

OEA/Ser.L/V/II.  
Doc. 116  
20 September 2018  
Original: Spanish

**REPORT No. 103/18**  
**PETITION 703-07**  
REPORT ON ADMISSIBILITY

WORKERS OF SINTRAISA, SINTRAISAGEN AND  
SINTRACHIVOR  
COLOMBIA

Approved by the Commission electronically on September 20, 2018.

**Cite as:** IACHR, Report No. 103/18. Petition 703-07. Admissibility. Workers of SINTRAISA, SINTRAISAGEN, and SINTRACHIVOR. Colombia. September 20, 2018.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioners:</b>	Jaime Aristizábal Tobón, Oscar Alveiro Vallejo Giraldo, José Vicente López Acero, Liliana María Uribe Tirado, Manuel Antonio Muñoz Uribe, Ana Isabel Aguilar Rendón, and Flor Ángela Cadavid Bedoya
<b>Alleged victims:</b>	Workers of SINTRAISA, SINTRAISAGEN and SINTRACHIVOR
<b>Respondent State:</b>	Colombia <sup>1</sup>
<b>Rights invoked:</b>	Articles 8 (Fair Trial), 16 (Freedom of Association) and 25 (Judicial Protection) of the American Convention on Human Rights, <sup>2</sup> in relation to Article 1.1 (Obligation to Respect Rights) thereof; Articles 8 (Trade Union Rights) and 9 (Social Security) of the Additional Protocol to the American Convention on Economic, Social and Cultural Rights; <sup>3</sup> and Article XXII (Association) of the American Declaration on the Rights and Duties of Man <sup>4</sup>

**II. PROCEDURE BEFORE THE IACHR<sup>5</sup>**

<b>Filing of the petition:</b>	June 4, 2007
<b>Additional information received at the stage of initial review:</b>	November 17, 2011
<b>Notification of the petition to the State:</b>	April 2, 2012
<b>State's first response:</b>	October 2, 2012
<b>Additional observations from the petitioner:</b>	November 9, 2012; March 1, 2013; April 7 and December 5, 2016, and April 18, 2017
<b>Additional observations from the State:</b>	December 22, 2012 and February 11, 2014

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of ratification instrument on July 31, 1973) and Protocol of San Salvador (deposit of instrument on December 23, 1997)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
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<sup>1</sup> Pursuant to Article 17.2.a of the IACHR Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, a Colombian national, did not partake in the discussion or the decision on this matter.

<sup>2</sup> Hereinafter "American Convention" or "Convention."

<sup>3</sup> Hereinafter "Protocol of San Salvador."

<sup>4</sup> Hereinafter "American Declaration" or "Declaration."

<sup>5</sup> The observations submitted by each party were duly transmitted to the opposing party.

<b>Rights declared admissible</b>	Articles 8 (Fair Trial), 16 (Freedom of Association), 24 (Equal Protection), 25 (Judicial Protection) and 26 (Economic, Social and Cultural Rights) of the Convention, in relation to Article 1.1 (Obligation to Respect Rights) thereof; Article 8 (Trade Union Rights) of the Protocol of San Salvador
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, on March 21, 2007
<b>Timeliness of the petition:</b>	Yes, on June 4, 2007

## V. ALLEGED FACTS

1. The instant petition was filed on behalf of the workers of the National Union of Workers of Interconexión Eléctrica S.A. (hereinafter “SINTRAIISA”), the National Union of Workers of ISAGEN S.A. (hereinafter “SINTRAISAGEN”) and the National Union of Workers of CHIVOR S.A. (hereinafter “SINTRACHIVOR”), mixed economy companies mainly dedicated to power generation, for the alleged international responsibility of the State of Colombia because it changed the Colombian Constitution by adopting a legislative act that limits the right of free association in that it precludes the possibility of collective bargaining on social security matters. The petitioners claim that this has caused a regression of the acquired fundamental rights of labor in Colombia.

2. The petitioners allege that the State of Colombia tried to curtail the scope of the human rights embodied in its Constitution by proposing a referendum—Law No. 796 of 2003—to prohibit collective bargaining over workers’ pension schemes and special social security schemes, except for the pension scheme for Presidents of the Republic and Army officers. This referendum was voted and rejected by the Colombian people. In view of this denial, the government issued Legislative Act 001/2005 in order to modify article 48 of the Constitution, which establishes the non-negotiable right to social security. This reform introduced a ban on collective bargaining over that matter. The petitioners allege that the trade unions had prior agreements relating to pensions, which were affected by this legislation ruling that all collective agreements relating to pensions would lapse on July 31, 2010, with the exception of the special scheme for Presidents and Army officers, limiting the Pensions General System through pension requirements less beneficial than those established in the collective agreements of the trade unions they represent. In this regard, the petitioners submit that the current maximum budget for pension payments is lower than the one in established through collective bargaining.

3. On October 6, 2006 the petitioners filed a constitutional complaint before the Constitutional Court, against Legislative Act 001/2005 in view of the violation of the fundamental rights of the workers they represent. In said complaint they alleged that the provisions of the legislative act violated the Constitution and international treaties on human rights, part of the constitutional provisions of Colombia, and that Congress had changed the Constitution through the adoption of said legislative act, exceeding its powers. In sentence C-472 of June 14, 2006 the Constitutional Court refrained from ruling on this by claiming lack of competence, because the complainants did not indicate how the adoption of said provisions would change the Constitution.

4. The petitioners remark magistrate Jaime Araujo Rentarías’ abstention from voting, who deemed that Legislative Act 001/2005 was unconstitutional considering that (i) if the impugned norm conformed to the Constitution it would not violate ILO International Conventions; (ii) the legislative act reproduced article 1 of Law 796 of 2003, which called for a referendum, meaning that Congress approved something Colombians had rejected; and (iii) according to the preamble of the legislative act, its objective was “to ensure that the Colombian pensions system is fair to all Colombians,” an objective violated by the same as it keeps special pension schemes for members of the Army and the President of the Republic, under subparagraph 7 thereof.

5. Said complaint was followed by constitutional complaints from other citizens, which the Constitutional Court resolved through judgments C-337 of May 3, 2006; C-740 of August 30, 2006; C-986 of November 29, 2006; C-178 of 2007; C-180 of 2007 and C-216 of March 21, 2007 by declaring itself not competent. They claim that Constitutional Court's denial to examine the remedies lodged by the petitioners and other citizen made it impossible to have the conflict resolved within the domestic jurisdiction, hence the need to resort to the international venue to complain on the lack of judicial protection from the State. Furthermore, the petitioners claim that on November 5, 2010 the SINTRAISA trade union requested to have a meeting with the Interconexión Eléctrica S.A. company (hereinafter "ISA S.A.") to organize a panel discussion in relation to the scope of Legislative Act 001/2005 on the subject of pension schemes, a request turned down by the Head of Gestor Talento Humano on November 26, 2010.

6. As for the State's allegation of a duplication of procedures, the petitioners argue that they filed a complaint before the International Labor Organization (ILO), case no. 2434, with a legal basis other than that of the petition to the IACHR, and their intention is to obtain a recommendation that the State will fulfil in good faith; that, therefore, said complaint does not interfere with the powers of the Commission.

7. For its part, the State claims that social security in Colombia is a public service ensured by the State by virtue of the Constitution and not just a right to benefits based on the relationship between employers and employees. In regard to the right of association, it indicates that Legislative Act 001/2005 does not prohibit or limit said right but that it establishes some limitations on trade unions' requirements on pension schemes, regulating the general conditions for accessing the pension system in order to ensure the financial sustainability of the social security system. It considers that these limitations on rights were applied for the sake of public interest, in accordance with article 30 of the American Convention.

8. As for the requirement of prior exhaustion of domestic remedies, the State claims that in this case the appropriate remedies were a constitutional complaint—which the petitioners exhausted in the domestic jurisdiction but failed to substantiate—and an appeal for legal protection, filed by other trade unions with identical claims. It submits that the latter will be resolved by the Constitutional Court through a unified judgment, which, under the Colombian case law, will have an effect on anyone who is in a similar legal situation.

9. As for the constitutional complaints, the State asserts that the Constitutional Court has admitted appeals for review of a legislative act whenever said acts involve a change in the Constitution, in view of the case law criterion establishing that Congress, a derived institution, is not entitled to revoke or replace the Constitution which Congress itself is derived from. However, it indicates that in their complaint, the petitioners did not substantiate the claim that Legislative Act 001/2005 meant a change in the Constitution—a claim of this nature needs to be based on clear, specific and solid arguments for it to be declared admissible. It alleges that the petitioners only expressed their disagreement with the content of the reform. It stresses that under article 241 of the Constitution, the Court is not entitled to assess the lawfulness of a legislative act in view of its material content, but that it is only entitled to examine its alleged unlawfulness in view of procedural defects in the lawmaking process.

10. Considering the foregoing, the State claims that domestic remedies have not been exhausted because the petitioners failed to duly exhaust a constitutional complaint prior to filing a petition to the IACHR. Therefore, it affirms that the instant petition does not fulfil the requirement set forth in Article 46 of the American Convention.

11. Lastly, the State indicates that the petitioners lodged the same complaint before the International Labor Organization, entered under number 2434, and that based on the provisions of Article 47.d of the American Convention, the instant petition must be declared inadmissible on grounds of duplication of international procedures, for the parties, the facts and claims are identical. Finally, it alleges that the Commission is not competent to deal with alleged violations of Article 9 of the Protocol of San Salvador in accordance with Article 19.6 thereof.

## VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

12. Based on the available information, on October 6, 2006 the petitioners filed a constitutional complaint before the Full Chamber of the Constitutional Court so that Legislative Act 001/2005 would be declared unconstitutional due to the modifications of the Colombian Constitution in that it prohibited collective bargaining of pension schemes in collective labor agreements. On June 14, 2006, the Constitutional Court ruled on said complaint by declaring itself not competent to resolve it. Six other constitutional complaints simultaneously filed against the same legislative act were settled in the same way. The last resolution, of case 216 of 2007, was issued by the Constitutional Court on March 21, 2007, which again ruled lack of competence.

13. Based on that information and considering that the parties do not controvert that a constitutional complaint is an appropriate remedy, the Inter-American Commission observes that the Constitutional Court's decision of March 21, 2007 exhausted all the domestic remedies, thus the instant petition is admissible by virtue of Article 46.1.a of the American Convention. As for the State's allegation that domestic remedies were not duly exhausted because of the poor substantiation of the constitutional complaint filed by the petitioners, the submitted information indicates that the petitioners complained before the domestic courts that the legislative act infringed the Constitution and international human rights treaties, which are part of the constitutional rules of Colombia; and that Congress changed the Constitution thus exceeding its competence. Therefore, it is for the IACHR to analyze, in the merits stage, whether those grounds were sufficient for the Constitutional Court to rule on the merits of the case.

14. In regard to the requirement of timeliness, the Commission observes that the petition was presented on June 4, 2007 and that the domestic remedies were finally exhausted on March 21, 2007; consequently, that the instant petition fulfils the requirement set forth in Article 46.1.b of the American Convention. For its part, the State did not file allegations on the time the petition was filed.

## VII. ANALYSIS OF COLORABLE CLAIM

15. The Inter-American Commission observes that the facts denounced by the petitioners—that the Constitution was modified through Legislative Act 001/2005, which prohibits trade unions' right to collective bargaining on social security but keeps two special pension schemes—, if proven, may *prima facie* constitute violations of the rights enshrined in Articles 8 (Fair Trial), 16 (Freedom of Association), 24 (Equal Protection), 25 (Judicial Protection) and 26 (Economic, Social and Cultural Rights) of the American Convention, in relation to Article 1.1 (Obligation to Respect Rights) thereof, and Article 8 (Trade Union Rights) of the Protocol of San Salvador, to the detriment of workers of the SINTRAISA, SINTRAISAGEN and SINTRACHIVOR trade unions.

16. With respect to the allegations of violations of Article 9 (Social Security) of the Protocol of San Salvador, the IACHR notes that the power foreseen in Article 19.6 of said treaty to determine violations in the context of an individual case is limited to Articles 8.a and 13. In regard to the other articles, in accordance with Article 29 of the American Convention, the Commission may take them into account for the purpose of interpreting and enforcing the Convention and other applicable instruments.

17. As for the claim on the violation of article XXII (Association) of the American Declaration, the IACHR has previously established that once the Convention is enforced in a State, it is this instrument and not the Declaration that becomes the primary source of law applicable by the Commission, provided that the petition concerns an alleged violation of substantially identical rights enshrined in both treaties, like in this case. In regard to the instant petition, the Commission has analyzed the rights enshrined in the American Declaration that were invoked by the petitioner in the light of the American Convention.

18. Lastly, in relation to the State's allegation of a duplication of international procedures in view of a proceeding before the ILO, the Commission observes that said complaints are different in the subject matter, and reminds that the possibilities of "international settlement," referred to in Article 46.1.c of

the Convention, provided by proceedings with the Committee on Freedom of Association, are not equivalent to those provided by the inter-American system of human rights.<sup>6</sup> In view of the foregoing, the Commission deems that the exception invoked by the State is out of order.

### VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 16, 24, 25 and 26 of the American Convention, in relation to Article 1.1 thereof; and Article 8 of the Protocol of San Salvador; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 20<sup>th</sup> day of the month of September, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.

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<sup>6</sup>IACHR, Report No. 41/16, Petition 142-04. Admissibility. José Tomás Tenorio Morales *et al.* (“Ervin Abarca Jiménez” Union for Higher Education Professionals of the National Engineering University). Nicaragua, par. 53.