



Advancing indigenous peoples' rights through regional human rights systems: The case of Paraguay

Maximiliano Mendieta Miranda
and Julia Cabello Alonso

iied

tierraviva
a los pueblos indígenas del Chaco



Legal tools for citizen empowerment

Around the world, citizens' groups are taking action to change the way investment in natural resources is happening and to protect rights and the environment for a fairer and more sustainable world. IIED's Legal Tools for Citizen Empowerment initiative develops analysis, tests approaches, documents lessons and shares tools and tactics amongst practitioners (www.iied.org/legal-tools).

The Legal Tools for Citizen Empowerment series provides an avenue for practitioners to share lessons from their innovative approaches to claim rights. This ranges from grassroots action and engaging in legal reform, to mobilising international human rights bodies and making use of grievance mechanisms, through to scrutinising international investment treaties, contracts and arbitration.

This paper is one of a number of reports by practitioners on their lessons from such approaches. Other reports can be downloaded from www.iied.org/pubs and include:

- Connected and changing: An open data web platform to track land conflict in Myanmar. 2016. Knapman, C. and Wai Wai, L.
- Pillars of the community: how trained volunteers defend land rights in Tanzania. 2016. Massay, G.
- Genre et foncier : l'expérience des consultations juridiques gratuites au Sénégal. 2016. Kébé Diouf, K. In French only.
- Mainstreaming gender in Tanzania's local land governance. 2016. Kisambu, N.
- Community-based advocacy: Lessons from a natural gas project in Mozambique. 2015. Salomão, A. Also available in Portuguese and in French.
- Bringing community perspectives to investor-state arbitration: the *Pac Rim* case. 2015. Orellana, M. *et al.* Also available in Spanish.
- Advocacy on investment treaty negotiations: Lessons from Malaysian civil society. 2015. Abdul Aziz, F.

In addition, under our Land, Investment and Rights series, we generate evidence around changing pressures on land, multiple investment models, applicable legal frameworks and ways for people to claim rights.

Reports in the Land, Investment and Rights series can be downloaded from www.iied.org/pubs. Recent publications include:

- Community perspectives in investor-state arbitration. 2017. Cotula, L. and Schröder, M.
- Strengthening women's voices in the context of agricultural investments: Lessons from Kenya. 2016. Chan, M.-K. and Mbogoh, A.
- Strengthening women's voices in the context of agricultural investments: Lessons from Tanzania. 2016. Chan, M.-K. *et al.*
- Land investments, accountability and the law: Lessons from West Africa. 2016. Cotula, L. and Jokubauskaite, G. Also available in French.
- Land investments, accountability and the law: Lessons from Cameroon. 2016. Kenfack, P.-E. *et al.* Also available in French.
- Land investments, accountability and the law: Lessons from Ghana. 2016. Yeboah, E. and Kakraba-Ampeh, M. Also available in French.
- Land investments, accountability and the law: Lessons from Senegal. 2016. Fall, M. and Ngaido, M. Also available in French.

To contact IIED regarding these publications please email legaltools@iied.org

Advancing indigenous peoples' rights through regional human rights systems: The case of Paraguay

Maximiliano Mendieta Miranda
and Julia Cabello Alonso

Acknowledgements

The authors would like to thank the communities for their example of struggle and resistance and the team at Tierraviva for their commitment and dedication to their work, beyond the call of duty.

Dedicated to the memory of Tomás Galeano.

This report was produced with the generous support of Danida (Denmark), Irish Aid and Sida (Sweden). However, the views expressed do not necessarily represent those of the institutions involved.

First published by the International Institute for Environment and Development (UK) in 2017
Copyright © International Institute for Environment and Development (IIED)
All rights reserved

ISBN: 978-1-78431-460-6

IIED order no.: 17602IIED

For copies of this publication, please contact IIED:
International Institute for Environment and Development
80-86 Gray's Inn Road
London WC1X 8NH
United Kingdom

Email: newbooks@iied.org

Twitter: @iied

Facebook: www.facebook.com/thelIIED

Download more publications at www.iied.org/pubs

A catalogue record for this book is available from the British Library.

Citation: Mendieta Miranda, M. and Cabello Alonso, J. (2017) Advancing indigenous peoples' rights through regional human rights systems: The case of Paraguay. IIED, London.

Cover photo: Women from the indigenous community of Sawhoyamaxa at the edge of the road that runs from Pozo Colorado to Concepción, July 2012. After more than twenty years living alongside this road, at Km. 370, the community re-occupied its ancestral land in March 2013, while waiting for a definitive land restitution decision by the Paraguayan state.
(Photo credit: Maximiliano Mendieta)

Typesetting: Judith Fisher, www.regent-typesetting.co.uk

Contents

Acronyms and abbreviations.....	ii
About the authors.....	ii
Abstract.....	iii
1. Background: the expansion of agribusiness and the human rights of indigenous peoples in Paraguay.....	1
2. Cases brought by indigenous communities before the Inter-American Human Rights System.....	3
3. Lessons learned from the process of reclaiming land.....	5
4. Conclusion.....	7
References.....	8

Acronyms and abbreviations

IACmHR Inter-American Commission on Human Rights

IACtHR Inter-American Court of Human Rights

IAHRS Inter-American Human Rights System

About the authors

Maximiliano Mendieta Miranda is a lawyer, researcher and human rights defender with the organisation Tierraviva, which works with the indigenous peoples of the Chaco region in Paraguay. He is also a leader of the activist organisation Desde Abajo, which seeks to change society through social justice. He has a Master's in Human Rights and the Rights of Indigenous Peoples from the University of Waikato, New Zealand, for which he was awarded a distinction. He is a lecturer in human rights and the author of numerous publications on human rights, justice and the criminalisation of poverty.

Julia Cabellos Alonso is a lawyer, researcher and human rights defender. She is the coordinator of Tierraviva and the organisation's representative on Paraguay's Coordinating Committee for Human Rights. She is responsible for international litigation in supra-national courts. She holds a Master's in Human Rights from the Master's Programme in International Human Rights Law with an Emphasis on Convention Enforcement run by Columbia University, the Human Rights Office at the Supreme Court of Justice and the Inter-American Institute of Human Rights. She is an activist with Desde Abajo.

Abstract

This report discusses the experience of Tierraviva – a Paraguayan organisation – in using the Inter-American Human Rights System (IAHRS) to defend the land rights of indigenous peoples. Taking a long-term perspective, the report examines the road taken by the indigenous communities, who demand the fulfilment of their rights as recognised by the IAHRS.

To place these demands in context, the report refers to the structural discrimination that affects indigenous peoples' rights to their ancestral lands and prevents the fulfilment of their human rights. Paraguay's economy is based on agribusiness, mainly soya monocropping and cattle ranching. Trade liberalisation has promoted the expansion of these industries, while bilateral investment treaties have established protections for agribusiness enterprises. Under pressure from agribusinesses, indigenous peoples have sought redress from regional human rights arrangements.

The report draws lessons from the national, regional and international advocacy Tierraviva has conducted over the course of more than two decades, working alongside the Enxet indigenous communities of Yakye Axa, Sawhoyamaya and Kelyenmagategma, and the Sanapaná people's community of Xákmok Kásek. Together, Tierraviva and these communities developed a way to advance their demands for the restitution of the basis for the exercise of their human rights as an organised people: land.

1. Background: the expansion of agribusiness and the human rights of indigenous peoples in Paraguay

In Paraguay, the fulfilment of indigenous peoples' human rights is constrained by powerful structural factors. The economic infrastructure is based on agribusiness, mainly soya monocropping and cattle farming, and public policy favours large landed estates. In common with some other countries in the global South, Paraguay is a supplier of raw materials and natural resources to the industrialised countries of the North. Paraguay is the most unequal country in the world with regard to land distribution (Galeano Monti 2014).

This situation excludes indigenous peoples and expropriates their land and territory. Social inequality is deeply entrenched, along with environmental degradation. These problems have been acknowledged by the United Nations Special Rapporteur on the Rights of Indigenous Peoples (Tauli-Corpuz 2015) and by the Committee on the Elimination of Racial Discrimination (Comité para la Eliminación de la Discriminación Racial de las Naciones Unidas 2016).

The Indigenous Communities Statute (Law 904 of 1981) establishes what is now an out-of-date process for indigenous land claims. It leaves the final decision on the return of indigenous land not to the state but to the landowners themselves. This is the case even when the legal basis for the claim has been proven, demonstrating the connection between the land in question and the different communities or peoples claiming it.

This structural discrimination is deeply ingrained in a society where the culture of human rights is largely absent and awareness of Paraguay's multiculturalism is lacking. Discrimination is widespread, from government authorities to schools and universities, including the commercial media and the justice system.

It is very difficult to defend the rights of people living in a situation of vulnerability and exclusion, such as indigenous peoples, in Paraguay's courts. This is due not only to biases and corruption in the administration of justice, which prioritises the rights of the soya farmers and cattle ranchers, but also to the lack of knowledge among judges on how to interpret and apply international human rights law – despite the fact that human rights treaties take precedence even over the Constitution of the Republic of Paraguay.

In this context, Tierraviva was founded in 1994 as a Paraguayan human rights organisation that seeks to change the state's practices and ensure that the state complies with the fundamental rights of indigenous peoples, particularly their territorial rights. It was set up as a non-governmental organisation that hires lawyers to enable indigenous communities and organisations from the Chaco region of Paraguay to access justice under equal conditions in relation to cattle ranchers, soya farmers and large landowners.

Today, Tierraviva carries out cross-disciplinary work that brings together a group of human rights defenders. Our work is not limited to legal matters and also includes other social fields such as anthropology and sociology. By working with indigenous peoples, Tierraviva has facilitated the restitution of more than 150,000 hectares of land in Paraguay's Chaco region. As part of this effort, and in the face of public authorities denying indigenous peoples their rights and refusing to return land to several communities, Tierraviva was forced to take a number of cases to the IAHR.

2. Cases brought by indigenous communities before the Inter-American Human Rights System

Tierraviva has represented five indigenous communities in cases brought before the IAHRs treaty bodies, namely the Inter-American Commission on Human Rights (IACmHR) and the Inter-American Court of Human Rights (IACtHR). It resorted to the IAHRs after having exhausted all remedies in the national courts, where it was impossible to get the Paraguayan state even to admit the communities' legitimate claims.

In 1999 there was one relatively positive experience that achieved compliance with a negotiated settlement involving the Sanapaná indigenous communities of Lamexay and Kayleyphapopyet.¹ After this, the cases of the Enxet people's communities of Yakye Axa² and Sawhoyamaxa³ and the Sanapaná community of Xákmok Kásek⁴ were taken to the IAHRs. In these cases, rulings against the Paraguayan state were obtained in 2005, 2006 and 2010, respectively. Another case involving the Enxet people's community of Kelyenmagategma is currently ongoing, having reached a friendly settlement in 2011.

This makes Paraguay the state with the most IACtHR rulings against it in cases involving indigenous peoples' territorial rights. However, in none of these last four cases have the judgments been fully complied with. The Yakye Axa community, for example, has been living at the side of the road for more than two decades. Eleven years after the judgment that recognised its claim and ruled that its land should be returned to it, the situation has not changed and the community is still there.

The case of the Sawhoyaxama community illustrates the tensions that can arise between advancing indigenous peoples' rights and international treaties for the protection of foreign investment. In 1991, the community began the process of obtaining legal recognition of its rights to the 14,404 hectares it was entitled to as part of its ancestral land. The process ultimately culminated in the community bringing the case to the IAHRs.

One of the state's main arguments justifying its position of refusing to return the land to the community was that an investment protection treaty that Paraguay had signed with Germany prevented the restitution. The government argued that this

1. The IACmHR received the complaint on 12 December 1996 and a Friendly Settlement Agreement was signed on 25 March 1998. The case was published on 29 September 1999.

2. The IACmHR received the complaint in the Yakye Axa case on 10 January 2000 and referred it to the IACtHR on 17 March 2003. A judgment in favour of the community was obtained on 17 June 2005.

3. The IACmHR received the complaint in the Sawhoyamaxa case on 15 May 2001 and referred it to the IACtHR on 3 February 2005. A judgment in favour of the community was obtained on 29 March 2006.

4. The IACmHR received the complaint in the Xákmok Kásek case on 15 May 2001 and referred it to the IACtHR on 3 July 2009. A judgment in favour of the community was obtained on 24 August 2010.

treaty was relevant because German capital was involved in the companies that held title to the land.

The IACtHR, in a brief and concise discussion, ruled in response to this argument that the application of bilateral investment treaties does not justify the failure to fulfil the state's obligations with regard to the human rights recognised by the Constitution, the American Convention on Human Rights and other national and international laws and treaties; on the contrary, the application of such agreements must always be compatible with human rights law.

In 2006, 15 years after the community had presented its claim to the Paraguayan courts, the IACtHR ruled against the Paraguayan state for having violated the community's collective right to property over its land, its right to life, its right to official legal status, and its right to legal safeguards and protection.

After a lengthy wait, and in the absence of any sign that the Paraguayan state was going to comply with this judgment ordering the return of the community's land, on 21 March 2013 the Sawhoyamaya families moved back onto their land and re-occupied it. This action forced the state to abide by the IACtHR's ruling by expropriating the land from the cattle ranch. Today, however, the definitive land titling process is yet to be finalised.

3. Lessons learned from the process of reclaiming land

The cases brought before the IAHRs were emblematic because they reflected the abuses suffered by indigenous communities in the Chaco region of Paraguay. Tierraviva identified the cases together with the indigenous movement in the Paraguayan Chaco.

Indeed, Tierraviva organises annual meetings of indigenous leaders from all the communities it supports. At these meetings, the strategy to be followed is agreed and the actions to be taken forward are identified. These meetings provide invaluable input, not only because a discussion is held with each affected community but also because the meetings enable discussing the overall situation of all of communities at the same time, and identifying similarities and potential synergies. The meetings also promote solidarity and learning by sharing experiences.

It was in these meetings that the representatives of several indigenous communities decided together that it was important for the international community to be made aware of the situation in which the indigenous communities of the Paraguayan Chaco found themselves. Thus, following several meetings and discussions, the indigenous communities agreed that Tierraviva should take these particular cases to the IAHRs.

The community representatives also made a commitment to support the cases throughout the long process they were about to undertake. This commitment was maintained from that moment onwards until now. Likewise, solidarity was shown by other indigenous organisations, some of which are not even present in the specific area where these communities live.

Cultural practices in decision-making

With regard to the procedures established by the IAHRs itself, prior to each step in the case it is necessary to ensure that the community has a full understanding in order to decide on the actions to be taken, especially taking into account that on several occasions there was no immediate unanimous consensus in the communities regarding which step to take. This may vary in each community, but, as a general point, the more discussion there is on each step to be taken, the more the community takes ownership of the legal and political strategy.

We should also highlight the openness and willingness of both the IACmHR and the IACtHR to respect these timescales that are different to their own, as well as the customs and cultural practices of each indigenous community. Thanks to this, the communities were able to provide these bodies with sufficient information to convey

to them the situation they were experiencing and, above all, the relationship they still have with their land.

The process is long and it is natural if feelings of frustration and desperation take hold. In one of the cases, a split took place in the community and one group left the area in search of land where they hoped to make a new start. This left a unique culture divided for ever. In another of the cases, a leader died before he was able to move back onto his community's land: Don Tomás Galeano, a historic political and spiritual leader of Yakye Axa. As a witness speaking before the IACtHR in his Enxet language, he showed everyone present how his people felt: their determination to fight for their land so that their children would not experience the same conditions of exclusion that he himself had known. Tomás died and was buried away from his community's land.

These lengthy processes also imply another challenge: how to ensure that those who were children at the start of the case and are now young people develop the same degree of conviction as those who took the decision to adopt the strategy of presenting their claim. With this in mind, Tierraviva launched a series of activities in what we called the Itinerant Political Training School. Together with community meetings, and of course the passing on of knowledge so characteristic of the region's indigenous culture, this initiative achieved the objective of getting young people to take on the responsibility. This is essential, because without community ownership no case will be able to survive such a lengthy and difficult process.

Perseverance in the face of obstacles

To take the cases of indigenous peoples to the IAHRs requires a great deal of perseverance, unity within the organisation, respect for the processes themselves and proven stamina, particularly because initiating international cases can result in backlashes. This affected both the communities and Tierraviva. On several occasions Tierraviva found itself being stigmatised as acting against the country's interests by exposing Paraguay to the eyes of the world and to the possibility of international sanction.

The visibility of the cases also implied a high degree of exposure for the indigenous leaders and the organisation itself. The backlash soon made itself felt in attempts to criminalise us, with investigations being opened into alleged offences that went as far as the courts, or the doors being shut against any possibility of working with the state, as well as a campaign to discredit us.

Unity within the communities, and the solidarity of neighbouring communities, proved crucial in overcoming these challenging moments. The experience of the Sawhoymaxá community, who re-occupied their land after delays on the part of the authorities to comply with the IACtHR judgment, also demonstrates the importance of social organisation and mobilisation to push the legal action forward.

4. Conclusion

In several rulings, the IACtHR held that the Paraguayan state failed in its duty to uphold and fully respect the human rights of the country's indigenous peoples, especially their territorial rights. This is due to structural discrimination against indigenous peoples and the policy bias in favour of agribusiness. For indigenous peoples, it is almost impossible to recover their ancestral land through national legal processes. This is why part of the indigenous movement decided to take their claims to the IAHRs, resulting in three judgments against Paraguay and two Friendly Settlement Agreements.

The IAHRs procedures are lengthy and difficult. Success ultimately depends on combining legal strategies with discussion and debate, not just among the communities presenting the claim but also in the wider indigenous movement.

The determination displayed by the indigenous communities was essential and will continue to be crucial for advocacy at the national level, not least because the content of the rulings makes the need to address the systemic discrimination against indigenous peoples explicit. Indeed, the IACtHR ordered Paraguay to make changes to institutions and laws related to indigenous peoples' rights.

In order to confront a situation that is so unequal in terms of power imbalances, it is essential for the indigenous movement to carry on deepening its level of organisation. This will make it possible to bring about a sustainable reversal of the situation we have described, deepening and expanding the restitution of land to indigenous peoples and securing it for their future.

References

- Comité para la Eliminación de la Discriminación Racial de las Naciones Unidas (2016) “Informaciones Finales sobre los Informes Periódicos Cuarto al Sexto de Paraguay”.
- Galeano Monti, J. (ed.) (2014) *Exclusión Social y Pobreza Urbana: Experiencias y Análisis desde el Bañado Sur*. Arandurã, Asunción.
- Tauli-Corpuz, V. (2015) “Report: The situation of indigenous peoples in Paraguay”. United Nations, UN Doc. A/HRC/30/41/Add.1. See <https://tinyurl.com/l7o8wfk>

Advancing indigenous peoples' rights through regional human rights systems: The case of Paraguay

Over the past few years, the Inter-American Court of Human Rights has ruled against Paraguay in three cases that refer mainly to violations of the territorial rights of indigenous peoples. This report describes the experience of Paraguayan organisation Tierraviva in working with communities from the Chaco region to bring such cases to the Inter-American Human Rights System (IAHRS).

Taking a long-term perspective, the report discusses the structural discrimination that prevents the fulfilment of indigenous rights in Paraguay; examines the work undertaken by Tierraviva alongside communities to advance their demands to the IHRS for the restitution of their land; and shares key lessons from the experience.

ISBN: 978-1-78431-460-6

IIED order no.: 17602IIED



Knowledge
Products

Research Report

June 2017

Law

Keywords:

Paraguay, human rights,
indigenous peoples, ancestral
land, Inter-American Human
Rights System