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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 40/05; Petition 12.139
Session: Hundred Twenty-Second Regular Session (23 February – 11 March 2005)
Title/Style of Cause: Jose Luis Forzanni Ballardó v. Peru
Doc. Type: Decision
Decided by: President: Clare K. Roberts;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez,
Commission Member Susana Villaran, a national of Peru, did not take part in the discussion and voting on this case, in accordance with Article 17(2) of the Commission's Rules of Procedure.
Dated: 9 March 2005
Citation: Forzanni Ballardó v. Peru, Petition 12.139, Inter-Am. C.H.R., Report No. 40/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
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I. SUMMARY

1. This report concerns the admissibility of Case 12.139, opened by the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) after it received, on April 13, 1997, a petition lodged by José Luis Forzanni Ballardó, (hereinafter “the petitioner”) against the State of Peru (hereinafter “Peru”, or “the Peruvian State”).

2. The petitioner alleges that the State is responsible for a series of illegal and arbitrary acts and omissions detrimental to the interests of Mr. Forzanni Ballardó as owner-manager of the company TRALAPU E.I.R.L., (hereinafter “TRALAPU E.I.R.L.” or “the Company”). He demands before the IACHR delivery of the sum ordered in the decision on the proceeding for payment in “intis”, updated to current values, as well as appropriate compensation and payment of costs, alleging that the Peruvian State has violated to his detriment the following rights enshrined in the Convention: equal protection (Article 24), fair trial (Article 8), judicial protection (Article 25), property (Article 21), as well as the obligation to respect the rights and freedoms enshrined therein, and to ensure to all persons subject to the jurisdiction of the State the free and full exercise of those rights and freedoms.

3. The State holds that petition does not state facts that tend to establish a violation of rights, nor does it meet the other admissibility requirements stipulated in the American Convention. In that connection, it says that the case is not admissible because the allegations refer to the company TRALAPU E.I.R.L., which is an artificial person, while the American Convention applies exclusively to the human rights of individuals.

4. The Commission concludes that it lacks *ratione personae* competence to accept this petition inasmuch as the remedies under domestic law were sought and exhausted by the company TRALAPU E.I.R.L., which is a legal entity distinct from the petitioner. Consequently, it finds the petition inadmissible for failure to comply with Articles 1(2) and 47(c) of the Convention and 31 of the Commission's Rules of Procedure. It has further decided to notify the parties of this decision, to publish the present report, and to include it in its Annual Report.

II. PROCESSING BY THE COMMISSION

5. The petitioner lodged his petition in writing on May 31, 1997, the date on which the Secretary General of the Organization of American States visited the State of Peru. On August 11 of the same year, the Commission asked the petitioner to furnish additional information with respect to exhaustion of domestic remedies, as well as any other relevant data. The petitioner sent supplementary information to the Commission on September 8, 1997.

6. By a note of April 13, 1998, the petitioner was informed that the Commission could not process the petition because it did not meet the requirements set down in the Commission's Regulations. In particular, the Commission mentioned that the petition did not state facts that tended to establish a violation of the rights guaranteed by the Convention.

7. On November 9, 1998, the IACHR received a third communication from the petitioner in which he alleged violations of Articles 24 (right to equal protection), 8 (right to a fair trial) Article 25 (right to judicial protection), and 1(1) (obligation to respect rights). By note of April 28, 1999, the Commission confirmed receipt of the communication from the petitioner and informed him of the opening of case 12.139, pursuant to the Commission's Regulations then in force. On April 28, 1999, the pertinent portions of the petition were also transmitted to the State, which was requested to provide information on the case within 90 days.

8. On July 22, 1999, the State requested an extension of the deadline to submit the relevant information. Accordingly, on the same day, the Commission granted the State an additional 30 days, and informed the petitioner of said decision.

9. On August 24, 1999, the Commission received the reply of the State, in which it requested the Commission to refrain from taking up the petition because it was lodged after the deadline of six months provided in Article 46(1)(b) of the Convention. On August 30 of that year, the Commission sent a copy of the State's reply to the petitioner.

10. On September 24, 1999, the State sent further observations on the case and requested the IACHR to declare the petition filed by the citizen José Luis Forzanni Ballardo inadmissible on the ground that the IACHR lacked *ratione personae* competence to examine a petition in which the alleged victim was an artificial person. The pertinent portions of the communication were forwarded on September 28, 1998, to the petitioner, who was granted 30 days to reply.

11. The Commission received the petitioner's observations to the State's response on October 25 and 28, 1999. In these communications, the petitioner amended his petition to

include arguments of alleged violations of Article 21 (right to property), in connection with his previous briefs regarding Article 24 (right to equal protection), Article 8 (right to a fair trial), Article 25 (right to judicial protection), and Article 1(1) (obligation to respect rights). On November 4, 1999, the Commission confirmed receipt of the above-dated communication of the petitioner and conveyed the pertinent portions to the State, granting it 30 days to reply.

12. The Commission received the observations of the State on December 7, 1999. In this communication, dated December 6, 1999, the Peruvian State requested that the petition be declared inadmissible for the aforementioned reasons; that is, lack of competence *ratione personae* and extemporaneousness of the petition. The pertinent parts were sent to the petitioner on December 10, who was asked to submit any observations within 45 days.

13. On March 13, 2000, the Commission confirmed receipt of the petitioner's communication of January 12, 2000, in which he submitted additional observations. Those observations were sent to the State on the same date. On April 25, 2000, the State submitted its reply and requested the IACHR to pronounce the petition inadmissible. On June 8, 2000, the Commission confirmed receipt of that communication and transmitted the pertinent portions to the petitioner.

III. POSITIONS OF THE PARTIES

A. The petitioner

14. For the purposes of the instant report, which is concerned only with examination of admissibility of the complaints put forward by the petitioner, the facts alleged may be summarized as follows: By Legislative Decree 054 of March 20, 1981, Empresa Pública de Producción de Harina y Aceite de Pescado was transformed without changing its legal personality into a private-law stock corporation by the name of Empresa Nacional Pesquera S.A. or PESCAPERU S.A. under the control of the State.

15. In May 1985, the company TRALAPU E.I.R.L. rendered services for the transportation of fish meal to Empresa Nacional PESCAPERU S.A., the fee for which was set at a given amount in the local currency of the time: the "inti". Seeing that no payment was received for said services, the petitioner, as legal representative of the Company, instituted a summary proceeding for collection against PESCAPERU S.A. in March 1986. On April 20, 1987, the Third Lower Civil Court of Callao accepted the claim. On August 18, 1989, the Superior Civil Court of Callao confirmed the judgment and ordered PESCAPERU S.A. to pay TRALAPU E.I.R.L. the amount owed.

16. Subsequently, on September 25, 1991, the Peruvian State promulgated Legislative Decree 674 (Law on Promotion of Private Investment in State-Owned Companies), which created the Committee on Promotion of Private Investment (COPRI). Thereafter, Decree Law 25604 of July 8, 1992, established the intangibility of the assets of any state-owned companies that had been declared in liquidation or formally included in the privatization process. Furthermore, Supreme Resolution 538-92-PCM of November 6, 1992, ratified the decision of

COPRI that approved the Promotion Plan for Empresa PESCAPERU S.A., and included it in the scope of Decree Law 25604, Article 3 of which said:

Let all judicial or arbitration proceedings be suspended that concern encashment of guarantees on tangible property, definitive attachments, or any other definitive judicial measure, constituted or imposed on assets of companies included in the scope of Article 1.

The Special Committee or Liquidation Board of a particular company are empowered to proceed with the sale of the asset to which any such aforesaid guarantee or judicial measure might apply

The proceeds from the sale of such assets shall be used, under liability of the Special Committee or the Liquidation Board, first to repay the credits protected by the guarantee or respective judicial measure

The sale proceeds mentioned in the foregoing paragraph shall be deposited by the company, under liability of the Special Committee or the Liquidation Board, in favor of the respective creditor. Once this has occurred, the Court or Arbitration Tribunal, as appropriate, shall order the immediate lifting of the guarantee on the tangible property or the respective judicial measure.”

17. Accordingly, on December 18, 1995, PESCAPERU S.A. sought the nullity of the payment order, with the argument that, based on Decree Law 25604, the Privatization Committee (COPRI) should assume liability for payment. On February 1, 1996, the lower court rejected the nullity petition. On appeal, that decision was overturned and the request for nullity was accepted in a ruling of March 14, 1996, and an explanatory ruling of November 22, 1996, of the Civil Chamber of the Superior Court of Justice of Callao.

18. On March 24, 1997, the Third Lower Civil Court of Callao ruled that the attachment order on the bank accounts of PESCAPERU S.A. was void because it found that the privatization process had not yet concluded and, therefore, under Law 25604, the company assets included in that process were exempt from attachment. On August 13, 1997, the lower court declared unfounded another petition for attachment submitted by TRALAPU E.I.R.L. By decisions of January 9 and 14, 1998, the lower court rejected the petitions of TRALAPU E.I.R.L. on the same grounds as those mentioned by the Superior Civil Court of Callao in its ruling of March 14, 1996 and explanatory ruling of November 22, 1996.

19. Meanwhile, in January 1997, TRALAPU E.I.R.L. sued Empresa Nacional PESCAPERU S.A. for US\$2 million in compensatory damages, injury to honor, consequential damages, satisfaction, loss of earnings, interest, and arrears for failure to meet the obligation to pay the debt to which the aforementioned proceedings refer. On November 26, 1997, the Third Lower Civil Court of Callao declared the claim unfounded because, inter alia, it found that while the record showed that there existed an obligation for the respondent to pay a sum of money to the plaintiff, that payment would be verified once its assets were realized upon the sale by the Privatization Committee of the properties and assets of PESCAPERU S.A. in the framework of the process under Decree Law 25604.

20. Furthermore, on March 4, 1998, José Luis Forzanni Ballardó, as legal representative of TRALAPU E.I.R.L., lodged a complaint with the Office of the Supreme Prosecutor for Internal Oversight against the members and judges of the Superior Court of Callao who took cognizance of the judicial proceedings, for alleged offences against the administration of justice, abuse of authority, violation of freedom of labor, denial and delay of justice, and breach of public duty. The complaint alleged that when the aforesaid judges applied Decree Law 25604 retroactively and issued the decision of March 14, 1996, in the proceeding for payment in intis, they had amended the judgment of August 18, 1989, in contravention of the mandate of a final judgment that constitutes *res judicata*.

21. The Superior Court of Callao, in a decision of March 12, 1998, found the complaint inadmissible because it was filed extemporaneously, inasmuch as the deadline for its presentation had expired as a matter of law. In an appeal brought by the petitioner, that decision was confirmed on October 30, 1998, by the Supreme Court. Finally, on September 3, 1998, the petitioner requested a further currency value update, which was refused on September 10 of that year.

22. The petitioner argues that despite the fact that a judgment in his favor was confirmed on August 18, 1989, by the Civil Chamber of the Superior Court of Justice of Callao, enforcement of that judgment has been prevented because in March 1996 the members of that chamber modified the aforementioned judgment, which constituted *res judicata* and unduly retroactively applied Decree Law 25604, promulgated in July 1992, freezing enforcement of the judgment.

23. Therefore, the petitioner alleges, the State has violated to his detriment the right to equal protection, a fair trial, and judicial protection. According to the petitioner, in a verdict of the Constitutional Tribunal published on March 7, 1997, the observations of that tribunal found that the State has a dual legal personality; when it exercises *ius imperium*, it acts as a person governed by public law, and when it procures or contracts its private assets it acts as a person governed by private law. The petitioner, therefore, argues that, when it contracts with and gives an undertaking to private persons, both parties must be bound by the same rules and the State cannot enjoy a degree of precedence because, otherwise, it would be contrary to the constitutional principle of equality before the law.

24. The petitioner also says that due to the fact that it was not able to enforce a judgment against the State, the Peruvian State has violated to his detriment the right to a fair trial guaranteed by Article 8 of the Convention. He further holds that no legal certainty exists for enforcement of a judgment in his favor, in accordance with Article 25 of the Convention, because he considers that the judiciary has failed to give his claim due attention.

25. With respect to the requirements necessary to determine admissibility, the petitioner mentions that the complaints lodged under Article 44 of the American Convention concern the personal rights of Mr. Forzanni Ballardó. In particular, he mentions that the company TRALAPU E.I.R.L. is only an asset, property and possession of his, as shown in the incorporation papers, in which he agrees to form the company in accordance with Law 21621 and to comply with the law; and that it is an instrument he uses to provide money to feed his family. According to the petitioner, the judiciary has amended a judgment that had the force of *res judicata* and also

retroactively applied a law adopted in 1992, freezing or suspending a judgment of August 18, 1989. Consequently, the petitioner has been the victim of an aggression against his right to use and enjoy his property, which is protected by the Convention at Article 21. He adds that the petitioner represents the activities and claims of TRALAPU E.I.R.L. as the owner and proprietor of an asset –in this case, the company- and that those activities and claims are protected in this instance by Articles 21 (right to property), 29 (restrictions regarding interpretation), 32 (relationship between duties and rights), 44, and 46 of the Convention. With respect to the deadline for filing the petition, the petitioner holds that the petition was not lodged after the six-month deadline provided in Article 46(1)(b), because he was notified of the final decision that exhausted domestic remedies on October 1, 1998, and the petition was lodged on November 9, 1998.

B. The State

26. The State holds that the case sub lite is inadmissible because the deadline for lodging the petition with the IACHR has expired and because the Commission lacks of competence *ratione personae*.

27. In first place, the Peruvian State argues that according to the pertinent portions of the petition and the note of the IACHR of the same date, the petitioner lodged his petition with the IACHR on April 28, 1999, which date was extemporaneous, since the deadline for presentation had expired. Indeed, the State holds, the Civil Chamber of the Superior Court of Justice of Callao, settled the nullity motion in the proceeding for payment in intis by invoking Decree Law 25604 in its decision of March 14, 1996 (clarified on November 22, 1996, inasmuch as its states the precise name of the respondent company), and ruled that the Privatization Committee would duly repay the debt after the sale of the assets and properties of PESCAPERU S.A.

28. The State says that no appeal to challenge said decisions was admissible because they had been issued in an incidental proceeding and that, in spite of that, the petitioner reiterated his request in the same proceeding. The Lower Civil Court of Callao, invoking Decree Law 25604 and in accordance with the decision already rendered by the Civil Chamber, dismissed that appeal in rulings of January 9 and 14, 1998, which, since they were not challenged by the petitioner, exhausted the remedies under domestic law. Furthermore, the new complaint of the petitioner on breach of duty was rejected at second and final instance by the Civil Chamber of Callao, thereby exhausting domestic remedies. With respect to the claim for compensatory damages, the Third Lower Civil Court of Callao ruled it unfounded on November 26, 1997, and on November 28 of that year notified the petitioner, who did not challenge it. Therefore, the decision became *res judicata* and domestic remedies were exhausted.

29. In addition, the criminal complaint brought to determine the responsibility of the judges who took cognizance of the aforementioned proceedings was not suitable to resolve the matter in dispute because it has a different purpose. In light of these considerations, the State holds that the IACHR should declare the petition inadmissible, particularly since the petitioner has not stated any facts or provided any justification to warrant invocation of the exception to that rule. Furthermore, it has been shown that he lodged his petition almost two years after he was notified of the final judicial decisions that exhausted the remedies under domestic law.

30. Second, the State says that the facts set out in the petition do not tend to establish a violation of rights under the terms of the Convention since they concern alleged violation of the rights of an artificial person, not a natural person. It says that the evidence provided by the petitioner and by the Peruvian State show that the alleged victim is the company TRALAPU E.I.R.L., which is a business entity of a social nature and limited liability, whose legal framework is provided by Decree Law 21621 (Law on Individual Limited Liability Companies), which expressly provides that such an entity has a legal personality separate from that of its owner, and that its assets, according to Article 1, are also distinct from those of its owner.[FN2]

[FN2] Decree Law 21621 (Law on Individual Limited Liability Companies), Chapter I, General Provisions.

Article 1 – An Individual Limited Liability Company is an artificial person created at the wishes of a single person, with assets distinct from those of its owner. It is created to engage in small-business economic activities under the auspices of Decree Law 21435.

31. The State indicates that the judicial actions mentioned by the petition, were brought by the artificial person TRALAPU E.I.R.L., given that, according to the petition, the property and rights allegedly harmed are those of said company. Moreover, the State says that all the proceedings mentioned in connection with exhaustion of domestic remedies were instituted by the artificial person TRALAPU E.I.R.L., and there is no record whatever of any complaint brought before the Peruvian courts in the name of the natural person José Luis Forzanni Ballardo. According to the State, it arises from the petition that the alleged facts concern property, the dispute over which has been decided by the courts in favor of TRALAPU E.I.R.L. and against PESCAPERU S.A., another artificial person governed by the standards of private-law that apply to state-owned companies. That decision must be enforced in the framework of the laws on corporate restructuring, and its effectiveness or enforceability must be demonstrated in that legal framework.

32. The State says that pursuant to the Convention, its preamble, and, in particular, Article 1(2), the protection afforded by that international instrument applies to every human being. Accordingly, the State maintains that the IACHR should declare the petition inadmissible *ratione personae*, since it lacks jurisdiction to take up cases concerned with the rights of artificial persons in accordance with Article 47 (b) of the Convention.

IV. ANALYSIS

33. The Commission must determine if it has *ratione personae* competence to examine the complaint presented by Mr. Forzanni Ballardo as both petitioner and alleged victim.

34. The petitioner is a natural person. He appears before the Commission as a corollary to trial under Peruvian law which did not involve the petitioner and alleged victim personally, but the company TRALAPU E.I.R.L. The foregoing is corroborated by the evidence provided by the petitioner.

35. The Commission has consistently and invariably held in its jurisprudence the inadmissibility of petitions filed by business entities or cases in which the domestic remedies were exhausted by such entities and not by the person appearing as petitioners before the Commission [FN3] Such is the situation in the instant case, where the alleged victim invokes that condition as proprietor of an artificial person in the name of which domestic remedies were exhausted. The petitioner recognizes that an artificial person is a juridical instrument to engage in economic activities. One of the reasons for the creation of artificial persons is to separate their assets from those of the physical persons that constitute them. Just as the laws of Peru and of all the other countries in the hemisphere draw a distinction between artificial persons and human, physical, or natural persons, so too are the laws to which they are subject different.[FN4]

[FN3] Inter alia, in the following cases: IACHR, Banco de Lima, Report 10/91, Case 10.169, Peru, Annual Report 1990-1991, p. 452 ff.; IACHR, Tabacalera Boquerón, Report 47/97, Paraguay, Annual Report 1997, p. 229 ff.; IACHR, Mevopal, S.A., Report 39/99, Argentina, Annual Report 1999; IACHR, Bernard Merens and Family, Report 103/99, Argentina, Annual Report 1999; IACHR, Bendeck- COHDINSA, Report 106/99, Honduras, Annual Report 1999.
[FN4] See note 2 supra.

36. The American Convention only protects the human person. The preamble of the American Convention on Human Rights and the provisions contained in Article 1(2) provide that “[f]or the purposes of this Convention, ‘person’ means every human being”, and that, therefore, the system of protection of human rights in this hemisphere is confined to the protection of natural persons and does not include artificial persons. It cannot be claimed that the clear distinction between a natural person and an artificial person, which is valid for all legal purposes, ceases when the protection of the American Convention is invoked.

37. In this case, the petitioner alleges that the State of Peru has violated his right to equal protection, a fair trial, and judicial protection, guaranteed by Articles 24, 8, and 25 of the Convention, respectively. The evidence put forward by the petitioner and the facts he describes in the petition, reveal a substantive connection between the alleged violations and the complaints of TRALAPU E.I.R.L., a company of which the petitioner is the owner-manager. Indeed, these alleged violations are concerned with acts or omissions of the management of PESCAPERU S.A., a Peruvian state-owned company, and of the judicial authorities of the State, which have to do directly with TRALAPU E.I.R.L. —an entity with legal personality— and not with the petitioner as an individual. This is clearly reflected in the briefs submitted by the petitioner and in the fact that the remedies under domestic law were attempted and exhausted in name and in representation of TRALAPU E.I.R.L., as an artificial person. Therefore, the Commission concludes that the alleged acts of discrimination and violation of due process and judicial guarantees would have been committed to the detriment of a business entity, not a person protected under the terms recognized in the American Convention on Human Rights.

38. The petitioner further claims to have been a victim of aggression against his right to property protected by the Convention at Article 21. It should be mentioned that in the inter-

American system, the right to property is a personal right and the Commission is empowered to vindicate the rights of an individual whose property is violated, but is not empowered with jurisdiction over the rights of artificial entities, such as corporations and businesses. The petitioner has lodged this complaint alleging that the Peruvian State has adopted measures intended to impair the rights of the company TRALAPU E.I.R.L. The Commission considers that it is not the right to property of the petitioner that is at issue, but the property rights of a business entity, and that this case does not fall into the jurisdiction of the Inter-American Commission on Human Rights. All things considered, the Commission notes that Mr. Forzanni Ballardo was not a party in any of the judicial proceedings exhausted by TRALAPU E.I.R.L. Furthermore, he has not argued that any physical or natural person has exhausted the remedies under domestic law, presented themselves before the national authorities as a victim, or mentioned any impediment that prevented them from doing so. The criminal complaint against the judicial officials was also brought in representation of the aforementioned company. Consequently, domestic remedies with regard to the individual right to property of the petitioner have not been exhausted.

39. In light of these considerations and pursuant to the terms of Articles 1(2) and 47(c) of the Convention and Article 31 of its Regulations, the Commission concludes that it lacks active competence *ratione personae* to hear this petition.

40. For reasons of procedural economy, the Commission will refrain from continuing to analyze the remaining aspects of this petition's admissibility.

V. CONCLUSIONS

41. Based on the foregoing factual and legal arguments, the Commission finds that the petition is inadmissible in light of the requirements established in Articles 44 and 1(2) of the American Convention, because the IACHR lacks *ratione personae* competence to admit this petition.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the instant petition inadmissible.
2. To notify the petitioner and the State of this decision; and
3. To publish this decision and include it in its 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 March 9th, 2005. Signed: Clare K. Roberts, President; Paulo Sérgio Pinheiro, Second Vice-President; Commission Members: Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez and Florentín Meléndez,