the parliamentary faction Alianza Frente de Todos another.

The electoral alliance gave its mandate to 10 deputies, while the parliamentary faction incorporated other forces and, in addition, included five legislators who represent Unión Cívica Radical, together with one from the Acción Chaqueña party.

21. The State affirms that the Senate, in making its decision, abided by what is stated in the text of the Constitution, which refers to "electoral alliances" and not to "parliamentary alliances". It also based its decision on Law 24.444, which imposed the criterion of the "origin of the mandate or of the seat" for the purposes of determining how many seats corresponded to each party or electoral alliance.[FN3]

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[FN3] The State cites the daily minutes of the sessions of the Chamber of Deputies of December 22, 1994 and the daily minutes of the sessions of the Senate of December 15 and 22, 1994.

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22. The State alleges that Law 24.444 refers also to the electoral alliances or parties "that took part in the last provincial election to renew provincial legislative posts." Therefore, only the three parties that took part in the 1997 provincial election may be considered: the Acción Chaqueña party, Alianza Frente de Todos, and the Justicialista party. Unión Cívica Radical, as an individual party, and for as long as the electoral alliance formed for the election of 1997 remained in full effect, could not, on its own, have nominated any candidate to occupy a senator's seat. The inability to obtain the necessary number of legislators, either elected for Unión Cívica Radical in 1995, or incorporated in Alianza Frente de Todos in 1997, has to do with respect for the will of the voters in 1995, who backed the identities and profiles of different parties.

23. The State alleges that the Constitution of the Province of El Chaco was reformed and the power of the Chamber of Deputies to "elect senators and consider their resignations"[FN4] was abolished, it remaining implicit that the Fourth Transitory Clause of the Argentine Constitution would apply directly.[FN5] Furthermore, Article 4 of the Rules of Procedure of the Senate requires that a new member be elected whenever the position of a senator becomes vacant; however, the State advises that the case sub-examine does not involve a situation in which such a rule would apply. The Senate considered as sufficient "title" for the candidacy of Mr. Hugo Sager and Mrs. Lidia Ayala the communication of the Provincial Legislature, which mentioned who voted for each candidate and specified the composition of the parliamentary factions, the choice of party to which the seat pertained, and the respective electoral certification.[FN6]

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[FN4] Clause 26 of former Article 115 – now Article 119.

[FN5] The Supreme Court of Justice maintained, "that makes it possible to rule out possible unfamiliarity with provincial autonomies" (legal reason 12, vote of Justices Nazareno, Moliné O'Connor, and López).

[FN6] The State cites as precedents the decisions of November 30, 1995 in the Province of El Chaco itself and of February 14, 1996 in the Province of Santiago del Estero.

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24. As for the rights to a fair trial and to effective recourse, the State alleges that the Supreme Court of Justice exercised its judicial authority to determine if the proceedings of the Senate were in keeping with the Constitution and legal procedures and regulations, and it concluded that the Senate had acted without overstepping the bounds of the law.[FN7] Furthermore, the judgement of the Supreme Court of Justice is based on grounds that warrant the operative part of the ruling and which, even though unfavorable to the petitioners' claim, cannot for that reason be called arbitrary as there is an "apparent basis" for it.

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[FN7] The State cites legal reasons 5, 8, 10, 12, 13, 14, and 18 of the vote of Justices Nazareno, Moliné O'Connor and López in the judgement of the Supreme Court of Justice.  
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25. The State says that the petitioners, represented by the Government of the Province of El Chaco, had access to a simple and prompt recourse in the form of the declaratory action they filed alleging the unconstitutionality of Senate Resolution DR-1083/98 before the Supreme Court of Justice, and that they had a chance, if they proved violation of the Constitution, of obtaining a judicial decision quashing the actions performed by the Senate.[FN8] The State also alleges that the petitioners' right to defense was also respected.

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[FN8] The State cites legal reasons 18 of the majority vote, and 17 of the vote of Justices Nazareno, Moliné O'Connor and López.  
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#### IV. ANALYSIS

A. Competence of the Commission *ratione loci*, *ratione personae*, *ratione temporis* and *ratione materiae*

26. The Commission is competent to take up the petition lodged by the petitioners. The facts alleged in the petition purportedly harmed individuals subject to the jurisdiction of the State when the duty to respect and ensure the rights recognized in the American Convention was in force for the State. Accordingly the Commission now proceeds to analyze whether the instant case satisfies other requirements provided for in Articles 46 and 47 of the American Convention.

B. Other admissibility requirements for the petition

a. Exhaustion of domestic remedies

27. Article 46(1)(a) of the Convention establishes as a requirement for a petition to be admitted, "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law". In the instant case the petitioners alleged that domestic remedies in relation to the alleged violations were exhausted with the lodging of two petitions. The State declared that the remedies under domestic law had been exhausted in accordance with the provisions of Article 46(1)(a) of the Convention. Therefore, the

Commission concludes that the petition meets the requirement set out in Article 46(1)(a) of the Convention.

b. Period of presentation

28. Article 46(1)(b) of the American Convention provides as a requirement in order for a petition to be admitted that it must be "lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment". The State declares that the petitioners presented themselves to the Commission within the period fixed in the forenamed provision. Accordingly, the Commission concludes that the petition was lodged within the six-month period provided in Article 46(1)(b) of the American Convention.

c. Duplication of proceedings and res judicata

29. Articles 46(1)(c) and 47(d), respectively, of the Convention provide as admissibility requirements that the subject of the petition or communication not be pending in another international proceeding for settlement, nor be substantially the same as one previously studied by the Commission or by another international organization. The Argentine State expressly said that the requirement set out in Article 46(1)(c) had been met. The Commission considers the subject of the petition is not the same as one previously studied by the Commission or by another international organization. Therefore, the Commission concludes that the requirements set out in Articles 46(1)(c) and 47(d) of the Convention have been met.

d. Characterization of the alleged facts

30. Article 47(b) of the Convention provides that the Commission shall consider inadmissible any petition that "does not state facts that tend to establish a violation of the rights guaranteed" by the Convention. The Commission considers that, in principle, the allegations presented by the petitioners refer to facts that tend to establish possible violations of the rights guaranteed in Articles 1, 8, 23, 24, and 25 of the Convention. Consequently, the Commission concludes that the requirement contained in Article 47 (b) of the American Convention has been met.

## V. CONCLUSIONS

31. The Commission concludes that it is competent to take cognizance of this case and that the petition is admissible in accordance with Articles 46 and 47 of the Convention.

32. Based on the foregoing de facto and de jure arguments and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant case admissible in respect of the alleged violations of Articles 1, 8, 23, 24, and 25 of the Convention.

2. To notify the parties of this decision.
3. To continue to examine the merits of the case;
4. To place itself at the disposal of the parties with a view to reaching a friendly settlement on the basis of respect for the human rights enshrined in the Convention and to invite the parties to give their opinion on that possibility, and
5. To publish this decision and include it in the Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of San José, Costa Rica, on this the 19th day of November of 1999. (Signed): Robert K. Goldman, Chairman; Hélio Bicudo, First Vice Chairman; Claudio Grossman, Second Vice Chairman; Commission Members: Alvaro Tirado Mejía, Jean Joseph Exumé and Carlos Ayala Corao.