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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 102/09; Petition 1380-06
Session: Hundred Thirty-Seventh Regular Session (28 October – 13 November 2009)
Title/Style of Cause: Pensioners of the National Agricultural Development Bank (BANDESA) v. Guatemala
Doc. Type: Decision
Decided by: First Vice President: Victor Abramovich;
Second Vice President: Felipe Gonzalez;
Commissioners: Paulo Sergio Pinheiro, Paolo G. Carozza.
Dated: 29 October 2009
Citation: BANDESA v. Guatemala, Petition 1380-06, Inter-Am. C.H.R., Report No. 102/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
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I. SUMMARY

1. On December 11, 2006 the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission,” “Commission,” or “IACHR”) received a complaint presented by the Asociación del Plan de Pensiones para los trabajadores [Workers’ Pension Plan Association] of the Banco Nacional de Desarrollo Agrícola [National Agricultural Development Bank] (BANDESA) (hereinafter “A.P.P. BANDESA” or the “petitioners”), acting through its President, Aura Marina Gómez Quiñónez, in representation of 179 former BANDESA workers (hereinafter the “alleged victims”), against the Republic of Guatemala (hereinafter the “Guatemalan State,” “Guatemala,” or “State”). In the petition, it is alleged that the State has incurred responsibility by reason of its delay in adjudicating the legal remedies pursued by the alleged victims in asserting their rights under the BANDESA workers’ pension plan.

2. The petitioners allege that the State of Guatemala is responsible for violations of Articles 4 (right to life), 8 (right to a fair trial), 17 (rights of the family), 24 (right to equal protection), and 25 (right to judicial protection) set forth in the American Convention on Human Rights (hereinafter the “Convention” or “American Convention”) to the detriment of the alleged victims. They also allege that the State is responsible for the violation of the rights enshrined in Articles XI (right to the preservation of health and to well-being), XVI (right to social security), XVIII (right to a fair trial), and XXIV (right of petition) of the American Declaration of the Rights and Duties of Man (hereinafter the “American Declaration”); Articles 9 (right to social security) and 17 (protection of the elderly) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador” (hereinafter, the “Protocol of San Salvador”); and Article 22 (right to social security) of the Universal Declaration of Human Rights (hereinafter the “Universal Declaration”).

3. As regards admissibility, the petitioners allege that, owing to the unwarranted delay on the part of justice administration bodies in the proceedings instituted under domestic law on September 29, 1999, which as of the date of this report have yet to be resolved, the exception to the requirement of exhaustion of domestic remedies set forth in Article 46(2)(c) of the American Convention is applicable.

4. For its part, the State does not dispute the facts alleged by the petitioners and acknowledges the delay in the labor proceedings pursued under domestic law. It therefore indicates that “it does not contest the admissibility” of the instant case and indicates that this does not imply a judgment by the State regarding the merits of this matter.

5. Having analyzed the petition, and in accordance with the provisions of Articles 46 and 47 of the American Convention, as well as Articles 30, 37, and related articles of its Rules of Procedure, the IACHR concludes that it has jurisdiction to consider the complaint lodged by the petitioners based on the alleged violation of Articles 8 and 25 of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of the alleged victims. Additionally, taking into consideration the *jura novit curia* principle, the Commission concludes that the petition is also admissible based on the alleged violation of Articles 21 and 26 of the Convention, in conjunction with Article 1(1) thereof. The Commission decides to declare the petition inadmissible with regard to the alleged violations of Articles 4, 17, and 24 of the American Convention; Articles XI, XVI, XVIII, and XXIV of the American Declaration; and Articles 9 and 17 of the Protocol of San Salvador. Finally, the Commission decides to notify the parties, to publish this admissibility report, and to include it in its annual report to the General Assembly of the Organization of American States.

II. PROCESSING BY THE INTER-AMERICAN COMMISSION

6. The petition was received on December 11, 2006, and assigned number P-1380-06. On April 9, 2007, it was forwarded to the State, setting a period of two months for it to submit its observations. The reply of Guatemala was received by the IACHR on June 19, 2007.

7. The Commission also received information from the petitioners on July 21, 2009, which was duly transmitted to the State.[FN1]

[FN1] The IACHR has also received numerous communications sent by the alleged victims requesting the Commission to issue a decision. These communications were duly transmitted to the State.

III. POSITIONS OF THE PARTIES

A. The petitioners

8. The petitioners state that by Resolution JD-071-92, adopted on November 3, 1992 by the National Agricultural Development Bank (BANDESA) – a decentralized state entity with economic functions, legally established in 1970 – a pension plan was established for those in a relationship of employment with that institution. They indicate that therefore a reserve fund was established for the operation of that plan, made up of contributions from the employer – in an amount equivalent to 5% of all wages due to its employees, accrued annually – and from the workers benefited – withholding 3% of their monthly and deferred wages as contributions to the pension regime.

9. The petitioners maintain that in 1997, BANDESA became a mixed capital bank, organized as a corporation, with the company name Banco de Desarrollo Rural [Rural Development Bank] (BANRURAL). They maintain that its conversion, adopted by Decree 57-97 of the National Congress of Guatemala, entailed a transfer of BANDESA's capital to BANRURAL, including the pension plan funds. In that regard, it is alleged that in BANDESA's case, in contrast to what occurred in the privatization of Empresa Guatemalteca de Telecomunicaciones (GUATEL), provision was not made to create a technical reserve so as to ensure funds for its workers' pension plan, despite numerous suggestions to that effect made to the National Congress by the aforementioned Bank's employees.

10. The petitioners maintain that when BANDESA had been converted, the pension plan was not respected. In this regard, they state that when the BANDESA officers caused alarm among the system's beneficiaries regarding the pension fund bankruptcy that could ensue as a result of the existing budgetary deficit, many workers demanded a refund of their contributions. They indicate that, nonetheless, A.P.P. BANDESA, the association with responsibility for guaranteeing retirement, death, or disability pensions, managed to continue to make payments for some time. However, they report that, after BANDESA-BANRURAL suspended both payments of contributions and withholdings of workers' wages, they had had to suspend retirement, death, and disability pension payments, to the detriment of the right to social security of all of its members.

11. Accordingly, the petitions list the following individuals as alleged victims: (1) María Concepción Dardón de Estrada; (2) Rafael Horacio Paredes Perdomo (deceased); (3) Israel Pérez Alay; (4) José Rafael Sáenz Díaz; (5) María Gabriela González Martínez; (6) Heriberto Ramírez Pérez; (7) Rodolfo Cruz S.; (8) Genaro Urrutia Orellana; (9) Benjamin Gamaliel Barrios Peralta; (10) Francisco Javier Lorenzo Morales; (11) Ángel Gabriel Méndez Álvarez; (12) Humberto González Arriola; (13) Rafael Garrido Acevedo; (14) Julio Cesar Orellana Noriega (deceased); (15) Vicente Sandoval Martínez (deceased); (16) Gloria Luz León López de Castillo; (17) Rosalina Parada Aroche; (18) Julio Armando Gaitán Palacios; (19) Joel Isidro Marroquín Méndez; (20) Pedro Augusto Lara Cordero; (21) Gustavo Eguizabal Palencia; (22) José Porfirio Díaz Rivas (deceased); (23) José Rolando Bonilla Sandoval; (24) Plácido García Hernández (deceased); (25) Urbano López S.; (26) Ricardo Alberto Martínez Escobar; (27) Melida Ruth Mansilla Castro; (28) Mauro Lara Contreras; (29) Olga Vilma Rene Peralta; (30) Beatriz Solórzano; (31) Reginalda Cruz Pineda Boteo; (32) Carlos Arnoldo E. Chévez Sierra; (33) Miriam Ovando viuda de Estrada; (34) María Lucinda Montufar; (35) Enrique Estrada Cana; (36) Romeo Efraín López Castillo (deceased); (37) Félix Humberto Estévez Morales; (38) Matilde Ortega viuda de Molina; (39) Jorge Inés Quevedo (deceased); (40) Víctor Manuel

Alvarado Espinoza (deceased); (41) Berta Amanda Marroquín; (42) Clara Consuelo Aguilar; (43) Lilian Mirella Benítez Rodríguez; (44) Carlos Waldemar Requena Cabrera; (45) Gonzalo Martínez Cruz; (46) Roque Cruz Sandoval; (47) David Juvencio del Águila (o David Juvencio del Águilla, deceased); (48) Carlos Francisco García Saquic; (49) Egidio Valle Raxtun; (50) Cristóbal Franco Acevedo; (51) Raquel Antonio Martínez y Martínez; (52) Herminio Gregorio Flores; (53) Oscar Armando Mateo Teo; (54) Carlos Roberto de León Ixcaragua; (55) Ernan Eleazar Calderón Ochoa; (56) Efraín Hernández Pacheco (deceased); (57) María de los Ángeles Novales Morán; (58) Francisco José Mena Vargas; (59) Moisés Hernández Santos; (60) Roderico Melvendino Álvarez; (61) César Augusto Tomas Palacios; (62) Ambrocio Larios Pérez; (63) Jorge Chan Sajche; (64) Héctor Augusto Batres Cacacho; (65) María Leticia Morales; (66) Ariel de Jesús Méndez López; (67) Margarita Figueroa García; (68) Domingo García Estrada; (69) Marcial Antonio Ventura; (70) Ángel Esteban Sandoval; (71) Francisca Elena Cerna; (72) Ricardo Saavedra Gonzáles; (73) Maximiliano Fajardo Morales; (74) Israel Isaías López Bautista; (75) Rolando Romeo Mayen Villagrán; (76) Rene Raúl Calderón (o Rene Raúl Calderón Mejicanos, deceased); (77) Víctor Manuel Chinchilla; (78) Maclovia Romero López; (79) Jesús Mayen Gómez; (80) Reginaldo Quech Serech (deceased); (81) José Facundo Vargas; (82) Julio Cesar Flores Arias; (83) Carlos Alfredo Moreno; (84) Pedro Pérez y Pérez; (85) Adolfo Palencia Pineda; (86) Carlos Arturo Morales; (87) Mario Cornelio Mejicanos; (88) Carlota Amelia Girón de Bolaños; (89) Juan Ramón Salgueros Arellano; (90) Roberto Alfredo Leal Catalán; (91) Emilio de Jesús Llamas Rodas; (92) Arnoldo Noe Juárez de León; (93) José Domingo Armas Palencia (deceased); (94) Arturo Juárez Barlovento; (95) Rogelio León Sosa (deceased); (96) Abelardo López Ramírez; (97) Raúl Francisco Romero; (98) Alvaro Salomón Paniagua Juárez (deceased); (99) Héctor de Jesús Esquivel; (100) Amabilia Espina de Rodríguez; (101) Fusbia Nely Vásquez; (102) Enrique Rolando López Castellanos; (103) Leopoldo Torres Girón; (104) Carlos Romeo Reyes Siliezar; (105) Hilda Aidé de León; (106) Silfida Lucila Salazar; (107) Carlos Enrique Alvarado Salazar (deceased); (108) Elvia Rosalina García; (109) Héctor Arturo Aragón; (110) Zoila Josefina Fonseca; (111) Irma Estela Rojas de Monzón; (112) José Alberto Ortega Fernández; (113) María del Carmen Culebro; (114) Luis Alfonso Padilla; (115) Oscar Pérez Gonzáles; (116) Julio César Alburez Godoy; (117) Oscar Sagastume Morán; (118) Gloria Emilia Reynoso Farfán; (119) José Fernando Solórzano; (120) César Augusto Castro Palomo; (121) Andrés Pérez López; (122) Eliseo Hernández Salgueros; (123) Oscar Pérez Gonzáles; (124) Telma Ruth Reyes Lara; (125) Simón Vásquez Gómez; (126) Aura Estela Leiva de Valladares; (127) Byron Pedro Arrivillaga; (128) César Humberto Méndez Recinos; (129) José Antonio Paz Yol; (130) Oscar Rene López Monzón; (131) José Isaías Figueroa; (132) Juanquin de León Barrios; (133) Moisés Ortiz Caal; (134) Ana María Ruiz Morales; (135) Claudia del Carmen Marroquín Lemus; (136) Rosa del Carmen de Noches; (137) Fidel Efraín Alay Najarro; (138) Juan Alberto Pérez Marroquín; (139) Miguel Enrique Oliva Estrada; (140) Sebastian Hernández López; (141) Mardoqueo Gómez Pichiya; (142) Aura Marina Gómez Quiñónez; (143) Beatriz Mena Klee; (144) Jorge Mario Arriola Maldonado; (145) Rufino Cordero Argueta; (146) Luis Alfredo Hernández García; (147) Edy Armando García Olmos; (148) Jorge Eduardo Samayoa Mendosa; (149) Álvaro Jeovany Chaman Pacay; (150) Ermelindo Rigoberto Molina; (151) José Rubén Rodríguez Cuyún; (152) Moisés Carias Corado; (153) Marco Tulio Letona Trapaga; (154) Mario Cresencio Cutz; (155) Rubén García López; (156) Blanca Estela Morales Pérez; (157) Rolando García Ichich; (158) Mirtala Amparo Enríquez de García; (159) María Elisa Del Rosario Moreira; (160) Víctor Manuel Herrarte Arroyo; (161) Lilian Patricia Cristiany Alvarado; (162) Julián Silverio Sontay Xiloj; (163) César Augusto

Hernández Castillo; (164) Adilia Aracely; (165) Hidalgo Monzón; (166) Gilberto Tumax A.; (167) María Cristina Martínez Rodríguez; (168) Gerber Glaimiro; (169) Hernández Castillo; (170) Arturo Benedicto Moran; (171) Samuel Humberto Hernández Castillo; (172) José Elmar Herrera Castillo; (173) Celso Rolando Molina Ortiz; (174) Israel Adolfo Contreras Pineda (deceased); (175) Eduardo Estrada Montufar (deceased); (176) José Antonio Molina Padilla (deceased); (177) Francisco Javier Corzo Quezada (deceased); (178) Juan Raquel Lorenzana Castañeda (deceased); and (179) José Vicente Rocha Cerdón (deceased).

12. The petitioners maintain that, in consequence, on September 29, 1999, they instituted proceedings against BANRURAL S.A., demanding payment of contributions in accordance with the provisions of the legislation governing the pension fund and requesting intervention by the banking authority. That complaint led to the litigation of Case 359-99, assigned to the Fourth Court of Labor and Social Security.

13. They maintain that in the above-mentioned litigation, certain procedural steps were held up, as were the proceedings in general. For example, the petitioners emphasize the delay caused by the Amparo Case 656-01, instituted by BANRURAL, which allegedly prevented litigation of the main case from proceeding, for the two years and eight months its resolution allegedly required. They likewise refer to the delays that allegedly occurred as a result of the exception lack of personal jurisdiction, cited by the National Government when it was added as a co-defendant. They allege that the delays meant that, as of the date that the petition was lodged with the IACHR, over six years had transpired since the institution of proceedings without any significant progress in the case.

14. Given the facts alleged, the petitioners conclude that the State has incurred responsibility for unwarranted delay in administering justice and that domestic remedies cannot be exhausted. In that regard, they allege the existence of a legal interest in delaying the labor proceedings to prevent the 179 former BANDESA workers from enjoying their right to a pension. That interest, the petitioners maintain, is evident from conduct such as taking an unreasonable period to resolve legal claims or the fact that now, six years from institution of proceedings, the defendants have yet to be established. They maintain that, in the aforementioned context, it would be impossible to exhaust domestic remedies, since pursuing each such remedy would ultimately benefit the State and profoundly debilitate the alleged victims, since each remedy pursued would for them entail a prolongation of the period in which their basic health and nutritional requirements were not met.

15. Based on the facts alleged, the petitioners argue that the State is responsible for the violation of Articles 4, 8, 17, 24, and 25 of the Convention, to the detriment of the 179 alleged victims. They also indicate that the State is responsible for the violation of Articles XI, XVI, XVIII, and XXIV of the American Declaration; Articles 9 and 17 of the Protocol of San Salvador; and Article 22 of the Universal Declaration.

B. The State

16. For its part, the State of Guatemala does not dispute the facts alleged by the petitioners and acknowledges the delay in administering justice.

17. In its communication, the State describes the different steps taken in litigating the domestic proceedings. In that connection, it reported that on February 14, 2007, the acting judge of the Fourth Court of Labor and Social Security, the court where Case 359-99 was being litigated, she recused herself from the case. It also specified the new court assigned, the Fifth Court of Labor and Social Security of Economic Area 1, and indicated that the Attorney General's Office had yet to be notified of that decision.[FN2]

[FN2] Situation as of June 19, 2007, the date on which the State forwarded its observations.

18. With regard to the procedural steps that the petitioners cite as delayed, the State referred only the Amparo Case No. 656-01, reporting on the procedural stages during its litigation and the respective rulings handed down.

19. Finally, the State concludes that legal remedies have been instituted and that remedies have not been prompt, for which reason it acknowledges delay in administering justice in the situation complained of, and indicates that it does not contest the admissibility of this case, while stating for the record that this does not imply a judgment regarding the merits of the matter.

IV. ADMISSIBILITY

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

20. The petitioners are entitled under Article 44 of the American Convention to lodge complaints with the IACHR.

21. The petitioners present as alleged victims the 179 former BANDESA employees listed in paragraph 11 of this report. The Commission notes that they are all natural persons whose rights under the American Convention the Guatemalan State undertook to respect and ensure. With regard to those deceased, the petitioners also indicate that they are submitting the respective claims on their behalf and that of their families. Therefore, the Commission has competence *ratione personae* to examine the petition.

22. The Commission has competence *ratione loci* to review the petition because in it are alleged violations of rights protected by the American Convention that allegedly occurred within the territory of Guatemala, a State Party to that Convention. The Commission has competence *ratione temporis* since the obligation to respect and guarantee the rights protected by the American Convention has been in effect for the State of Guatemala since May 25, 1978, the date it deposited its instrument of ratification of the Convention. Finally, the Commission has competence *ratione materiae* because in the petition are alleged violations of human rights protected by the American Convention.

23. As regards the alleged violations of rights protected in the American Declaration, the Commission reiterates that although the Declaration is a source of international obligations,[FN3] once the Convention has entered into force in a State, it and not the Declaration, becomes the primary source of law to be applied by the Commission, as long as the petition alleges violation of substantially identical rights set forth in both instruments.[FN4] In the instant case, the provisions of the American Declaration cited by the petitioners and the provisions of the Convention are substantially the same. Thus, the rights to the preservation of health and to well-being (Article XI), to social security (Article XVI), to a fair trial (Article XVIII), and to petition (Article XXIV) are subsumed in different provisions of the Convention. Therefore, admissibility will be analyzed in connection with the provisions of the American Convention.

[FN3] IACHR, Report N° 38/09 (Admissibility and Merits) Case 12.670 National Association of Ex-Employees of the Peruvian Social Security Institute et al., Peru, March 27, 2009, para. 68; I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Serie A No. 10, paras. 43-46.

[FN4] IACHR, Report N° 03/01 (Admissibility), Case 11.670, Amilcar Menéndez, Juan Manuel Caride, et al. (Social Security System), Argentina, January 19, 2001, paras. 41 and ff.

24. The petitioners also cite as rights violated those enshrined in Articles 9 and 17 of the Protocol of San Salvador. In this regard, the Commission reiterates that Article 19(6) of the said treaty contains a clause granting limited jurisdiction to the organs of the inter-American system, enabling them to examine individual petitions concerning the rights protected in Articles 8(a) and 13. Therefore, the Commission does not have subject matter jurisdiction to examine alleged violations of Article 9 and 17 of the Protocol of San Salvador. However, as this Commission has held, this is notwithstanding its competence to analyze the right to social security in the light of Article 26 of the American Convention and taking it into account in interpreting other relevant regional instruments.[FN5]

[FN5] IACHR, Report N° 38/09 (Admissibility and Merits), Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute et al., Peru, March 27, 2009, para. 69.

25. Finally, with regard to the possible violation of the Universal Declaration, the IACHR notes that it is not an instrument adopted in the regional jurisdiction of the inter-American system. Having said that, the foregoing does not preclude its use as sources of interpretation in the decision in the instant case .[FN6]

[FN6] IACHR, Report N° 38/09 (Admissibility and Merits), Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute et al., Peru, March 27, 2009, para. 70.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

26. Article 46(1)(a) of the American Convention provides that admission by the Commission of a petition lodged in accordance with Article 44 thereof shall be subject to the requirement that remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law. The purpose of this requirement is to allow national authorities to examine alleged violations of a protected right and, if appropriate, to resolve them before its consideration by an international authority.

27. Article 46(2) of the Convention provides that the requirement of prior exhaustion of remedies under domestic law does not apply when: (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

28. In the instant case, the petitioners adduce the applicability of the exception to the rule of exhaustion of remedies under domestic law set forth in Article 46(2)(c), since at the time the petition was lodged with the IACHR, over six years had transpired since the institution of domestic proceedings, and the defendants have yet to be established. For its part, the State acknowledges the delay in administering justice.

29. Based on the record and the allegations of the parties, the IACHR notes that on September 29, 1999, a labor complaint was filed by the petitioners against BANRURAL before the Fourth Court of Labor and Social Security. The complaint was assigned number 359-99. .

30. According to the information submitted by the petitioners, on March 31, 2000, the defendant (BANRURAL) filed a conflict of jurisdiction claim, which was rejected by the Fourth Tribunal of Labor and Social Security on July 26, 2000. On March 27, 2001, the First Chamber of the Court of Labor and Social Security Appeals confirmed the resolution of the Fourth Tribunal of Labor and Social Security rejecting the jurisdictional matter raised by BANRURAL. Subsequently, the defendant filed a conflict of jurisdiction claim before the Court of Conflict of Jurisdiction. The Court rejected the claim in a decision of October 19, 2001. In November 2001, the defendant filed an amparo action (656-2001) before the Chamber of Amparo and Antejuicio of the Supreme Court of Justice against the decision of the Court of Conflict of Jurisdiction,. The Supreme Court confirmed the dismissal of the amparo application on July 13, 2004. Ultimately, on March 29, 2005, the case was sent back to the Fourth Tribunal of Labor and Social Security. The IACHR observes that during the processing of amparo action– three years and four months – Labor Case No. 359-99 was suspended.

31. The IACHR also notes that in 2005 the litigation of the main case was suspended again – for six months -, by virtue of the filing of an exception of lack of juridical standing by the State of Guatemala when it was included as a co-defendant in Case N° 359-99 (in Guatemala, the lack

of juridical standing can refer to the legitimacy to intervene in trial as a defendant or as a plaintiff; in this case, the State filed both exceptions). In particular, the IACHR observes that, according to the information submitted by the petitioners, on July 27, 2005, the Government of Guatemala was included as a defendant in Case 359-99. In that context, on October 7, 2005, the State filed exceptions before the Fourth Tribunal of Labor and Social Security, which were rejected in a decision of October 11, 2005. An appeal was filed against that decision which, after being admitted by the aforesaid tribunal, was brought before the First Chamber of the Court of Appeals of Labor and Social Security as Case No. 37-2006. In a decision issued on April 10, 2006, the Court declared admissible the exception of lack of juridical standing referring to the legitimacy to intervene in trial as a defendant raised by the State; also, the Court established that the defendants in the case had to be identified before it could continue to be analyzed.

32. Having passed more than 10 years since the filing of domestic proceedings, no information has been received that would indicate any substantial progress in the resolution of the case. The IACHR observes that, as of the date of this report, the action of Guatemalan courts was limited to formal matters, such as the establishment of jurisdiction to which the case was assigned, or the identification of the defendants in the case, the latter still remaining to be established.

33. The IACHR has held as elements for analysis in determining unwarranted delay in rendering a final judgment, inter alia, the appeals filed by the State and delay of the judicial authorities to rule on the remedies which led to the process being held back for long periods of time.[FN7] In the circumstances of the instant case, the Commission considers that the ten years that have transpired since the institution of Case 359-99 without a final judgment or a determination of the rights of the alleged victims constitutes unwarranted delay in the terms of Article 46(2)(c) of the American Convention.

[FN7] IACHR, Report N° 21/09 (Admissibility), Petitions 965-98, 638-03, and 1044-04, National Association of Laid off and Retired Employees of SUNAT, Peru, March 19, 2009, para. 65.

34. Finally, it should be noted that citing the exceptions to the rule of exhaustion of domestic resources contained in Article 46(2) of the Convention is closely related to the establishment of possible violation of rights enshrined therein. However, Article 46(2), by its nature and purpose, is an autonomous provision, in contrast to the substantive provisions of the Convention. Therefore, a determination as to whether the exceptions to the rules of exhaustion of domestic resources contained in that provision are applicable in the case at hand must be made prior to and independently of the analysis of the merits, since it the standard by which to assess this requirement is different from the one needed to determine violation of Articles 8 and 25 of the Convention. It should be noted that the causes and effects that have prevented the exhaustion of domestic resources in the instant case will be considered, to the extent relevant, in any report on the merits adopted by the Commission to establish whether they in fact constitute violations of the American Convention.

2. Timeliness of the petition

35. Article 46(1)(b) of the Convention establishes that, for a petition to be admissible by the Commission, it must be lodged within a period of six months from the date on which the alleged victim was notified of the final judgment at the national level. However, Article 32(2) of the IACHR's Rules of Procedure requires that in cases where the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition must be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission must consider the date on which the alleged violation of rights occurred and circumstances of each case.[FN8]

[FN8] IACHR, Report N° 15/09 (Admissibility), Petition 1-06, Massacre and Forced Displacement of Montes de Maria, Colombia, March 19, 2009, para. 62.

36. In the complaint under review, the IACHR has established the applicability of the exceptions to the exhaustion of domestic remedies under Article 46(2)(c) of the American Convention. In view of the date on which the facts denounced are alleged to have occurred and the delay that is evident, prima facie, in the labor proceedings pursued under domestic law, whose effects – in terms of the alleged failure to administer justice –continue today, the Commission considers that the petition, received on December 11, 2006, was lodged within a reasonable period and that therefore the requirement contained in Article 46(1)(b) of the Convention has been met.

3. Duplication of international proceedings and res judicata

37. For a petition to be declared admissible by the Commission, the Convention, in its Article 46(1)(c), requires that that the subject of the petition is not pending in another international proceeding for settlement; and, in its Article 47(d), that it is not substantially the same as one previously studied by the Commission or by another international organization. In the case under review, the Commission notes that the parties have not alleged the existence of either of these grounds for inadmissibility nor can they be deduced from the record. Therefore, the IACHR finds that the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Colorable Claim of a violation

38. For the purposes of admissibility, the IACHR must decide, pursuant to Article 47(b) of the American Convention, whether the facts alleged, if proven, could characterize a violation of rights, or, pursuant to paragraph (c) of the same article, or whether the petition is "manifestly groundless" or "obviously out of order." The standard by which these requirements are assessed is different from the one needed to decide the merits of a petition. The Commission must perform a prima facie evaluation and determine whether the petition provides grounds for an apparent or potential violation of a right guaranteed by the American Convention, although not

whether the violation has in fact occurred. This examination is a summary analysis that does not imply a prejudgment or preliminary opinion on the merits.

39. In the instant case, the petitioners allege that the State has incurred responsibility for having allowed, by virtue of the delay in the process for which its justice administration apparatus is responsible, the elimination of the social security system established on behalf of the BANDESA employees. For its part, the State has accepted the admissibility of the complaint, without necessarily admitting the claims regarding the merits.

40. The Commission notes that, if proven, the allegations of failure to respect the right of the alleged victims to be heard within a reasonable time by the competent authorities, the consequence of which would be the denial of judicial protection, could constitute violations of Articles 8 and 25 of the American Convention.

41. Additionally, in application of the *jura novit curia* principle, the IACHR considers that, if proven, the facts could constitute violation of Article 21 of the Convention, since, as this Commission has held, the proprietary effects of a pension regime to which persons have made contributions as withheld wages should be understood as falling within the scope of the right to property.[FN9] In the instant case, the 3% withheld from the monthly wages of the alleged victims and the alleged disappearance of the respective social security regime, without any receipt of any consideration or refund of the amounts contributed, if proven, could constitute a violation of said article.

[FN9] IACHR, Report N° 38/09 (Admissibility and Merits) Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute et al., Peru, March 27, 2009, para. 103.

42. Furthermore, in application of the *jura novit curia* principle, the IACHR notes that the facts described by the petitioners could constitute a violation of Article 26 of the American Convention, since the right to a pension, as an integral part of the right to social security, comes within the scope of that article.[FN10] In that regard, the Commission notes that acts or omissions by different state entities may have resulted in a significant reduction in the enjoyment of their right to social security, or even the elimination of the pension regime of which the alleged victims were beneficiaries. Therefore, and without prejudging the merits of the case, the IACHR considers it relevant to include Article 26 of the American Convention in the analysis of the merits of the instant case.

[FN10] IACHR, Report N° 38/09 (Admissibility and Merits) Case 12.670, National Association of Ex-Employees of the Peruvian Social Security Institute et al., Peru March 27, 2009, para. 130.

43. On the other hand, the IACHR considers that the facts described and the information provided by the parties do not provide sufficient grounds to be characterized as alleged violations

of the right to life, rights of the family, or the right to equal protection, respectively, enshrined in Articles 4, 17, and 24 of the American Convention.

44. Therefore, the Commission will consider at the merits stage the existence of possible violations of Articles 8 and 25 in conjunction with Article 1(1) of the American Convention, to the detriment of the 179 alleged victims. Additionally, taking into consideration the *jura novit curia* principle, the Commission will analyze the potential violation of Articles 21 and 26 of the Convention in conjunction with Article 1(1) thereof. Thus, the Commission concludes that the requirements established in Article 47(b) and (c) of the American Convention have been met.

V. CONCLUSIONS

45. The Commission concludes that it is competent to examine the petition lodged by the petitioners and that it is admissible under Articles 46 and 47 of the Convention based on the alleged violations of Articles 8 and 25, in conjunction with Article 1(1) thereof. Additionally, by the application of the *jura novit curia* principle, the Commission will analyze at the merits stage the potential violation of Articles 21 and 26 of the Convention in conjunction with Article 1(1) thereof.

46. The Commission decides to declare the instant petition inadmissible with regard to the alleged violations of Articles 4, 17, and 24 of the American Convention; Articles XI, XVI, XVIII, and XXIV of the American Declaration; and Articles 9 and 17 of the Protocol of San Salvador.

47. Based on the foregoing arguments of fact and law, and without prejudging the merits,

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

DECIDES:

1. To declare the case admissible with regard to the alleged violations of the rights enshrined in Articles 8 and 25, in conjunction with Article 1(1) of the American Convention. Additionally, taking into consideration the *jura novit curia* principle, the Commission will analyze at the merits stage the potential applicability of Articles 21 and 26 of the Convention in conjunction with Article 1(1) thereof.
2. To declare the petition inadmissible with regard to the alleged violations of Articles 4, 17, and 24 of the American Convention; Articles XI, XVI, XVIII, and XXIV of the American Declaration; and Articles 9 and 17 of the Protocol of San Salvador.
3. To forward this report to the petitioners and the State.
4. Continue with the analysis of the merits of the case.
5. To publish this report and to include it in its annual report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 29th day of the month of October, 2009.
(Signed): Víctor E. Abramovich, First Vice-President; Felipe González, Second Vice-President; Paulo Sérgio Pinheiro, and Paolo G. Carozza, members of the Commission.