

REPORT N° 76/03¹
PETITION 12.054
ADMISSIBILITY
MARIA SALVADOR CHIRIBOGA AND GUILLERMO SALVADOR CHIRIBOGA
ECUADOR
October 22, 2003

I. SUMMARY

1. On June 3, 1998, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the IACHR"), received a complaint alleging violation of rights protected in the American Convention on Human Rights (hereinafter "the American Convention") by the Republic of Ecuador (hereinafter "the State" or "Ecuador") to the detriment of Ms. Maria Salvador Chiriboga and Mr. Guillermo Salvador Chiriboga (hereinafter "the putative victims"), who are Ecuadorian nationals and siblings, represented by Mr. Alejandro Ponce Villacís and Mr. Juan Manuel Marchán, their lawyers, (hereinafter "the petitioners"). The petition claims that the State of Ecuador violated Articles 21, 8(1), 25, and 2 to the detriment of the petitioners, in disregard of the international obligations incumbent upon the State, pursuant to Article 1(1) of the American Convention.

2. The putative victims maintain that their property has been confiscated, in that they have been deprived of the use and enjoyment of their land without having received just compensation from the State, as the law of Ecuador requires. In spite of the fact that they have sought judicial remedies since the year 1994, the Ecuadorian courts have failed to produce a final resolution of the issue or to have paid them just compensation for the property.

3. On May 13, 1991, the then Municipal Council of Quito (*Concejo Municipal de Quito*) resolved to declare certain properties to be of public utility in order to expropriate them, for the purpose of converting approximately 571 hectares into a public park to be named "Metropolitan." Pursuant to the law, the affected landowners could appeal the decision to the Ministry of Government. Six years later, on September 16, 1997, the Ministry issued "Ministerial Agreement 408" annulling the decision to declare the property to be of public utility. Two days thereafter, the same Ministry issued "Ministerial Agreement 417" rendering without effect the previous agreement.

4. The petitioners have filed multiple lawsuits in this matter, commencing in 1994. None of these lawsuits has resulted in a final decision. Attempts to reach a mediated friendly settlement also have failed to bear fruit. The petitioners allege that their property has been expropriated without payment of just compensation, in violation of Article 21(2) of the American Convention. In addition, petitioners allege that the judicial proceedings failed to be completed and failed to produce a resolution of the matter, in violation of Article 8(1), that the writ of *amparo* which they presented and which was resolved by the Constitutional Tribunal, did not consider the alleged violations of the American Convention raised by the petitioners, in violation of Article 25, and that Article 794 of the Ecuadorian Code of Civil Procedure violates Articles 25 and 2, all in alleged violation of the international obligations incumbent upon the State, pursuant to Article 1(1) of the American Convention. The State, for its part, argued that the petition is inadmissible for failure to exhaust domestic remedies and for failure to denounce facts that constitute a violation of the American Convention.

5. The Commission decides in this report that the petition meets the admissibility requirements set forth in Article 46 of the American Convention. Therefore, the Commission decides to declare the petition admissible, to open the case and to notify the parties of this decision, and to continue with its analysis of the merits regarding the alleged violations of Articles 2, 8(1), 21(2), 25(1) and 1(1) of the American Convention. The Commission also decides to publish the instant report.

¹ Dr. Julio Prado Vallejo, an Ecuadorian national, did not participate in the discussion of this case in accordance with Article 17 of the Rules of the Procedure of the IACHR.

II. PROCESSING BY THE COMMISSION

6. The Commission received this complaint on June 3, 1998. On October 2, 1998, the Commission communicated the petition to the State and requested a response within 90 days. On December 8, 1998, the Commission received the response from the State, which included information from the economist Roque Sevilla Larrea, the Mayor of Quito. This information was transmitted to the petitioners on December 31, 1998 with a request that observations be presented within 30 days. On May 3, 1999, the Commission received the petitioner's observations which are dated March 8, 1999. These observations, in turn, were communicated to the State on July 13, 1999 with a request for any further information to be presented within 30 days. On September 22, 1999, the Commission received a second response from the State, which again included information from Mr. Roque Sevilla Larrea, the Mayor of Quito.

Friendly Settlement

7. On October 5, 1999, the Commission held a hearing on the case, during which the Mediation Center of the Attorney General's Office (*Centro de Mediación de la Procuraduría General del Estado*) offered to mediate the dispute and to begin a dialogue between the parties in order to reach a friendly settlement of the matter. The parties agreed to inform the Commission of their respective proposals and of the estimated time that they believed that the mediation process would take. On October 13, 1999, the Commission requested the parties to inform it of their proposal and of the estimated time within 30 days. On November 29, 1999, the Commission received a letter from Dr. Ramon Jiménez Carbo, the Attorney General, which was dated November 18, 1999, which included copies of the notifications to the parties for the initiation of the mediation process.

8. On March 2, 2000, the Commission held a second hearing on the case. On June 16, 2000 the petitioners presented their observations to the State's response and also to the positions taken by the State during the hearing held on March 2nd. These observations were transmitted to the State on August 14, 2000 with a request for any further observations to be presented within 30 days. On January 17, 2001 the petitioners requested another hearing before the Commission, which was rejected due to the large number of requests for hearings at that session. On January 26, 2001, the Commission received a third response from the State, dated January 24, 2001 in which it reiterated its interest in seeking a friendly settlement of the matter, which was transmitted to the petitioners on September 25, 2001. The State's response included a letter from the Attorney General to the Executive Secretary of the Commission listing the judicial actions that had been undertaken by the petitioners in national courts and noting that domestic remedies had not been exhausted.

9. The Commission received additional information from the petitioners on February 22, 2001 and April 26, 2001. The Commission received a fourth response from the State dated September 6, 2001 in which it ratified its earlier submissions to the effect that the Ecuadorian State acted pursuant to the constitutional laws and norms which govern the State. The pertinent parts of this response were transmitted to the petitioners on September 25, 2001. On October 27, 2001 the Commission received the observations of the petitioners to the fourth response of the State, which were transmitted to the State on October 31, 2001, with a request for any further observations to be presented within 30 days. The Commission received additional information from the petitioners on February 5, 2002, July 2, 2002, July 31, 2002 and November 5, 2002.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

10. On May 13, 1991, the then Municipal Council of Quito (*Concejo Municipal de Quito*) resolved to declare certain properties to be of public utility in order to expropriate them, for the purpose of converting approximately 571 hectares of land into a public park. Included in

the properties to be expropriated was a plot of 60 hectares, designated N° 108, which was the property of Mr. Guillermo Salvador Tobar, the father of the petitioners. This extensive property is also known as "Batán of Merizalde," and now forms part of the Metropolitan Park. Mr. Salvador Tobar is dead and Ms. Maria Salvador Chiriboga and Mr. Guillermo Salvador Chiriboga are his heirs. In reaction to the administrative act taken, some of the affected landowners appealed the decision to the Ministry of Government, pursuant to Article 253 of the Law of Municipal Regimes. Six years later, on September 16, 1997, the Ministry issued "Ministerial Agreement 408" annulling the decision to declare the property to be in the public utility. Two days thereafter, the same Ministry issued "Ministerial Agreement 417" rendering without effect the previous agreement. The petitioners have filed numerous law suits, some of which are still pending, but all of which have the same purpose, namely, to have the Ministerial Agreement 417 declared illegal and the Ministerial Agreement 408 declared valid, annulling the decision to declare their property to be of public utility.

11. On May 11, 1994 the petitioners filed a claim for a "subjective or full jurisdiction" remedy (*recurso subjetivo o de plena jurisdicción*) with the First District Administrative Court against the former Municipality of Quito (now the Municipality of the Metropolitan District of Quito) for having declared the property of Guillermo Salvador Tobar, as well as others, to be of public utility, although he had died by that time and was, therefore, not the owner of the property. The claim was also based on the State's failure to comply with certain legal requirements in declaring the property to be of public utility, including the failure to apply several provisions contained in the Public Procurement Law, its Regulations, and the Law on Financial Administration and Control, as well as on failure to notify the petitioners of the administrative ruling.

12. On June 7, 1997, the Municipality took control over the property and began felling trees. Park employees advised the petitioners that they could not access their property because the Municipality was making some necessary modifications. The Municipality brought suit (No. 13000-96) against the petitioners, before the Judge of the Ninth Civil Law Court in Quito, for expropriation of the property. On November 4, 1997, the Judge revoked the ruling on admissibility of the suit in the aforementioned case, due to the State's failure to comply with the certain requisites set forth in the Constitution and in Article 42 of the Public Procurement Law. Consequently, the authorization to immediately occupy the property and the declaration of the property to be of public utility, were overturned. The petitioners state that despite this judicial decision in their favor, the Municipality continues to occupy the property.

13. In spite of the fact that the Municipality has arbitrarily deprived the petitioners of the use and enjoyment of their property, the Municipality continues to assess taxes on it from the petitioners.

14 The petitioners point out that among the other properties that were included in the statement of May 13, 1991 declaring the property to be of public utility, a plot known as "Urban Market" and today known as "The Gardens of Batán", was authorized for development and today buildings have been constructed on it. This development was built on land belonging to the Isaías Mahuad family and the petitioners note that since August 10, 1992, Dr. Jamil Mahuad has been the Mayor of the Municipality of Quito. Consequently, the petitioners requested authorization to develop a portion of their property, and this request was denied. On January 12, 1995, the petitioners filed a "subjective or full jurisdiction" claim with the First District Administrative Court against the Council of the Metropolitan District of Quito and its Mayor, in order to obtain a ruling annulling the administrative act of the Planning and Nomenclature Commission of September 7, 1994, which contains a report opposing the request to build on approximately three hectares belonging to the petitioners. At the time of presentation of the instant complaint, the resolution of this suit was still pending.

15. On July 9, 1997, the petitioners filed a claim for the protection of their constitutional rights (*recurso de amparo constitucional*) with the First District Administrative Court, alleging a violation of rights guaranteed in the Constitution, Article 21 of the American Convention on Human Rights, and in the American Declaration of the Rights and Duties of Man. The First

District Administrative Court disqualified itself from hearing the *amparo* claim. This decision was appealed to the Constitutional Court, which, on September 15, 1997, ruled that the lower court could not disqualify itself from hearing the claim.

16. In a ruling issued on October 2, 1997, the First District Administrative Court rejected the *amparo* claim, arguing that there had been no illegitimate exercise of authority and declaring that all the actions taken by the various authorities involved were lawful. An appeal against this decision of the First District Administrative Court was filed with the Constitutional Court, which denied the *amparo* appeal presented and affirmed the lower court's ruling.

17. It should be noted that there are two sets of proceedings in this case. The first involves the reaction to the administrative act taken and the appeal to the Ministry of the Interior (*Ministerio de Gobierno*); the second involves the "subjective or full jurisdiction" claims filed with the First District Administrative Court. Whereas the first set is administrative, the second set is judicial, in nature.

18. The essence of the complaint is that the putative victims have been deprived of the use and enjoyment of their property without having received "just compensation" for the expropriation, in alleged violation of Article 21 of the American Convention. The petitioners do not challenge the power of the State to deprive them of their property for the greater good of the public interest. The discussion, they argue, is over the issue of just compensation, or more precisely, the amount of that compensation. The petitioners allege that the just compensation for the property must be paid before the expropriation proceedings can be initiated. The petitioners allege that they have been deprived of their property without the State respecting the "forms established by law" as required by the American Convention. In addition, since 1994, the petitioners have initiated a number of proceedings, which, as a result of delays have not resulted in judgments, in alleged violation of Article 8(1) of the American Convention. The petitioners alleged also that in the writ of *amparo* that they presented, which was decided by the Constitutional Court, the Court failed to consider the alleged violations of the American Convention, in violation of Article 25 of the Convention. The petitioners also alleged that the failure to resolve the administrative remedy they presented to have the declaration that the property was of public utility nullified violates the State's undertaking "to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State" set forth in Article 25 of the Convention; and further, that the nullification of Ministerial Agreement 408, two days after it was issued, not only violated domestic law but also violated the State's undertaking "to ensure that the competent authorities shall enforce such remedies when granted" also violates Article 25, and in addition, Article 2 of the Convention. Further, the petitioners allege that Article 794 of the Ecuadorian Code of Civil Procedure provides that the declaration of public or social utility made by the above mentioned entities, in order to proceed to expropriation, may not be the subject matter of judicial review, but only administrative review. Petitioners allege that this norm violates article 25 which guarantees the right to judicial protection and also violates Article 2 of the American Convention because it prevents the petitioners from initiating a judicial action against the declaration of public utility. The petitioners alleged that the State of Ecuador violated Articles 2, 8, 21, and 25 to the detriment of the Chiriboga siblings, in connection with the obligations incumbent upon a State party, set forth in Article 1(1) of said Convention

B. Position of the State

19. The State, for its part, replied that the expropriation proceedings were carried out pursuant to the law and regulations in force at the time, but that the putative victims were unwilling to accept the amount of compensation determined by the Municipality, pursuant to the norms of Article 254 of the Law of Municipal Regimes and Articles 801 and 802 (2) of the Code of Civil Procedure. Article 794(2) of the Code of Civil Procedure expressly states that the declaration of public utility " . . . shall not be a matter for judicial consideration, but only for administrative review." The petitioners filed for administrative review, but the proceedings have not yet been completed, according to the State, due to the "serious problems afflicting the administration of justice in Ecuador." The only proceeding which has resulted in a final

judgment is the petitioners' filing of a writ of *amparo* before the Constitutional Court, which was rejected on February 2, 1998.

20. In the third response from the State, received on November 29, 1999, the Attorney General informed the Commission that the Mediation Center of the Attorney General's Office was available to attempt a friendly settlement in this case. The mediator appointed by the State was Dr. Alvaro Galindo Cardona. In its fourth response, dated January 24, 2001, the State raised the issue that internal remedies had not yet been exhausted, which was a *sine qua non* requisite for the Commission to declare a case admissible. The State also expressed its disposition to continue the dialogue in order to reach a friendly settlement of the matter. In its fifth and final response, dated September 6, 2001, the State reiterated that it had acted respecting the constitutional and legal norms of the State. It noted that since 1993 it had engaged in transactional arrangements with the owners of 50% of the land which is comprised within the limits of the Metropolitan Park. The Municipality, the response noted, is continuing to negotiate with the owners, and in the next few months it expected to consolidate the property of approximately 70% of the Park. As regards the instant case, the State concluded that the Municipality was still engaged in and interested in concluding negotiations with the petitioners.

IV. ANALYSIS OF ADMISSIBILITY

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

21. The petitioners are entitled to lodge petitions with the IACHR under Article 44 of the American Convention. The petition cites as alleged victims two persons on whose behalf Ecuador undertook to respect and ensure the rights recognized in the American Convention. Insofar as the State is concerned, the Commission finds that Ecuador has been a state party to the American Convention since December 28, 1977, when it deposited its respective instrument of ratification. Accordingly, the Commission has competence *ratione personae* to examine the petition.

22. The Commission has competence *ratione loci* to take up the petition because it claims violations of rights protected in the American Convention that allegedly took place in the territory of a state party to that treaty.

23. The Commission has competence *ratione temporis* inasmuch as the duty to respect and ensure the rights recognized in the American Convention was in force for the State at the time when the alleged violations contained in the petition are said to have occurred.

24. Finally, the Commission has competence *ratione materiae* because the petition alleges violations of human rights set forth in and protected by the American Convention.

B. Other admissibility requirements for the petition

a. Exhaustion of domestic remedies

25. The State raised the issue of the failure of the petitioners to exhaust domestic remedies in this case. According to the State, the petitioners only had administrative remedies available to challenge a declaration of public utility, due to article 794(2) of the Code of Civil Procedure, which expressly excludes judicial remedies. The petitioners filed a writ of *amparo* which raised the issues presented in this case, specifically that the petitioners were denied the protections guaranteed by the Ecuadorian Constitution and by the international treaties that Ecuador is a party to, as regards the right not to be deprived of one's property except upon payment of just compensation. The *amparo* was denied by the Constitutional Court of Ecuador on February 2, 1998. The petitioners also filed administrative remedies, yet according to the State, these

proceedings have not yet been completed, due to the "serious problems afflicting the administration of justice in Ecuador." Consequently, the Commission finds that the petitioners are not required to exhaust domestic remedies due to the exception provided in Article 46 (2)(c) of the American Convention which provides that domestic remedies need not be exhausted for the purposes of admissibility when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

b. Timeliness of the petition

26. Article 46(1)(b) of the American Convention provides that the petition must be lodged within a period of six months from the date on which the petitioner is notified of the final judgment that exhausted domestic remedies. Since the Commission considers that domestic remedies were exhausted by means of the writ of *amparo* and the Constitutional Court denied the writ on February 2, 1998, the petitioners are within the six months rule since they presented their petition on June 3, 1998.

c. Duplication of proceedings and *res judicata*

27. The Commission finds that the subject matter of the petition is not pending in another international proceeding for settlement, nor is the petition substantially the same as one previously studied by the Commission or by another international organization. Accordingly, the requirements set forth in Articles 46(1)(c) have also been met.

d. Characterization of the alleged facts

28. The Commission finds that the allegations, if proven, could establish violations of the rights recognized in Articles 21(2), 8(1), 25, and 2 of the American Convention in connection with Article 1(1) thereof. The petitioners maintain that they are victims of an outright confiscation, in that they have been deprived of the use and enjoyment of their property without having received just compensation from the State, as the law of Ecuador and the international treaties to which Ecuador is a party, require. In spite of the fact that the petitioners have sought judicial remedies since 1994, the Ecuadorian courts have failed to resolve the expropriation issue or to have paid them just compensation for the property. Consequently, the petition is not barred as inadmissible under Articles 47(b) or (c) of the Convention.

V. CONCLUSION

29. Based on the factual and legal arguments given above and without prejudging the merits of the matter, the Commission concludes that this case meets the admissibility requirements set forth in Article 46 of the American Convention.

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
DECIDES:**

1. To declare this case admissible as regards Articles 21(2), 8(1), 25, 2 and 1(1) of the American Convention.
2. To transmit this report to the petitioner and the State.
3. To continue with the analysis of merits in this case.
4. To publish this report and to 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 in the city of Washington, D.C., on the 22nd day of the month of October, 2003. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.