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Decided by: Chairman: Paolo Carozza;
First Vice-Chairwoman: Luz Patricia Mejia Guerrero;
Second Vice-Chairman: Felipe Gonzalez;
Commissioners: Sir Clare K. Roberts, Florentin Melendez, Victor Abramovich.
Dated: 11 February 2009
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Represented by: APPLICANTS: Jesus Mogollon, Pablo Alvarez
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I. SUMMARY

1. On November 11 and 12, 1998, the Inter-American Commission on Human Rights (hereinafter also “the Inter-American Commission,” “the Commission,” or “the IACHR”) received a petition submitted by Mr. Jesús Mogollón, Pablo Álvarez, and the Single Workers Union of ECASA (Sindicato Único de Trabajadores de ECASA[FN1] (hereinafter also “SUTECASA” or “the petitioners”) on behalf of the members of the Single Workers Union of ECASA (hereinafter also “the alleged victims”), alleging violation by the Republic of Peru (hereinafter also “Peru,” “the State,” or “the Peruvian State”) of the rights enshrined in Articles 8, 24, and 25 of the American Convention on Human Rights (hereinafter also “the American Convention,” “the Convention,” or the “ACHR”).

[FN1] Later, Mr. José Chulles Espinoza was constituted as co-petitioner.

2. The petitioners state that in the context of privatizing state-owned companies in 1991 the government decided to liquidate the Empresa Comercializadora de Alimentos S.A. (hereinafter also “ECASA”), causing the dismissal of the alleged victims, ignoring the guarantees established in the Collective Agreement that governed them, all on the basis of Decrees 057-90-TR and 107-90-PCM, ordering the suspension of salary increases established under Collective Agreements. The petitioners stated that given this situation they filed appeals for protection of constitutional rights, appeals that were decided in their favor at all levels. They specify that the final decision established that the aforementioned decrees were not applicable to the ECASA workers, but that

the Peruvian State has failed to restore the status quo ante the application of those decrees by paying benefits owed and recognized at various state levels.

3. For its part, the State of Peru argued that the decision it has allegedly failed to comply with only declared that the Decrees were not applicable, without establishing the payment of sums in favor of the alleged victims. The State indicated that in order to obtain payment of the benefits that the petitioners feel are owed to them, they have to file an ordinary declarative judgment action regarding that debt. In this respect, the State argued that the petitioners failed to exhaust domestic remedies in that they used the wrong legal route by resorting to a constitutional mechanism rather than the indicated labor action.

4. After examining the positions of the parties in the light of the admissibility requirements established in Articles 46 and 47 of the American Convention, the Commission concluded that it is competent to hear the claim submitted and that the petition is admissible based on the alleged violation of right enshrined in Articles 21, 8, and 25 of the American Convention, as they relate to the general obligations established in Articles 1(1) and 2 of the same instrument. Articles 2 and 21 of the Convention have been incorporated by the Commission based on the principle of *iura novit curia*. The Commission also concluded that the petition is inadmissible as regards the alleged violation of Article 24 of the American Convention. As a result, the Commission decided to notify the parties, make this Admissibility Report public, and include it in its Annual Report.

II. PROCESSING BEFORE THE COMMISSION

5. On November 11 and 12, 1998, the Commission received two communications submitted by Mrs. Jesús Mogollón and Pablo Álvarez on behalf of 24 individuals, and by the General Secretary of SUTECASA, respectively, in which the same facts were alleged. These communications were registered under No. P 914-98. On February 19, 2002, August 16, 2002, May 30, 2003, and August 31, 2003 communications providing additional information were received from the petitioners.

6. On January 27, 2006, the Commission forwarded to the State the relevant sections of the petition and the later updates, asking that the State, in accordance with Article 30(3) of the IACHR Rules of Procedure, submit the observations it considered relevant within a period of two months.

7. On March 24, 2006, the Peruvian State requested an extension of this deadline, which was granted for an additional month on March 29, 2006.

8. On May 4, 2006, the State submitted its response to the petition, which was forwarded to the petitioners on May 22, 2006, asking them to submit the observations they considered relevant within a period of one month.

III. POSITIONS OF THE PARTIES

A. The petitioners

9. To provide background, the petitioners stated that in the context of the policy on the privatization of state-owned companies, on April 28, 1991 the government selected ECASA as the first company to be privatized, for which purpose it proceeded to declare it dissolved and liquidated, forcing the resignation of more than 4,000 workers nationally, who were dismissed after six months of severely reduced compensation, ignoring the 90-91 Collective Agreement that governed those workers, particularly with respect to the salary schedule. They stated that this violation was authorized by Executive Decrees 057-90-TR and 107-90-PCM.

10. The petitioners stated that the ECASA Liquidation Committee paid what was governed by the 90-91 Collective Agreement and the salary schedule to only a privileged group of workers and creditor companies, engaging in discrimination and ignoring the Peruvian Constitution that established the priority to be given to paying compensation and fringe benefits over any other obligation.

11. They specified that it was against this action that SUTECASA filed an appeal for protection of constitutional rights (amparo) and they allege that the appeal was decided in their favor at all levels, including the Constitutional Court. They added that at the time they submitted the petition – after seven years of litigation – the process was in the stage at which the decision is executed but they had not obtained payment of the “unpaid compensation” even though on February 16, 1993 the decision on appeal favorable to SUTECASA became definitely, solidly, and inalterably res judicata by resolution of the Supreme Court, which ordered publication of its resolution.

12. According to the petitioners, failure to carry out the decision has been due to “delaying tactics,” including those on the part of official experts.

13. The attachments provided by the petitioner indicate that the first instance decision on appeal was dated April 22, 1991; that the second instance decision was dated September 27, 1991; that on September 14, 1992 the Chamber of Constitutional and Social Law declared that there was no nullity and that it agreed with the decisions issued by the lower courts; and that on November 14, 1996 the Specialized Court for Civil Matters of Lima issued a resolution requiring the respondent to comply within a period of three days with the order of the “Supreme Court.”

14. Among the actions attempted and resolutions from governmental authorities ordering that the decision be enforced, the petitioners mention the following:

- In 1993 they filed a complaint with the Oversight Committee of the Democratic Constituent Congress, which agreed to send an official letter to the President of ECASA ordering him to proceed to pay the workers’ fringe benefits in accordance with what had been ordered in the Supreme Court’s final decision of February 16, 1993.

- On November 10, 1995, the Superior Court of Justice issued a decision responding to the ECASA Privatization Committee and the Government Prosecutors who sought to ignore the legal status and existence of the union; the Court expressed its views in the following terms “it is obvious that what the summoned ECASA is seeking by liquidating is to evade the union and not satisfy the rights of the workers that the union brings together, in that it is has full knowledge that the principal action has been won by the petitioners under a final decision of the Supreme

Court, the processing of which is at the stage when the decision is to be executed. This resolution was confirmed by the Supreme Court of the Republic on February 16, 1996.

- The petitioners went to the ILO and received a response indicating that the ILO had intervened with the Government of Peru and would keep them informed of the response.

- In 1997 SUTECASA filed a complaint with the Oversight Committee of the Congress, the Chair of which set up a sub-committee that recommended that a criminal complaint be filed against the Special Committee of ECASA in liquidation, as well as the intervention of the Office of the Comptroller General of the Republic.

- The Special Committee was created under Law 27452 and the Multisectoral Committee was created by Executive Decree 027-2001-TR; these committees ruled in their final reports that based on the decision in favor of SUTECASA, the petitioners were entitled to payment of fringe benefits given that Executive Decrees 057-TR and 107-PMC had been applied to them by ignoring the Collective Agreement and Salary Schedule signed by SUTECASA and ECASA, the result of which was that the payment calculations were less than what the petitioners were entitled to, in addition to the violation of the constitutional standard establishing that obligations to workers take precedence.

- They reported the situation to the Constitution Committee of the Congress and the Labor Committee; on August 6, 2001 the first committee sent an official letter to the Minister of Economy and Finance, indicating that since the debts were recognized by the Constitutional Court, they should be honored with the greatest urgency. This was reiterated on March 20, 2002 and June 4, 2002. The second committee sent an official letter to the same official and to the same effect on May 15, 2002.

15. With respect to violation of the constitutional preference given to labor obligations, the petitioners stated that despite the decision in their favor, through various emergency decrees such as Decree No. 030-94, the government on several occasions authorized the transfer of real states and movable assets from ECASA to various companies that were creditors of the State.

16. The petitioners mentioned in general terms the approval of Law 27803 on the Review of Collective Dismissals, seeking to “cut off” fringe benefits earned and not satisfied by any government administration. This law establishes four articles allowing terminated individuals to have recourse either to reinstatement or relocation without recognition of accrued salary payments; to early retirement; to financial compensation or \$3,000 or less; or employment retraining or training.

17. They reported that they again had recourse to the judicial branch in an attempt to receive justice from the new government,[FN2] but that their situation remained unchanged.

[FN2] Communication received on August 30, 2003.

B. Position of the State

18. The State provided a summary of the facts submitted by the petitioner, indicating that the 90/91 Collective Agreement between ECASA and SUTECASA was signed on June 25, 1990 and

that the government issued Decrees 057-90-TR and 107-90-PCM in August 1990, suspending the compensation increases established by unilateral decision of the employer or under the Collective Agreement. The State added that ECASA was declared dissolved and liquidated by Decree 085-91-PCM of April 23, 1991 and that on May 27, 1991 ECASA asked for police forces to prevent the entry of workers who had not accepted the resignation with incentive that had been offered, forcing the resignation of 3,905 workers, who they terminated six months later, ignoring the agreements reached under the 90/91 Collective Agreement.

19. The State presented its version – corresponding to that of the petitioners – regarding other actions taken by SUTECASA before the Legislative and Executive Branches to achieve enforcement of the court decision in their favor. According to the State’s version, these bodies concluded that, in compliance with the Decision of the Supreme Court of Justice, the members of SUTECASA should be paid the money owed for fringe benefits.

20. Regarding the judicial process, the Peruvian State indicated that in August 1990 SUTECASA filed an action for constitutional protection against the Office of the President of the Council of Ministers, the Ministry of Economy and Finance, the Ministry of Labor, and ECASA with the First Temporary Business Court of Public Law, seeking to have Decrees 057-90-TR and 107-90-PCM declared inapplicable and, as a result, declaring the Single Salary Schedule and the Collective Agreement to be in force.

21. The State specified that on February 16, 1993 the Supreme Court of Justice declared the referenced decrees inapplicable to the ECASA workers, which decision became final on June 25, 1996 when the Constitutional Court, declaring the appeal inadmissible, declared the decision of the Supreme Court to be solid and enforceable. The State emphasized that when the complaint was brought before the Inter-American Commission, the process was open in the Specialized Court of Public Law, in the decision execution phase.

22. The State related that at this phase of the execution of the decision, the court ordered that expert analysis be performed in order to establish whether between May 1990 and April 1991, ECASA had complied with the increases contemplated in the Collective Agreement signed by SUTECASA for that period. It mentioned that the expert testimony was issued on September 6, 1998, concluding that Decrees 057-90-TR and 107-90-PCM were not applied to the members of SUTECASA and that the analysis had not been able to determine the existence of amounts due in their favor. It added that this expert testimony was approved by the Chamber for Public Law on December 18, 1998, that on January 14, 1999 the Court of Public Law declared the appeals process complete, and that this final decision was confirmed by the Chamber of Public Law on February 12, 1999 after ruling on the appeal filed by SUTECASA.

23. According to the State, this decision indicates “that the declarative legal question that is the subject of the appeal for constitutional protection had been converted into a question of fact and a claim to payment, and that if the complainants felt that ECASA did not pay them the amount to which they felt they were entitled, given the inapplicability of the aforementioned Executive Decrees that are the subject of the complaint, they had sought to enforce the payment of compensation owed, leaving unharmed the right of the Union members to demand that this be done in the appropriate manner and using the appropriate means.”

24. The State argued that the decision on the constitutional appeal cannot be enforced for purposes of payment, since an ordinary process should be conducted first so that a judge can rule that a debt exists, on the amount thereof, and who is obligated to pay it. The State emphasized that the subject of the constitutional appeal process was the applicability of Decrees 057-90-TR and 107-90-PCM, so that enforcement was exhausted by ordering and confirming that inapplicability, which was clearly seen in the expert testimony in the process of executing the decision.

25. The State added that on December 31, 2003 SUTECASA filed a Proceeding for Enforcement of a Final Court Decision with the 13th Labor Court of Lima, asking that the court order the payment of 180,811,430.37 new soles to the claimants. It specified that that proceeding concluded with the resolution of December 7, 2004, whereby the Second Labor Chamber of Lima declared the entire proceeding null and the complaint with respect to execution of a final court decision inadmissible, arguing that, according to Law No. 23506, the judges of the First Instance Court for Civil Matters are competent to hear the constitutional appeal action and thus labor judges are not competent to hear cases with respect to the execution of resolutions issued in constitutional appeal proceedings.

26. The Peruvian State requested that the petition be declared inadmissible based on the failure to exhaust domestic remedies, since although SUTECASA “was successful in a constitutional appeal proceeding that ruled in favor of all the workers in the union, the petitioners’ claim for payment is not possible except through an ordinary labor proceeding.” In the State’s opinion, the petitioners did not use the appropriate venue for filing its action to enforce its right to claim payment. The State concluded that “it is the absolute responsibility of the petitioners to have filed a constitutional proceeding that although ruling in favor of the petitioners, cannot be enforced in order to bring about the payment they claim.”

27. The State concluded that the appeal for constitutional protection filed by SUTECASA concluded after having been handled according to the law and adhering to the rules of due process. In addition, the State indicated that the facts reported do not indicate violations of the rights enshrined in Articles 24 and 25 of the American Convention.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence

1. Competence *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae* of the Commission

28. The petitioners have standing under Article 44 of the Convention to submit complaints on behalf of the alleged victims. The alleged victims in the case were under the jurisdiction of the Peruvian State on the date of the alleged facts. For its part, the State of Peru ratified the American Convention on July 28, 1978. As a result, the Commission is competent *ratione personae* to examine the petition. Although the alleged victims in the case are not individually identified, in the potential merits phase, the Commission will consider the possible violation of

rights enshrined in the Convention with respect to individuals who successfully identify themselves as members of SUTECASA, who were beneficiaries of the court decision that has allegedly not been enforced.

29. The Commission is competent *ratione loci* to hear the petition, in that it alleges violations of rights protected by the American Convention that took place in the territory of a State party to that convention.

30. The Commission is also competent *ratione temporis* since the obligation to respect and guarantee the rights protected by the American Convention was already in effect for the State on the date on which the facts alleged in the petition would have occurred.

31. Finally, the Commission is competent *ratione materiae*, because the petition denounces alleged violations of human rights protected by the American Convention.

B. Exhaustion of domestic remedies

32. Article 46(1)(a) of the American Convention provides that in order for a complaint filed with the Inter-American Commission to be admissible in accordance with Article 44 of the Convention, the domestic remedies must have been attempted and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow domestic authorities to hear the alleged violation of a protected right and, if appropriate, to have the opportunity to resolve the situation before it is heard by an international body.

33. The Peruvian State filed the objection on a timely basis with respect to a failure to exhaust domestic remedies. The argument raised by the State is summarized as stating that although the petitioners obtained a favorable decision in the constitutional appeal, that decision ruled on the inapplicability of the Executive Decrees and did not include orders to pay fringe benefits. In this sense, the State argued that the petitioners had to initiate an ordinary declarative labor proceeding regarding the debt that, in their view, is owed to them by the State.

34. The attachments provided by the parties indicate that as of the date the decision in the constitutional appeal ruling in favor of the alleged victims became final – February 16, 1993 – the respective process executing the decision began. The Commission notes that the decision of February 12, 1999, ordered that the case be archived; leaving unharmed the right of the alleged victims to file a remedy to the appropriate venues.

35. The information available indicates that although the decision in favor of the alleged victims refers only to the inapplicability of Decrees 057-90-TR and 107-90-PCM, during the process of executing the decision, some of the judicial authorities who made decisions in the process recognized that the purpose of said processing of the execution of the decision was to restore the status quo ante and, thus, to achieve payment of the debt ECASA had to the alleged victims as a result of the application of the decrees declared judicially “inapplicable” because they constituted a violation of labor rights.

36. By way of example, it can be mentioned that expert analyses were ordered to determine the application of the decrees and the amount of the debt that had not been received as a result. In this respect, the attachments to the file include expert reports dated April 22, 1996 and September 8, 1998, indicating that the purpose of the reports was to determine the application of the 90-91 collective agreement, to determine whether or not Decrees No. 057-90TR and 107-90 PCM were applied, and to determine the amount that ECASA owed to the workers represented by SUTECASA.

37. In addition, the Superior Court of Justice of Lima, in a decision of November 10, 1995, declared the nullity of the appeal filed by ECASA, stating:

(...) in this sequel to what was already settled in the principal action, there is no restriction whatsoever on the rights of the workers who are supported by the Constitution and the labor laws that governed during the period they rendered their services; in this respect, nothing can render invalid what was resolved by the Final Decision of the Supreme Court in an Appeal for Constitutional Protection (...) declaring the constitutional appeal filed by the Single Union of Workers of the Empresa Comercializadora de Alimentos Sociedad Anónima, leaving settled the right of the complainant workers, who have been acting through their Union to have their individual labor rights honored; (...) administrative decisions are ineffective when they violate the constitutional rights of the complainants, who have a legitimate right to demand payment of their fringe benefits, and the method they use to have their legitimate claims honored is irrelevant, all the more so when their already recognized rights have attained status as res judicata and it is counterproductive that the processing of execution and the process of liquidations would delay payment of the amounts owed to them and that the workers would have to confront new difficulties in addition to those they have already overcome, since the record shows that the handling of this case has been drawn out over several years, threatening to make the complainants' rights illusory and to render without effect the appeal for constitutional protection.

38. The argument of the petitioner is based in the lack of compliance of a decision on their favor. Once they obtained a favorable decision of amparo, they acted in the process of execution in which on February 12, 1999, it was declared that amparo has only declarative effects even though during the procedure judicial authorities required expert reports to determine the amount of the debt.

39. Without at this stage analyzing whether the failure to pay the benefits that were not received as a result of having applied the challenged Decrees constituted a failure to comply with the decision, the Commission considers that during the process of executing the decision, the judicial authorities acted in a way that indicated that the process of executing the decision was the appropriate mechanism for achieving payment of the benefits owed. Under these circumstances, the Commission considers that the State failed in demonstrating the existence of another adequate remedy besides the process of executing the decision. The Commission concludes that the said decision of February 12, 1999, exhausted the remedies of the domestic jurisdiction in compliance with the requirement established in Article 46.1 a) [FN3].

[FN3] The Commission notes that years later, a group of petitioners filed a new procedure to execute the decision in the civil jurisdiction. They obtained a decision declaring the lack of competence of the judge. Taking into account the conclusion of this paragraph, the IACHR does not take into consideration that procedure in order to determine if domestic remedies have been exhausted.

C. Deadline for submitting the petition

40. Article 46(1)(b) of the Convention establishes that in order for a petition to be declared admissible it must have been submitted within a period of six months from the date on which the interested party was informed of the final decision that exhausted the domestic jurisdiction.

41. According to the section on the exhaustion of domestic remedies, the process of executing the decision ended on February 12, 1999, after submission of the petition to the Commission. The Commission concluded that the domestic remedies were exhausted with that decision. In this respect, compliance with the requirement to submit the petition on a timely basis is intrinsically linked to the exhaustion of domestic remedies.

D. Duplication of international procedures and res judicata

42. Article 46(1)(c) of the Convention provides that the admission of petitions is subject to the requirement that the matter "is not pending in another international proceeding for settlement" and Article 47(d) of the Convention stipulates that the Commission shall not admit a petition that is substantially the reproduction of a petition or earlier communication already studied by the Commission or another international body. In the instant case, the parties have not argued the existence of either of these two inadmissibility situations, nor are they deduced from the file.

E. Characterization of the alleged facts

43. For purposes of admissibility, the Commission must decide whether the petition relates facts that could characterize a violation, as stipulated in Article 47(b) of the American Convention, and whether the petition is "manifestly groundless" or "obviously out of order" in accordance with subparagraph (c) of the same article. The standard for evaluating these points is different from that required to decide on the merits of a complaint. The Commission must perform a prima facie evaluation to examine whether the complaint provides a basis for the apparent or potential violation of a right guaranteed by the Convention and not to establish the existence of a violation. Such examination is a summary analysis that does not involve prejudging or opining in advance on the merits.

44. The Commission feels that should the facts alleged in the petition be true, they could characterize a violation of the rights enshrined in Articles 21[FN4], 8, and 25 of the American Convention, as they relate to the obligations established in Articles 1(1) and 2 of the same instrument.

[FN4] The Commission believes that should it be proven that the alleged failure to comply with the decision prevented the alleged victims from having an effective remedies with respect to their property rights, particularly the salaries and fringe benefits to which they were entitled by virtue of the collective agreement that governed them, the facts could characterize a violation of the right to property.

45. From the information provided by the petitioners, the Commission does not have sufficient evidence to rule on the possible characterization of a violation of the right enshrined in Article 24 of the American Convention.

V. CONCLUSIONS

46. Based on the de facto and de jure considerations presented, and without prejudging the merits of the case, the Inter-American Commission concludes that the instant case meets the admissibility requirements established in Articles 46 and 47 of the American Convention and as a result

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the petition under review admissible with respect to the rights enshrined in Articles 21, 8, and 25 of the American Convention as they relate to the obligations established in Articles 1(1) and 2 of the same instrument.
2. To declare the petition under review inadmissible with respect to the right enshrined in Article 24 of the American Convention.
3. To notify the State and the petitioner of this decision.
4. To begin processing on the merits of the case.
5. To publish this decision and include it in the Annual Report to be presented to the OAS General Assembly.

Approved by the Inter-American Commission on Human Rights on February 11, 2009. (Signed): Paolo G. Carozza, Chairman; Luz Patricia Mejía Guerrero, First Vice-Chairwoman; Felipe González, Second Vice-Chairman; Sir Clare K. Roberts, Florentín Meléndez, and Víctor Abramovich, members of the Commission.