

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 11/03; Petition 326/01
Session:	Hundred and Seventeenth Regular Session (17 February – 7 March 2003)
Title/Style of Cause:	Xakmok Kasek Indigenous Community v. Paraguay
Doc. Type:	Decision
Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Second Vice-President: Jose Zalaquett; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts.
Dated:	20 February 2003
Citation:	Xakmok Kasek Indigenous Community v. Paraguay, Petition 326/01, Inter-Am. C.H.R., Report No. 11/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003)
Represented by:	APPLICANT: TIERRAVIVA
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I. SUMMARY

1. On May 15, 2001, TIERRAVIVA, an NGO representing the indigenous peoples of Chaco (hereinafter the “petitioners”), lodged a petition with the Inter-American Commission on Human Rights (hereinafter the “Commission” or the “IACHR”) on behalf of the Comunidad Indígena Xakmok Kásek del Pueblo Enxet and its members, (hereinafter the “Xakmok Kásek Indigenous Community” or the “Indigenous Community”), against the Republic of Paraguay (hereinafter the “State” or “State of Paraguay”). The petition alleged that the State of Paraguay had violated the obligation to respect rights (Article 1), the obligation to adopt domestic legal effects (Article 2), the right to legal guarantees (Article 8(1)), the right to property (Article 21), and the right to judicial protection (Article 25) of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”) to the detriment of the Indigenous Community and its members.

2. The petitioners argue that more than 12 years have passed since the requisite proceedings were undertaken to recover part of the ancestral lands of the Xakmok Kásek Indigenous Community, and that to date the situation has not been favorably resolved, despite the fact that the Constitution of Paraguay acknowledges the right of indigenous peoples to develop their lifestyles in their own habitat. With respect to the admissibility requirements, the petitioners contend that their petition is admissible through application of the exceptions to the requirements that remedies under domestic law be exhausted, as stipulated in Article 46(2) of the Convention.

3. In its initial communication, the State declares that given the Foreign Ministry’s policy of cooperating with international human rights organizations, given that the Government of Paraguay places priority on cases that meet the requirements for being handled by an

international institution, and given that the petition presented on behalf of the Xakmok Kásek Indigenous Community fulfilled such requirements, the State wishes to reach a friendly settlement.

4. Having analyzed the positions of the parties and the fulfillment of the requirements provided for in Articles 46 and 47 of the Convention, the Commission concludes that it is competent to hear the complaint and declares the petition admissible under Articles 2, 8(1), 21, and 25 of the Convention, and in accordance with Article 1(1) of the same instrument.

II. PROCESSING BY THE COMMISSION

5. The Commission received the complaint against the State of Paraguay on May 15, 2001 and received additional information from the petitioners on May 25, 2001. On June 6, 2001, the Commission forwarded the pertinent sections of the petition to the State and gave the State two months to respond.

6. On August 1, 2001, the State expressed its desire to reach a friendly settlement and on August 2 the Commission gave the petitioners 15 days to present their observations.

7. On August 27, 2001, the Commission convened the parties to a working group meeting to be held on October 1 during the 113th Regular Session to deal with issues linked to the petition. Said meeting was subsequently postponed until November 13.

8. On September 17, 2001, the Commission received a brief from Mr. Roberto C. Eaton K. in response to the petition. On September 20, the Commission informed Mr. Eaton that the parties to the proceeding under the inter-American system of human rights were the presumed victims, on the one hand, and the respective State, on the other. For this reason, the Commission could not consider Mr. Eaton's brief of September 17 as a response to the petition. On October 31, 2001, Mr. Eaton requested that the Commission receive his previous presentation on an amicus curie basis.

9. On November 13, 2001, at a working meeting during the 113th Regular Session of the Commission, the parties signed a "Friendly Settlement Agreement".

10. On November 21, 2002, the petitioners informed the Commission of their decision to withdraw from the friendly settlement process. On December 10, notice of their decision was forwarded to the State, which was requested to present its admissibility arguments within 30 days.

11. On December 8, 2002 the Commission, through the Executive Secretariat, visited the Community Xakmok Kásek.

12. On January 15 and 16, 2003, the State sent additional information to the Commission.

A. Friendly Settlement Process

13. In its first written response, the State requested the IACHR to mediate in order to help the parties reach a friendly settlement. On November 13, 2001, during the 113th Regular Session of the Commission, the parties signed a “Friendly Settlement Agreement” in which they agreed to initiate negotiations as part of the friendly settlement process. The parties held meetings in Asunción, Paraguay within the framework of this process.

14. On November 21, 2002, the petitioners informed the Commission of the decision of the Xakmok Kásek Community to withdraw from the process of direct negotiations with the government and to consider the friendly settlement agreement subscribed by the two parties on November 13, 2001 to be null and void. They based their decision on the lack of results obtained within the framework of the friendly settlement solution offered by the State of Paraguay, the time elapsed and the lack of concrete measures undertaken to remedy the stated violations.

III. THE PARTIES’ POSITIONS

A. The petitioners

15. The petitioners allege that the State of Paraguay has violated Articles 1(1), 2, 8(1), 21, and 25 of the Convention, to the detriment of the Xakmok Kásek del Pueblo Enxet Indigenous Community and its members, by failing to return to the Community part of its ancestral lands, whose ownership and property rights were disentitled without compensation of any sort through continuous acts of dispossession in the form of the confiscation and sale of its lands to third parties by the Government of Paraguay. The petitioners add that although the Constitution of Paraguay recognizes the right of indigenous peoples to develop their lifestyles in their own habitat,[FN1] to date the State has failed to return said ancestral lands to the Indigenous Community.

[FN1] Article 63 About Ethnic Identity

The right of Indian peoples to preserve and to develop their ethnic identity in their respective habitat is hereby recognized and guaranteed. They also have the right to freely apply their systems of political, socioeconomic, cultural, and religious organization, and to voluntarily observe customary practices in their domestic coexistence as long as they do not violate the fundamental rights established by this Constitution. Indian customary rights will be taken into account when deciding conflicts of jurisdiction.

Article 64 About Property Owned by the Community

Indian peoples have the right, as communities, to a shared ownership of a piece of land, which will be sufficient both in terms of size and quality for them to preserve and to develop their own lifestyles. The State will provide them with the respective land, free of charge. This land, which will be exempt from attachments, cannot be divided, transferred, or affected by the statute of limitations, nor can it be used as collateral for contractual obligations or to be leased. It will also be exempt from taxes.

The removal or transfer of Indian groups from their habitat, without their express consent, is hereby prohibited.

16. The petitioners maintain that in 1990, the Indigenous Community, through its leaders, initiated administrative proceedings with the competent agencies, namely the Rural Welfare Institute (IBR) and the Paraguayan Institute of Indigenous Affairs (INDI), with the objective of obtaining restitution of part of its ancestral lands. These proceedings were undertaken within the framework of the procedure established in Law N° 904/81 on the Status of Indigenous Communities, which led to the opening of IBR administrative inquiry N° 15.032/90.

17. The petitioners add that after various years of procedural arguments and the lack of resolution through administrative channels, on June 25, 1999 the leaders of the Indigenous Community requested the Senate to vote a law to expropriate approximately 10,700 hectares corresponding to part of its traditional habitat. The draft law was sponsored by Senator Nidia Ofelia Flores. On November 16, 2000, the Senate rejected the request for expropriation through Resolution N° 693.

18. With respect to the exhaustion of domestic remedies, namely the administrative and legislative procedures contemplated in Paraguayan domestic legislation, the petitioners contend that the Xakmok Kásek Community has tried in every possible way, in conformity with the principles of international law, to exercise its property rights to its traditional lands.

19. The petitioners add that although the Community had access to the domestic remedies provided for under Paraguayan legislation and had pursued these remedies in a timely and substantive fashion, these efforts had not resulted in the effective restitution of the rights of the Community to its lands. They further state that more than 12 years have passed since the Indigenous Community initiated the necessary proceedings to reclaim part of its traditional habitat from the State of Paraguay and that to date the Community has been unable to achieve a definitive solution to its petition.

B. The State

20. The State has expressed the following in its initial written response:

...Cases brought forward that fulfill the requirements for being handled by an international organization are a matter of priority for the Government of Paraguay and must therefore be dealt with in order to ensure progress in improving the human rights situation in the country.

Since this case fulfills these requirements, the Government of Paraguay wishes to reach a friendly settlement with the petitioners and therefore requests the Inter-American Commission on Human Rights to mediate in order to help achieve such an objective.

21. In its observations sent on January 15 and 16, 2002, the State deplored the decision of the petitioners to withdraw from the friendly settlement process and reiterated its commitment to deal with the claims concerning the rights of the indigenous peoples of Paraguay, through measures being instituted by government bodies to ensure the effective enjoyment of the right to community ownership of the lands of the Xakmok Kásek Community, as well as in connection with other rights enshrined in the National Constitution, the American Convention and Agreement N° 169 of the International Labour Organization.

22. With respect to this point, the State added that the President of the Paraguayan Institute of Indigenous Affairs (INDI), Colonel Oscar Centurión, was currently taking steps to acquire a 4,000 hectare property which is a segment of ranch N° 1418 and which, when combined with a parcel of land adjacent to the above property and currently owned by INDI, could be offered to the Xakmok Kásek Community.

23. Without prejudice to the above, the State contends that the petition is unlikely to be declared admissible because the petitioners have failed to exhaust domestic remedies, pointing out that the Republic of Paraguay possesses an adequate legal framework to protect the right or rights alleged by the petition in question to have been violated, specifically the right to community property.

24. In respect of the first argument, the State says that the petitioners did not exhaust domestic remedies and identifies three pending remedies: first, administrative measures to purchase a fraction of the 4,000 hectares of the property called “Potrerito,” so that it may be definitively transferred and its title assigned to the indigenous community are still pending in the administrative body—INDI. Second, should the owners refuse to offer the claimed part of the property for sale, the National Congress will be asked to pass an expropriation bill; and, third, the recourse established under International Labour Organization Convention 169 on Indigenous and Tribal Peoples, in accordance with Article 14 and 15 of Act 904/81 on the Statute of Indigenous Communities, has yet to be exhausted. Its purpose is to request the prior, free, and express consent of the community for a possible transfer to other lands of equal size and quality.

25. The State also contends that the legal framework of the Republic of Paraguay is such that it can protect the right or rights allegedly violated in the present petition, to wit, the right to community property of the Xakmok Kásek community and bases its assertion on the fact that the institution charged with handling matters concerning the land requested by the community—INDI—is currently continuing to make arrangements for acquisition of the property claimed by the indigenous community and, with respect to the delay in the final resolution of the community’s petition, says that it has been justified for the reasons given above.

26. At the same time, the State maintains that the delay in successfully completing proceedings with the administrative authorities is due to the fact that purchasing the lands to be turned over to the indigenous communities requires negotiations with the current owners to convince them to sell. In the event that they refuse to sell, it will be necessary to bring draft legislation before the legislative authorities with a view to requesting expropriation of the land. In such cases, the National Congress has the power to approve or reject the respective draft legislation.

27. Regarding the allegation of new facts that, in the view of the State, have legal consequences that warrant consideration by the Commission, the State explains that the former owner of the area claimed by the Xakmok Kásek community transferred its title to a Mennonite cooperative, which means that negotiations must be reinitiated with the new owners to convince them to sell the claimed portion to INDI, thus enabling its subsequent transfer to the indigenous community. It adds in this regard that, according to Paraguayan law, the “new facts” argument is

recognized in positive law and, in the present case, could be applied supplementally in this quasi-judicial proceeding to afford INDI more time to purchase the claimed property in 2003.

28. The State, in its written arguments, places on record that it has not obstructed or hampered the administrative proceeding in violation of the legitimate rights of the Xakmok Káseks, through any government institution or its agents.

IV. ANALYSIS ON ADMISSIBILITY

A. The Commission's competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*

29. The petitioners are entitled to lodge complaints with the IACHR under Article 44 of the American Convention[FN2] and, as concerns the presumed victims, i.e. the Xakmok Kásek Community and its members, the State of Paraguay has undertaken to respect and ensure the rights enshrined in the Convention. With respect to the State, the Commission observes that Paraguay is a State Party to the American Convention, having ratified it on August 24, 1989. Therefore, the Commission has competence *ratione personae* to examine the complaint.

[FN2] The petitioners provided censuses of the Xakmok Kásek Community for the years 1995 and 1998.

30. The Commission has competence *ratione loci* to hear the petition inasmuch as the alleged violations of the rights protected under the American Convention have occurred within the territory of a State Party to the Convention.

31. The Commission has competence *ratione temporis* to address the facts alleged in the petition since they took place when the State of Paraguay was bound to respect and ensure the rights established in the Convention.[FN3]

[FN3] Paraguay ratified the American Convention of Human Rights on August 24, 1989.

32. Finally, the Commission has competence *ratione materiae* because the petition alleges violation of rights protected under the American Convention.

B. Other admissibility requirements

1. Exhaustion of remedies under domestic law

33. Article 46(1)(a) of the Convention, concerning admission of a petition, requires that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. Article 46(2)(a) provides that the rule requiring

exhaustion of domestic remedies will not be applicable when: a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of its rights has been denied access to the remedies under domestic law or has been prevented from exhausting them, and c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

34. With respect to the recovery of the ancestral lands of the Indigenous Community--the main grounds for the petition--it is the Commission's understanding that two avenues of recourse exist in Paraguay, one through the INDI-IBR and the other via the National Congress. The petitioners have pursued both avenues.

35. Indeed, the record shows that in 1990 the procedures outlined in the domestic legislation were undertaken with the respective administrative body, i.e., INDI-IBR, with a view to reclaiming the traditional habitat of the Community. To date, no definitive solution has been reached concerning the petition. Similarly, the petitioners' attempt to resolve the matter through the Senate of Paraguay was also unsuccessful because successive pieces of draft legislation to expropriate the property were rejected by the Senate, most recently through a resolution adopted on November 16, 2000. Consequently, 12 years after having initiated the relevant procedures, the Xakmok Kásek Indigenous Community has yet to reclaim its lands.

36. In its arguments on admissibility, the State said that the petitioners had not exhausted those two domestic remedies and that the present petition was therefore inadmissible. The Commission notes in this connection that the State, alleging failure to exhaust remedies, is compelled to demonstrate the effectiveness of the remedies that, in its view, have not been exhausted. In its arguments, the State has not provided evidence to demonstrate that affirmation. Indeed, the remedies mentioned by the State have to do with powers of the Executive, i.e. both arrangements for the acquisition of the area claimed by the community and the possibility of filing a new bill for expropriation in the National Congress. The two remedies mentioned by the State have already been pursued unsuccessfully in the domestic proceeding and the State has not indicated that they might be effective.

37. As for the alleged non-exhaustion of the mechanism established in ILO Convention 169, in accordance with the Paraguayan law on the Statute of Indigenous Communities, under which the consent of the indigenous community will have to be sought for a possible transfer to lands other than those claimed, the Commission finds that this is not a domestic remedy and that consequently it need not be exhausted by the petitioners.

38. Given the characteristics of the case, the Commission therefore considers that the remedies under domestic law have been pursued and that there has been unwarranted delay in reaching a final judgment as to these remedies; accordingly, the petitioners are exempt from the rule requiring exhaustion of domestic remedies, as provided for in Article 46(2)(c).

2. Time period for presenting a petition

39. Under Article 46(1)(b), the Convention requires that a petition be lodged within a period of six months from the date on which the party alleging violation of its rights was notified of the

final judgment. Article 32 of the Rules of Procedure of the Commission states that “in those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case”.

40. In the present case, the Commission concluded *supra* on the applicability of the exception to the requirement concerning the exhaustion of domestic remedies. In this respect, the Commission considers that the petition presented to the IACHR by the petitioners on May 15, 2001 was lodged within a reasonable period of time, taking into account the specific circumstances of the case, particularly the fact that on November 16, 2000, the Senate rejected the request for expropriation.

3. Duplication of Proceedings

41. Articles 46(1)(c) and 47(d) of the Convention stipulate as admissibility requirements that the subject matter of the petition or communication must not be pending in another international proceeding for settlement and not be substantially the same as another previously studied by the Commission or by some other international organization.

42. The Commission’s inquiry has not revealed that the petition is pending in another international proceeding for settlement or that the petition is substantially the same as another previously studied by the Commission or by some other international organization.

43. The Commission therefore concludes that the requirements contained in Articles 46(1)(c) and 47(d) of the Convention have been fulfilled.

4. Characterization of the facts alleged

44. 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 the Convention guarantees”.

45. In connection with the allegation of new facts raised by the State to the effect that the owner of the property claimed by the community transferred it and that more time is therefore needed to negotiate with the new owners and thus secure the sale to INDI for subsequent transfer to the community, the Commission considers that said allegation does not affect the facts that could represent a violation of the rights ensured by the Convention, considering that the facts alleged in the petition persist and that the change of owner of the area claimed by the indigenous community does not affect the facts on which the petition is based.

46. The Commission considers that *prima facie* the facts alleged by the petitioners tend to establish a violation of Articles 2, 8(1), 21, 25 and 1(1) of the Convention, including the obligation to adopt domestic legal effects, the right to legal guarantees, the right to judicial protection, and the right to private property, to the detriment of the victims in this case.

47. The Commission therefore concludes that the petition satisfies the requirements stipulated in Articles 47(b) and (c) of the American Convention.

V. CONCLUSIONS

48. The Commission concludes that it has competence to take cognizance of the complaint presented by the petitioners and that the petition is admissible in conformity with Articles 46 and 47 of the Convention.

49. Based on the foregoing arguments of fact and of law, and without prejudging the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition admissible as regards the alleged violations of Articles 2, 8(1), 21, 25 and 1(1) of the American Convention, to the detriment of the Xakmok Kásek del Pueblo Enxet Indigenous Community and its members.
2. To notify the State of Paraguay and the petitioners of its decision.
3. To proceed with the analysis of the merits of the case.
4. To publish this decision and include it in the Commission's Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights on the 20th day of February of 2003. (Signed): Juan Méndez, President; Marta Altolaquirre, First Vice-President; José Zalaquett, Second Vice-President; Robert K. Goldman, Julio Prado Vallejo and Clare K. Roberts, Commissioners.