I. BACKGROUND

1. The Commission received a complaint dated June 17, 1993, alleging a violation by the State of Honduras of the rights to property (Article 21 of American Convention) and to judicial protection (Article 25 of the American Convention) of Mr. Juan Milla Bermúdez.

II. PROCEEDINGS BEFORE THE COMMISSION

2. Having received the complaint on July 22, 1993, the Commission processed it in accordance with the statutory requirements, and communicating with the petitioner and the Government of Honduras; it sent notes to both parties, and reviewed and considered all information received from them.

3. On October 28, 1993, the complaint was transmitted to the Government, which sent its answer to the Commission on February 10, 1994. The answer was sent to the petitioner, who returned his reply on April 11, 1994. On April 27, 1994, the reply was sent to the Government which was given 45 days for rejoinder and final comments. Not having received a reply from the Government within that time, the Commission repeated its request on June 20, 1994, citing the possible application of Article 42 of the Regulations of the Inter-American Commission of Human Rights if none were received. The Commission received no response from the Government to its request.

III. FACTS ALLEGED BY THE PETITIONER

4. On March 13, 1967, the firm INDECO (Industria de la Construcción S.A.) purchased a parcel of 41,700 square "varas" from Mrs. María de la Paz Bermúdez de Milla Cisneros. The parcel was part of Mrs. Bermúdez "El Potosí" estate. The purpose of the purchase was to erect a factory to manufacture concrete blocks, paving stones, and premixed concrete. On January 11, 1972, INDECO bought a second parcel of 91,754.43 square "varas" from Mr. Juan Milla, the heir of Mrs. Bermúdez de Milla Cisneros. This second parcel was also part of "El Potosí" estate and adjoined the original purchase. It has the shape of an irregular polygon, and consists for the most part of the rock and gravel flat in Río Piedras, an uninhabitable area that passes across the property. The second parcel was to be used as a quarry for raw material for the factory of the purchasing firm.

5. The purchase agreement indicated that a competent land surveyor had demarcated and measured the land, including the directions and longitudes of the sides of the polygon. However the fifth clause of the agreement read that if the actual placement of the markers to set off the boundaries of the land resulted in a discrepancy with the stipulated boundaries and in a lesser area on remeasurement ..... the seller shall compensate for that decrease from his own land by modifying any of the lines forming the polygon...

6. Pursuant to that provision, a duly licensed civil engineer was hired by the buying firm the week following signature of the contract and occupation of the land. He marked out, remeasured, and supervised construction of a fence delimiting the recently bought parcel. Thus on January 14, 1972, with the seller's delivery of the plot to the buyer who received it, the purchase agreement was consummated.

7. For 2 years and 8 months, from January 14 to September 14, 1974, INDECO, in full, legal, and peaceful possession of the land, exploited the beach area by extracting from it more than 120,000 cubic meters of gravel.

8. In 1974, as a result of the passage through the area of Hurricane Fifí, which caused floods and damage, San Pedro Sula Municipality constructed protective shelters in Río Piedras, for which purpose it expropriated several portions of private properties bordering on the Río. The then de facto Government used the natural disaster arising from the hurricane to justify the taking. The areas expropriated for the construction included a part of the land INDECO bought from Mr. Milla and other land on the coast.

9. The expropriation and construction modified the land boundaries so that Milla and INDECO properties no longer shared common boundaries. Construction of the shelters led to expropriation of portions of land from both proprietors, with some 61,072.75 square "varas" being taken from INDECO.

10. On September 11, 1976, INDECO filed a complaint against the petitioner, Mr. Milla, alleging that he had breached the sales contract since he had not delivered a portion corresponding to that expropriated by the Municipality, which was 75% of the second parcel bought from the Millas. On February 3, 1977, the seller answered that he had complied with the contract, that the land that had been taken by the Municipality could not be considered a "shortfall from the sale" and that the statute of limitations governing the firm's right had expired

because four years and eight months had passed since the transfer of ownership and of peaceful possession and use of the property.

11. On October 25, 1984, INDECO registered by public deed as one consolidated lot the two parcels it had purchased from the Milla family, and that had received in 1967 and 1972. On that same date, it transferred, in payment of a debt, ownership of some 71,817.84 square "varas" of those lots to the public enterprise Corporación Nacional de Inversiones. That parcel comprised in part land bought from Mrs. Milla, and, in part, some 61,072.75 square "varas" that Juan Milla was being sued for on account of an alleged "shortfall from the sale."

12. On November 12, 1986, in the suit of INDECO against Milla for compensation for the shortfall from the sale, the civil judge of first instance in San Pedro Sula handed down judgment in which he accepted the statute of limitations defense raised by Mr. Milla in 1977, and dismissed the claim by INDECO. The judgment acquits the defendant, Mr. Milla, and fines the plaintiff for costs.

13. INDECO then lodged an appeal of this judgment with the San Pedro Sula Court of Appeal which on February 18, 1987, summarily quashed the judgment from below.

14. On November 25, 1987, a new judge, an ad-hoc appointee, dismissed the defenses presented by Milla, declared the suit instituted by INDECO against Milla meritorious, and ordered him to compensate the area shortfall from the sale by adding 61,072.75 square "varas" from his own land by modifying any of the lines. On July 13, 1988, the San Pedro Sula Court of Appeal affirmed this judgment.

15. On August 24, 1988, Mr. Milla filed an appeal with the Supreme Court of Justice to vacate for error of law the affirmation by the Court of Appeal of the judgment rendered by the ad-hoc Judge in the Court of First Instance.

16. On July 12, 1989, INDECO granted the Banco de Occidente (Western Bank) a mortgage to partially secure a loan. The mortgaged property is the remaining 61,636.79 sq. yds. INDECO retained from the consolidated lot purchased from the Millas, after the reduction due to the payment in kind to the National Investment Corporation (Corporación Nacional de Inversiones) (see para. 11).

17. On August 2, 1989, the Supreme Court of Justice, disregarding the Court prosecutor's recommendation, dismissed the appeal to vacate a judgment for error of law lodged by Mr. Milla because it "suffered from defects of clarity and precision."

18. On October 1989, the San Pedro Sula Civil Court of First Instance decided to enforce the judgment and "as restitution for the shortfall from the sale," to transfer to INDECO, on the basis of expert opinion, a parcel equal to the area claimed by that firm. The parcel would be taken from the most valuable area of Mr. Milla's property, and must neither be adjacent to the area claimed, nor be part of the January 1972 sale of the gravel beach. On October 4, 1989, Mr. Milla opposed that judgment by pleading impossibility of performance of the act ordered and that the

proceedings held before that judge were absolutely null and void. The judge rejected the defenses and the appeal was dismissed.

19. On February 6, 1991, Mr. Milla filed an amparo action with the Supreme Court of Justice and requested a stay of the judgment. On February 13, 1991, the Court admitted the application but did not stay the judgment, which led the judge to transfer ownership of the parcel replacing the alleged shortfall.

20. On March 10, 1993, the Supreme Court of Justice denied the requested amparo action because the judgment was being enforced strictly according to the verdict rendered, and, consequently, the constitutional guarantees invoked were not being denied.

THE GOVERNMENT'S ANSWER OF JANUARY 20, 1994 STATING ITS POSITION

21. In its reply in a report prepared by the Secretariat of the Supreme Court of Justice regarding the amparo application, the Government discusses the procedure for and content of the amparo remedy. It also maintains that all legal guarantees were provided, and statutory proceedings followed in the judicial proceedings which it listed.

22. It maintains that it can be seen from the list of proceedings that the judicial guarantees based on procedural law have been observed and that Mr. Milla has enjoyed the remedies afforded by the Honduran Constitution and the judicial guarantees established by the American Convention on Human Rights.

23. It maintains that, as can be seen from the list, the legal process under review could not have possibly harmed Mr. Milla Bermúdez by: a) depriving or substantially restricting his opportunity to mount a legal defense; b) a decision by a court that is not legally constituted; c) a decision not based on legal grounds; d) a decision contrary to or dismissive of the applicable law or by application of a nonexistent law; e) disregarding irrefutable and decisive evidence duly introduced to the process, or by citing irrelevant evidence; f) by failing to consider issues duly proposed by the parties and bearing on the disposition of the matter, or by taking into account considerations irrelevant to the process.

REPLY OF THE PETITIONER

24. In its reply, the petitioner states that the Government's answer, communicated through the IACHR in a report on the case in the Supreme Court of Justice, is partial, and shows the deplorable way in which the amparo remedy proceeding was conducted, since, inter alia, the decision took two years and three months when the law indicates it should be taken within six days of lodging the application.

25. He also maintains that the enforcement of the decision should be suspended, since, inter alia, it is among those judgments that "no authority may legally enforce" (Article 26, Ch. IV, Law of Amparo). He reiterates that the original judgment was res judicata, and that the decision of the executing officer regarding the amparo being sought changes the terms of that original judgment. He argues that in his compensating for a shortfall by modifying the lines of the

polygon delimiting the property of the original sale, on account of the decision, he would have to deliver a second plot in a second transaction, though he was not involved in the second transaction. He also argues that there ought not to have been any compensation since the property sold had been transferred in its entirety, surveyed with boundaries marked out, recorded as complete by the buyer in the property registry, and used by that same buyer for several years.

26. He argues that in its decision the Supreme Court of Justice disregarded the original judgment by the judge who agreed with him. Uncertainty therefore exists as to whether there was strict adherence to the guidelines of the judgment, and whether questions of fact have been omitted, or proffered evidence not considered.

He underscores that despite the assumption of office of the new Supreme Court of Justice, which comprises jurists of recognized eminence and competence, with the advent of the new government on January 24, 1994, that Court cannot intervene because all domestic remedies were exhausted prior to its constitution. With this situation, he is therefore compelled to resort to the inter-American human rights system.

27. The State of Honduras did not respond to the request for a reply and final comments on the case, despite a second appeal from the Commission as indicated in paragraph 3.

HEARING BEFORE THE COMMISSION

28. On October 11, 1996, during the 93rd Regular Session of the Commission, a hearing was held with the parties in attendance. The petitioner presented his case again and stated that his complaint referred: (a) to the writ of execution issued by the civil judge of the first instance of San Pedro Sula, which called for transfer to INDECO, as "restitution for the shortfall from the sale," on the basis of expert opinion, of a parcel equal to the area claimed by that firm, which would be taken from the most valuable part of Mr. Milla's property, would not be adjacent to the area claimed, and would not be part of the gravel flat sold in January 1972; and (b) to the decision of the Supreme Court of Justice to deny the requested amparo action against the writ of execution.

ISSUES TO BE RESOLVED BY THE COMMISSION

I. ADMISSIBILITY

Formal aspects

29. The complaint was presented within six months of the January, 1994 final decision in which the Supreme Court of Justice denied the amparo remedy. That fact and the list of judicial procedures and remedies instituted by the petitioner, makes it possible to prove that the complaint was properly presented and the available domestic remedies for resolving the case before the Commission have been exhausted.

30. According to information in the hands of the Commission and information from the petitioner that were not contradicted by the Government, the case under review is neither pending before nor has been the subject of a decision by another international body.

Competence of the Commission: The "fourth instance formula"

31. The international protection provided by the supervisory bodies of the Convention is of a subsidiary nature. The Preamble to the Convention is clear in this respect, when it refers to the reinforcement or complementariety of the protection provided by the domestic law of the American states.

32. The rule of prior exhaustion of domestic remedies is based on the principle that a defendant state must be allowed to provide redress on its own and within the framework of its internal legal system. The effect of this rule is "to assign to the jurisdiction of the Commission an essentially subsidiary role."[FN1]

[FN1] Resolution No. 15/89, Case 10.208 (Dominican Republic), April 14, 1989. IACHR Annual Report 1988-1989, p. 100 par. 5.

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33. The nature of that role also constitutes the basis for the so-called "fourth instance formula" applied by the Commission, consistent with the practice of the European human rights system.[FN2] The basic premise of this formula is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.

[FN2] The European Convention on Human Rights, by Frede Castberg. A.W. Sijthoff-Leiden - Oceana Publications Inc. Dobbs Ferry, N.Y. 1974. pp.63-64.

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34. The Commission is competent to declare a petition admissible and rule on its merits when it portrays a claim that a domestic legal decision constitutes a disregard of the right to a fair trial, or if it appears to violate any other right guaranteed by the Convention. However, if it contains nothing but the allegation that the decision was wrong or unjust in itself, the petition must be dismissed under this formula. The Commission's task is to ensure the observance of the obligations undertaken by the States parties to the Convention, but it cannot serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction. Such examination would be in order only insofar as the mistakes entailed a possible violation of any of the rights set forth in the Convention.

35. The "fourth instance formula" was developed by the Commission in the case of Clifton Wright, a Jamaican citizen who alleged that judicial error resulted in a death sentence against him. The domestic system had no process of appeal of judicial error, leaving Mr. Wright without a recourse. In that case, the Commission determined that it could not function as a "quasi-judicial

fourth instance" with the power to review the holdings of the courts in the member states of the OAS. However, the Commission found the facts in the petitioner's favor and determined that the petitioner could not have committed the crime. The Commission thus found that the Government of Jamaica had violated the petitioner's right to judicial protection, a violation of his fundamental rights, because the domestic legal process did not allow for a correction of judicial error.

36. The Commission issued Resolution No. 29/88 of September 14, 1988 in the Wright case. The following considerations, relevant to the instant case, were stated:

5. ...It is the function of the Inter-American Commission on Human Rights to act on petitions presented to it pursuant to Articles 44 to 51 of the American Convention as regards those States that have become parties to the Convention.
6. ...The Commission's role is to investigate whether a government action violated a right of the petitioner's which is protected by the Convention.[FN3]

[FN3] Case 9.260 (Jamaica), IACHR Annual Report 1987-1988, p. 161.
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37. Another precedent was established in Report No. 74/90 of April 4, 1990. The petitioner, Mr. López-Aurelli, an Argentine worker, was arrested and unlawfully imprisoned on charges of committing politically motivated offenses in November 1975. He claimed that the trial was conducted without minimum legal safeguards. Further, Mr. Lopez-Aurelli claimed that the trial judges were not impartial and independent of the military dictatorship that ruled Argentina from 1976 to 1983.

38. In that case, the Commission determined that it was not competent to decide whether domestic law had been applied correctly by the domestic courts.[FN4] However, the Commission found that the Argentine judiciary had failed to review the proceedings once a democratic government had been installed and had ratified the Convention. The Commission concluded that such a denial of due process constituted a violation of López-Aurelli's rights under Articles 8.1 and 25.1 of the Convention.

[FN4] IACHR Annual Report 1990-1991, p. 75, par. 20.
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39. These decisions offer examples of the scope of the Commission's competence with respect to the review of domestic decisions. The Wright and López- Aurelli cases constitute exceptions to the "fourth instance" formula, and they may be used to illustrate the requisites a petition must meet in order to be reviewed by the Commission.

40. The jurisprudence of the European Commission of Human Rights is consistent with this rule, as stated in the admissibility decision in the case of Alvaro Baragiola v. Switzerland:

The Commission recalls that it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic law.

The Commission recalls that what is decisive is not the subjective apprehensions of the subject concerning the impartiality required of the trial court, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified.[FN5]

[FN5] Application No. 17625/90, Yearbook of the European Convention on Human Rights 1992, p. 103, par. 1, and pp. 105-106, respectively.

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41. The European Commission held a similar view when it rejected petitions based on alleged incorrect applications of domestic law, or improper evaluation of facts or evidence. The European Commission has repeatedly stated that it was not competent to review decisions of the domestic courts unless a violation of the European Convention is involved.[FN6]

[FN6] ...whereas theretofore it (the Commission) cannot take cognizance, in examining the admissibility of an Application, of alleged errors of fact or of law committed by the domestic courts of such States save insofar as such errors would appear to have resulted in violation of the rights and freedoms specifically set forth in the Convention...
Application No. 458/59, Judgment of March 29 1960, Yearbook of the European Convention on Human Rights, Vol. 3, 1960, p. 236.
The Commission therefore finds that the regional Court based its judgment on the assessment of the evidence it had before it and drew its conclusions therefore. Whether these conclusions involved an error of fact or law is an issue which the Commission cannot determine, as it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention...
Application No. 23953/94, September 1995, Decisions and Reports, European Commission of Human Rights, 82-A, p. 254.
Insofar as the applicants complain of errors of fact and law committed by the Brussels Court of Appeal, the Commission recalls that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts...
Application No. 10785/84, July 1986, European Commission of Human Rights,D.R., 48, Par. 150.

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42. Especially relevant to the instant petition is the precedent set in the case of Gudmundur Gudmundsson. Mr. Gudmundsson was an Icelandic citizen who presented an application before the European Commission claiming that a special property tax imposed by law was a violation of his right to property and to equal protection of the law. In that case, the European Commission found that the text of the disputed law was consistent with the "permissible interferences"

mentioned in Article 1 of the Protocol to the European Convention, and that the alleged discrimination was merely a differential treatment with respect to co-operative societies and joint stock companies. Finally, it concluded that the petition was manifestly ill-founded and restated the "fourth instance formula" in these terms:

...whereas errors of law or fact, including errors as to the question of the constitutionality of acts passed by a national parliament, committed by the domestic courts, accordingly concern the Commission during its examination of the admissibility of the application only insofar as they appear to involve the possible violation of any of the rights and freedoms limitatively listed in the Convention.

...an examination of the case as it has been submitted including an examination made ex officio does not disclose any apparent violation of the rights and freedoms set forth in the Convention.[FN7]

[FN7] Application No. 511/59, Decision of 20th December 1960. Yearbook of the European Convention on Human Rights 1960, p. 426.

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43. In democratic societies, where the courts function according to a system of powers established by the Constitution and domestic legislation, it is for those courts to review the matters brought before them. Where it is clear that there has been a violation of one of the rights protected by the Convention, then the Commission is competent to review.

44. The Commission has full authority to adjudicate irregularities of domestic judicial proceedings which result in manifest violations of due process or of any of the rights protected by the Convention.

45. The Commission is mindful that the petitioner's complaint refers exclusively to the Judiciary's action in the writ of execution. If, for example, the petitioner had presented evidence that appeals lodged during the procedural session in question had not been considered in an impartial manner because the judges were corrupt or had exhibited attitudes of racial, religious, or political prejudice detrimental to such appeals, the Commission would have been competent to examine the case under Articles 8, 21, and 25 of the Convention.

46. With respect to certain matters of procedure relevant to this case, the Inter-American Court of Human Rights has stated:

The Convention sets out the prerequisites a petition or communication must meet in order to be found admissible by the Commission (Article 46); it also sets out the cases of inadmissibility (Article 47) which may be determined once the proceeding has been initiated (Article 48(1)(c)). Regarding the form in which the Commission should declare inadmissibility, the Court has already pointed out that this requires an express act, which is not required in a finding of admissibility.[FN8]

[FN8] Advisory Opinion OC-13/93 of July 16, 1993. Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights). Requested by the Governments of the Republic of Argentina and the Oriental Republic of Uruguay. p. 11, par. 40.

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47. The practice of the Commission, consistent with the guidelines of OC-13/93, has been to make a preliminary analysis of the petitions brought before it in order to ascertain whether the formal and essential requisites of the Convention and the Regulations have been met.

48. The Inter-American Court of Human Rights has established that the finding of inadmissibility of a petition or communication by the Commission precludes a decision on the merits.[FN9] The Court has also stated that such "procedural impossibility"

...does not in any way detract from the Commission's exercise of other attributes which Article 41 confers upon it in extenso. In any case, the use of the latter attributions, for example, those contemplated in paragraphs (b), (c), and (g) of that norm, must be by means of acts and procedures other than the procedure governing the examination of individual petitions or denunciations based upon Articles 44 through 51 of the Convention...[FN10]

[FN9] Idem, par. 42.
[FN10] Idem, par. 44.

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49. The Court determined in the same Advisory Opinion that a state accused of violating the Convention may exercise its right of defense before the Commission by arguing any of the provisions of Articles 46 and 47. If the Commission considers the argument to be successful, it may decide to interrupt the proceeding and close the file.[FN11]

[FN11] Idem, par. 41, p. 11.

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50. In the case at hand, the Government maintained, in its reply to the Commission's request for information, that "in the aftermath of the judgment the State of Honduras has observed all the judicial guarantees extended in our adjective law to the parties to a suit. The remedies established in our constitution have also been enjoyed by Mr. Juan Milla Bermúdez; thus Article 8, Right to a Fair Trial, of the American Convention on Human Rights has not been violated by the Government of Honduras." The Government also states that in the judgment on the merits of the case and in the aftermath of the judgment the right to judicial protection enshrined in Article 25 of the Convention was observed.

51. It may be pointed out that the European Commission has followed the practice of declaring petitions "inadmissible as being manifestly ill-founded only when an examination of the file does not disclose a prima facie violation" of the European human rights standards.[FN12]

[FN12] De Becker case, Application No. 214/56, Decision of 9th June, 1958. Yearbook of the European Convention on Human Rights 1958-59, p. 254.

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52. That practice has been explained in the following terms:

...However, when the Commission declares an application to be manifestly ill-founded, in actual fact it pronounces on the merits, on the ground of a prima facie opinion on the alleged facts and the legal grounds put forward. On the other hand, the drafters of the Convention have indeed intended to entrust the Commission with the task of acting as a screen for the great number of applications to be expected. The competence of the Commission to exclude manifestly ill-founded applications from the further procedure would seem to fit in with this aim of procedural economy.[FN13]

[FN13] Theory and Practice of the European Convention on Human Rights, P. Van Dijk, G.J. van Hoof, p.104.

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53. With respect to the instant case, the violations alleged by the petitioner have been examined in light of the text of the Convention and other international human rights standards, as well as the practice followed and established by the Commission, the Inter-American Court, and the bodies of the European human rights system. The petitioner's claims were also scrutinized under Articles 8 and 25, to verify the possibility of a due process violation.

54. Ultimately, a review of the instant petition by the Commission and a subsequent decision on the merits of the case would effectively require it to act as a quasi-judicial fourth instance, or appellate court, with respect to the final decision handed down by the Honduran judiciary. The Commission lacks the competence required to carry out such a proceeding, as has been stated throughout this report.

IV. CONCLUSION

55. The Commission concludes that this case meets the requisites for formal admissibility under Article 46 of the Convention.

56. However, an examination of the available information also leads the Commission to conclude that the petition does not disclose any apparent violation of the right to property (Article 21) or the right to equal protection of the law (article 24), invoked by the petitioner. The same can be said in respect of the right to a fair trial (Article 8) and judicial protection (Article 25).

57. Given the foregoing considerations, the Commission finds the case inadmissible under Article 47(b) of the Convention, and decides to immediately publish this report, and to include it in the Annual Report to the General Assembly of the OAS.