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REPORT No. 29/15
PETITION 4072-02
REPORT ON ADMISSIBILITY

SYLVINA WALGER
ARGENTINA

Approved by the Commission at its session No. 2034 held on July 21, 2015
155th Regular Period of Session.

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I. SUMMARY

1. On September 17, 2002, Sylvina Walger, represented by attorney Santiago Felgueras (hereinafter “the petitioners”), filed a petition before the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) alleging the international responsibility of the Republic of Argentina (hereinafter “the State” or “Argentina”) for the alleged violation of Articles 8 (Right to a Fair Trial), 13 (Freedom of Thought and Expression), 24 (Right to Equal Protection), and 25 (Right to Judicial Protection) of the American Convention on Human Rights (hereinafter “the American Convention” or “Convention”), in connection with Articles 1.1 and 2 thereof.

2. The petitioners maintain that in 1995 journalist Sylvina Walger was subjected to a lengthy criminal proceeding for the offense of defamation [*injurias*] which began with the criminal complaint filed by a former member of the national congress. They argue that this case violated not only her right to a speedy trial but also her right of freedom of expression, by pressuring her and even preventing her from criticizing public officials or taking part in public debate.

3. For its part, the State asked the IACHR to declare petition inadmissible, on the grounds that the facts described therein do not amount to a violation of the rights guaranteed by the Convention.

4. Upon examining the positions of the parties and compliance with the requirements set forth in Articles 46 and 47 of the American Convention, the Commission decided to declare the petition admissible for purposes of examining the alleged violation of Articles 8, 9, 13 and 25 of the American Convention in relation to Articles 1.1 and 2 thereof. Also, the Commission decided to declare the inadmissibility of Article 24 of the American Convention. In addition, the Commission decided to notify the parties of this decision and to include it in its Annual Report to the OAS General Assembly.

II. PROCEEDINGS BEFORE THE COMMISSION

5. The petition was received by the IACHR on September 17, 2002. The petitioners reiterated their request on the following dates: December 29, 2003, April 23, 2004, July 8, 2004, February 24, 2005, June 27, 2005, and August 31, 2005. On January 27, 2010 the IACHR requested additional information from the petitioners, which was received on January 3 and March 25, 2011.

6. On November 15, 2011, the IACHR forwarded the pertinent parts of the petition to the State, requested that it submit its observations within two months, and informed the petitioners that it had done so.

7. On January 13, 2012, the State asked the IACHR for a one-month extension of the deadline for the submission of its observations, which was granted on March 15, 2012. In addition, the Commission again asked the State to present its observations on July 5, 2012, and September 25, 2013.

8. On November 14, 2013, the State submitted its observations to the Commission, which were forwarded to the petitioners for their respective observations. The IACHR received the petitioners’ observations on December 30, 2013, which were forwarded to the State on February 20, 2014. On April 14 and June 26, 2014, the State asked the Commission for a deadline to respond to the additional observations, which was granted. Finally, on July 7, 2014, the State submitted its observations. On September 22, 2014, the brief submitted by the State was forwarded to the petitioners.

III. POSITIONS OF THE PARTIES

A. Position of the petitioners

9. The petitioners reported that in January 1995 journalist Sylvina Walger published the book entitled *Pizza con Champán: Crónica de la fiesta menemista*, which reportedly presented “a critical overview” of the initial years of the Carlos Saúl Menem administration. According to their explanation, the journalist explained her objectives in the introduction to her book as: “to outline a profile of the jovial, unpunished, amoral customs of Argentina at the end of the last century. The result of rereading and ordering five years’ worth of newspapers and magazines, and without any narrative or sociological pretensions, the book instead is very much a journalistic bricolage [...]” According to the petitioners, the book contained an “enormous quantity of information on diverse issues and government officials.”

10. According to the petition, on March 31, 1995, Congressman Alberto Albamonte filed a criminal complaint against journalist Walger for criminal defamation (Art. 110 of the Criminal Code), based on a reference to him in the journalist’s book, in which he was called “congressman clown.”¹ In his complaint, the congressman asserted that “Using that nickname to refer to a person whose job is not to entertain others, much less when that person is a member of the National Congress, [...] is clearly slander, insulting by nature, and defamatory because of the way in which it was disseminated. Indeed, calling someone a clown is essentially the same as calling him an outlandish, laughable buffoon.” The petitioners stated that in Argentina criminal defamation is a crime that can only be prosecuted at the victim’s request, and at the time it was punishable by two years in prison.

11. The petitioners stated that the case was heard by Magistrate’s Court No. 4, Office of the Clerk No. 66 of the Federal Capital, under the procedures governing offenses that can only be prosecuted at the victim’s request. They explained that, under Argentine law, given the nature of these offenses, the criminal case has no investigation phase and is initiated by the victim’s criminal complaint. Once the complaint has been filed, the court does not examine the merit of the accusation, but rather limits itself to setting a conciliation hearing. In the event that the parties are unable to reach an agreement, the judge will order the parties to appear for a public, oral trial. They stated that the advancement of the trial “is exclusively in the hands of the victim,” which means that the judge cannot act on his or her own initiative in the case and that the prosecutor cannot move the case forward. At the time the criminal complaint was brought against the journalist, Articles 422 and 423 of the Code of Criminal Procedure established that the complainant’s unwarranted failure to appear at the conciliation hearings or for oral argument would be tantamount to withdrawing the criminal action and would result in the defendant’s acquittal.²

12. The petitioners asserted that the Court set a conciliation hearing for April 9, 1996. They indicated that the complainant did not appear at that hearing, in spite of having been properly served notice. On April 17, 1996 the alleged victim requested that the case be considered abandoned in view of the complainant’s unexcused failure to appear at the hearing, pursuant to Article 422 of the Code of Criminal Procedure. They reported that the trial court judge denied their request, but that the Appeals Chamber overturned the lower court’s decision. Accordingly, the case was terminated and dismissed on February 7, 1997. The complainant appealed that decision, which was upheld by the Appeals Chamber on June 10, 1997. The congressman subsequently filed a petition for cassation and an action alleging the unconstitutionality of

¹ The petitioners indicated that the congressman objected to the following passage: “In April 1994, courtesy of the President, Olivos was turned into an improvised Vital Records Office for the marriage of the “clown” Congressman Alberto Albamonte to his long-time partner, Silvia Pfeiffer. Menem was a witness to the wedding and fêted the newlyweds with pizza, wine, and champagne” [*Pizza con Champán*, p. 322].

² The petitioners cite Article 422 of the current Code of Criminal Procedure, which provided that “The private criminal action will be considered withdrawn when [...] (2) The complainant or his representative fails to appear at the conciliation hearing or the oral argument without just cause, which must be proven in advance, to the extent possible, or within five days thereafter.” Article 423 established that, “When the Court declares the criminal action terminated by the withdrawal of the complainant, it will dismiss the case and order the complainant to pay court costs, unless the parties have agreed otherwise.”

Article 422 of the Code of Criminal Procedure before the Chamber of Criminal Cassation. On December 16, 1997, the Court ruled Article 422³ unconstitutional and overturned the judgment of dismissal.

13. The petitioners stated that, as a consequence of this decision, a new conciliation hearing was held in May 1998 and attended by both parties. In view of their inability to reach an agreement, the case continued and the alleged victim's criminal history and fingerprint records were added to the case file. According to the petitioners, the case was inactive until October 2000, when the alleged victim again requested that the complaint be declared abandoned. The complainant filed appeals against this request, and on February 21, 2001, the judge ruled that the statute of limitations had expired. The complainant appealed this decision to the Appeals Chamber and then to the Chamber of Criminal Cassation, which both affirmed the lower court's decision. The petitioners stated that "After a seven-year prosecution, the case against [journalist Sylvia Walger] was dismissed on March 20, 2002. She never even managed to present a defense or offer evidence in this case, the sole grounds for which was her having called Congressman Albamonte a 'clown.'"

14. In view of the above, the petitioners argued that this criminal case violated the rights of journalist Walger to a speedy trial, freedom of thought and expression, and equal protection.

15. With respect to the alleged victim's right to a speedy trial, the petitioners first noted that the criminal case brought against her was not a complex case; on the contrary, it was a simple case with minimal evidentiary requirements. In their opinion, the alleged defamation of the public official was contained in the book that the journalist acknowledged having written, and former Congressman Albamonte's status as a public official was a matter of public knowledge; therefore, the issue to be resolved was more legal than factual. Second, they indicated that the action of the alleged victim did not cause delays in the proceedings, as it was limited to requesting that the case against her be dismissed. In the petitioners' opinion, the delay was mainly due to the total inactivity of the complainant. They reiterated that, because criminal defamation can be prosecuted only at the request of the victim, the judge was prevented from moving the case forward, and the legal framework as shaped by the declaration of unconstitutionality of Articles 422 and 423 of the Code of Criminal Procedure does not require the complainant to move the case forward within a specific period of time. The petitioners maintained that this legal framework gave rise to inaction on the part of the judge, allowing "for many public officials to take advantage of this legal situation in order to hold a sword of Damocles over the heads of the most critical journalists, in the form of a criminal accusation that will be activated or lie dormant at the complainant's will."

16. Next, the petitioners stated that the right to freedom of thought and expression is infringed in two different ways. First, they argued that "the fact that the legal system allows—and in fact favors—a public official or public figure keeping a criminal case open against his or her critics, entirely at his or her will, for manifestly unreasonable lengths of time, creates a clear pressure on journalists, which is a violation of Article 13.1 and 13.3 of the Convention." They maintained that under this pressure the journalist in this case had to constantly decide whether or not to pursue activities that might displease the complainant, given that he could at any time react to legitimate criticism by moving forward with the complaint. They argued that although "State agencies can do little to prevent the filing of frivolous complaints[,] they also have the inescapable duty to prevent the case from going on for a manifestly unreasonable period of time, such that it becomes a sword of Damocles hanging over the journalist's head." In their opinion, this "is a perverse system in which undisputed statements can be removed from public speech through the threat of reactivating dormant cases."

17. The petitioners further maintained that, "The mere fact that a criminal case has such an unjustifiable duration as the one [...] filed by Congressman Albamonte entails, *per se*, a restriction to freedom of expression." They asserted that the IACHR has expressed concern over the chilling effect that results from

³ According to the petitioners, the Chamber found that "In the exercise of its local jurisdiction, the National Legislature established a criminal cause of action different from what is established in the Criminal Code, thus encroaching upon the framework of the National Congress as the legislator of the Criminal Code. Therefore, arts. 422. 2 and 423 of the [National Code of Criminal Procedure] are unconstitutional."

the criminal prosecution of journalists and the threat of penalties such as a prison sentence, in addition to long and tortuous criminal proceedings. In their opinion, such a situation gives rise to self-censorship and also encourages the filing of criminal complaints by those public officials who wish to use the legal system to silence and harass their critics.

18. The petitioners added that the differences between the filing and processing of public and private criminal actions established in the Argentine legal framework in force at the time of the events gave rise in practice to violations of the alleged victim's rights incompatible with the right to equal protection. They explained that, "We do not maintain that the proceedings for each one of these types of offenses cannot be regulated differently." Rather, they maintain that private criminal action proceedings "lack a judicial analysis of the merit of the accusation—something that is guaranteed in all other cases. An evaluation of the merits of the accusation by a court is an essential step in a criminal case, which is not done in Argentina with respect to crimes that can only be prosecuted at the request of the victim."

B. Position of the State

19. The State asserted that the petition should be declared inadmissible pursuant to Article 47.b) of the American Convention on Human Rights, as it does not contain facts that constitute a violation of the human rights enshrined in the American Convention.

20. With regard to the right to a speedy trial, the State acknowledged that the criminal defamation proceeding brought against journalist Sylvina Walger ended after 7 years when the National Chamber of Criminal Cassation ruled that the criminal statute of limitations had expired. It asserted that, "An analysis of the criminal case against the petitioner indicates that the actions of the judge did not constitute an unreasonable delay." The State maintained that the duration of the case "is closely related to the procedural actions of both parties. The motions filed (for reconsideration, appeal, unconstitutionality, cassation, and review of a denied appeal) are provided for in the [National Code of Criminal Procedure] and the rulings of the intervening courts have not been unreasonably delayed. The decision to file motions—both on the part of the complainant and the petitioner—cannot be restricted by the State if they are provided for in the procedural law, as they are, and the resulting duration of the case cannot be attributed to the State as an alleged violation of the right to a speedy trial, especially when those motions have been adjudicated within a reasonable period of time, according to the nature of each one."

21. The State explained that the hearing provided for under Argentine law in these cases could not be held due to the various filings and motions of the parties—authorized by existing law—and individually adjudicated by the judge handling the case, the Appeals Chamber, and the Chamber of Cassation, within a reasonable period of time. The State thus asserted that the length of time between the filing of the criminal complaint—April 3, 1995—and the conciliation hearing—May 19, 1998—cannot be attributed to the State.

22. The State maintained that there was no judicial inaction subsequent to that hearing to justify the allegation of a violation of the right to a speedy trial. Regarding this point, it reported the following facts: On July 10, 1998, at the complainant's request, journalist Walger was summonsed to appear to offer evidence. On August 7, she appointed her defense attorney, who accepted the position more than a month later, on September 21, and on October 2, her criminal history and fingerprint records were added to the case file. Five months later, on March 16, 1999, the complainant filed a brief once again requesting that the defendant be summonsed to appear to offer evidence. The judge did not conduct this proceeding because, according to an order dated August 20, 1999, she was not represented by counsel. One year and seven months later, on October 13, 2000, the alleged victim requested that the complaint be declared abandoned due to the complainant's inactivity. The complainant was notified of this in an order dated November 3, 2000, and he appeared in court to contest the motion. That motion was denied on November 21, and notice was served on the complainant two days later. As a result, the complainant filed a petition for review of a denied appeal, and the case file was forwarded to the National Appeals Chamber for a ruling on December 7, 2000. The Chamber issued its decision in less than a month, on December 29, 2000, suspending the ruling on the motion because there was another motion pending with respect to the statute of limitations which, as a matter of public

policy, had to be adjudicated first. The State indicated that, after the January court holiday, the judge took cognizance of the case on February 15, 2001, and one week later, on February 21, ruled that the statute of limitations had expired. The complainant appealed this decision. Five months later, on June 26, 2001, the Appeals Chamber upheld the trial court's decision in the petitioner's favor. The complainant filed a petition for cassation in September, which was granted, and the case file was forwarded to the Chamber of Cassation in October, where a decision was issued on March 20, 2002.

23. Concerning the right to freedom of thought and expression, the State alleged that the petition had failed to demonstrate there has been a restriction to the journalistic activity of the alleged victim as a result of criminal proceedings initiated against her, calling her allegations vague and general. The State indicated that the situation raised by the petitioners "does not imply a violation in itself", since according to the case law of the Inter-American Court, the use of criminal law is not contrary *per se* to the right to freedom of expression, but this possibility should be analyzed in each case with "extra caution". As explained by the State, freedom of expression is not an absolute right and may be subject to conditions and limitations, particularly when it interferes with the other rights recognized in the Convention, such as the right to privacy. The State said that in the ruling *Kimel v. Argentina*, the Inter-American Court set out rules to weigh these two rights. It also explained that on the same line in the judgment *Fontevicchia and D'Amico v. Argentina*, the Inter-American Court reiterated that "to the extent they meet the requirements of necessity and proportionality, both the civil courts and criminal proceedings are legitimate under certain circumstances as means to establish subsequent liabilities to the expression of information or opinions that affect honor and reputation".

24. The State reported that it enacted legislative reforms in 2011 to bring its criminal law into line with the relevant standards contained in the American Convention. It stated that with the enactment of Law 26.551, the statutory definitions of the criminal defamation offenses [*calumnias e injurias*] were amended to exclude "statements regarding matters of public interest" and "statements that are not affirmative," and imposes monetary fines for the commission of such offenses.

25. The State maintains that the distinction between public action crimes and crimes that can be prosecuted only at the request of the victim cannot be considered discriminatory or arbitrary, since the difference is based on the legally protected interest and the State's interest in prosecuting the infringement of certain legally protected interests it deems fundamental, while leaving the prosecution of other such offenses—for example, those affecting the honor of individuals—in the hands of private individuals. The State indicated that although prosecution and the duty to advance the proceedings in cases of criminal defamation correspond solely to the victim, the law provides for the tacit withdrawal of the complaint and the expiration of the statute of limitations to keep the proceedings from being extended disproportionately.

26. With regard to the tolling of the statute of limitations for criminal defamation, the State added that in 2004, Law 25990 amended the criminal code to limit the procedural grounds for doing so to: (a) the commission of another crime; (b) the first summons for the accused to provide a formal statement at the initial appearance; (c) the issuance of a charging document or the referral of a case to trial; (d) an order to stand trial or equivalent procedural step; and (e) a conviction, even if it is not a final judgment.

27. Finally, the State expressed concern in its brief to the Commission with respect to the delay in processing this petition.

IV. ANALYSIS

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

28. The petitioners are entitled, in principle, to file petitions before the Inter-American Commission under Article 44 of the American Convention. The petition names an individual person as the alleged victim, with respect to whom the State agreed to guarantee the rights enshrined in the American Convention. With respect to the State, the Commission notes that Argentina has been a State Party to the

American Convention since September 5, 1984, on which date it deposited its ratification instrument. Therefore, the Commission has jurisdiction *ratione personae* to examine the petition. The Commission also has jurisdiction *ratione loci* to examine the petition, insofar as it alleges violations of rights protected in the American Convention that reportedly took place within the territory of Argentina, a State Party to the treaty.

29. The Commission has jurisdiction *ratione temporis* because the obligation to respect and guarantee the rights protected in the American Convention were already in force for the State on the date on which the acts alleged in the petition reportedly took place. Finally, the Commission has jurisdiction *ratione materiae*, because the petition alleges the potential violation of human rights protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

30. Article 46.1.a) of the American Convention provides that for a petition submitted to the Inter-American Commission to be admissible under Article 44 of the Convention, the petitioner must first have pursued and exhausted domestic remedies, in keeping with generally recognized principles of international law. This requirement is intended to allow national authorities to consider an alleged violation of a protected right and, when applicable, to give them the opportunity to correct it before it is heard and decided by an international body. The Commission has reiterated that in situations where the evolution of the facts initially presented at the domestic level signifies a change in compliance with the admissibility requirements, the petition must be examined based on the current situation at the time the admissibility decision is rendered.

31. In this case, the petitioners proved that the March 20, 2002 judgment of the National Chamber of Criminal Cassation, affirming that the prosecution against the journalist was time-barred by statute of limitations, had become *res judicata*. They maintain that this decision exhausted domestic remedies. The petitioners additionally reported that all available petitions for remedies were filed during the criminal case against the alleged victim until the time at which the decision on the expiration of the statute of limitations became final. The State, for its part, did not allege the failure to exhaust domestic remedies.

32. Accordingly, the Commission finds that the suitable remedies related to the alleged violations were properly exhausted.

2. Timeliness of the petition

33. Article 46.1.b) of the Convention establishes that, in order for the petition to be declared admissible, it must be filed within 6 months of the date on which the interested party was served notice of the final decision that exhausted the domestic remedies.

34. In the instant case, notice of the judgment of the National Chamber of Criminal Cassation que dejó en firme la prescripción de la acción penal against the alleged victim was served on March 20, 2002, and this petition was received by the Commission on September 17, 2002. Therefore, the IACHR finds that the petition was timely filed and that the requirement established in Article 46(1)(b) of the American Convention has been met.

3. Duplication of international proceedings

35. There is nothing in the case record to indicate that the subject of the petition is pending adjudication in another international proceeding, or that it duplicates a petition already examined by this or another international body. Therefore, the requirements established in Articles 46.1.c and 47.d of the American Convention have been met.

4. Colorable claim

36. The Inter-American Commission must determine whether the act described in the petition amount to violations of the rights enshrined in the American Convention, according to the requirements of the Article 47.b, or whether the petition, according to Article 47.c, should be dismissed as “manifestly groundless” or “obviously out of order.” At this stage of the proceedings, the IACHR must conduct a *prima facie* evaluation, not for purposes of establishing the alleged violations of the American Convention, but rather to examine whether the petition alleges acts that could potentially constitute violations of the rights guaranteed in the American Convention. This analysis does not entail prejudgment or an advance opinion on the merits of the case.

37. Neither the American Convention nor the IACHR’s Rules of Procedure require the petitioner to identify the specific rights alleged to have been violated by the State in the matter submitted to the Commission, although the petitioners may do so if they wish. It is incumbent upon the Commission, based on the case law of the system, to determine in its admissibility reports what provision of the relevant inter-American instruments is applicable and to find a violation of the facts alleged are proven through sufficient evidence.

38. The State argued that the facts of the instant case do not amount to potential human rights violations. The petitioner, for his part, stated that in this case the alleged victim was submitted during 1995-2002 to a criminal prosecution for the alleged offense of defamation (Art . 110 of the Criminal Code), which was determined by the Inter-American Court as in violation of Articles 9 and 13 of the American Convention in the case of *Kimel v. Argentina*⁴.

39. In the opinion of the IACHR, the State’s arguments do not constitute an admissibility issue that demonstrates, in accordance with the inter-American case law and doctrine,⁵ that the petition is manifestly groundless or obviously out of order. Those arguments must be made at the merits stage of the case.

40. In view of the points of fact and of law presented by the parties, and the nature of the matter submitted for its consideration, the IACHR finds that the allegations of the petitioners may describe possible violations of Articles 8 (Right to a Fair Trial) and 13 (Freedom of Thought and Expression) of the American Convention in connection with Articles 1.1 and 2 thereto, in view of the effects of the prolonged criminal case prosecuted against the petitioner for criminal defamation. Finally, the Commission observes that, to the extent it is pertinent, it could examine potential violations of Articles 9 (Freedom from Ex Post Facto Laws) and 25 (Right to Judicial Protection) of the American Convention during the merits phase.

41. In conclusion, the IACHR decides that the petition is neither “manifestly groundless” nor “obviously out of order,” and therefore finds that the petitioners have met *prima facie* the requirements of Article 47.b. of the American Convention in relation to potential violations of Articles 8, 9, 13 and 25 of the American Convention, in relation to the general obligations enshrined in Articles 1.1 and 2 thereto, as detailed above.

42. Also, the IACHR declares inadmissible the claims regarding the alleged violation of Article 24 (Right to Equal Protection) of the American Convention, due to the lack of *prima facie* elements regarding its possible violation.

⁴ I/A Court H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177.

⁵ I/A Court H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008 Series C No. 177; IACHR. Report No. 88/10. Case No. 12.661. Néstor José and Luis Uzcátegui, et al. Venezuela. July 14, 2010; I/A Court H.R., *Case of Uzcátegui et al. v. Venezuela*. Merits and reparations. Judgment of September 3, 2012. Series C No. 249; IACHR. 1994 Annual Report. Chapter V: Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights. Title II. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995; IACHR. 2009 Annual Report. Report of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009, para. 113.

V. CONCLUSIONS

43. The Inter-American Commission concludes that it has jurisdiction to examine the claims asserted by the petitioners regarding the alleged violation of Articles 8, 9, 13, 24, and 25, in relation to Articles 1.1 and 2 of the American Convention, and that those claims are admissible according to the requirements of Articles 46 and 47 of the American Convention.

44. Based on the foregoing points of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDE:

1. To declare this petition admissible with respect to Articles 8, 9, 13 and 25, in connection with Articles 1.1 and 2 of the American Convention.
2. To declare inadmissible this petition with respect to Article 24 of the American Convention.
3. To notify the State and the petitioners of this decision.
4. To proceed to 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.

Done and signed in the city of Washington, D.C., on the 21st day of the month of July, 2015. (Signed): Rose-Marie Belle Antoine, President; James L. Cavallaro, First Vice President; José de Jesús Orozco Henríquez, Second Vice President; Felipe González, Rosa María Ortiz, Tracy Robinson and Paulo Vannuchi, Commissioners.