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REPORT No. 157/20
PETITION 1038-13
REPORT ON ADMISSIBILITY

ALBERTO SAAVEDRA SILVA AND OTHERS
PERU

Approved electronically by the Commission on June 9, 2020.

Cite as: IACHR, Report No. 157/20, Petition 1038-13. Admissibility. Alberto Saavedra Silva and others. Peru. June 9, 2020.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Renata Bregaglio Lazarte and Javier Mujica Petit
Alleged victim:	Alberto Saavedra Silva and others ¹
Respondent State:	Peru ²
Rights invoked:	Articles 8 (right to a fair trial), 9 (principle of legality and retroactivity), 21 (private property), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention on Human Rights ³ , in relation to its Articles 1.1 (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law)

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	June 24, 2013
Additional information received at the stage of initial review:	October 28, 2013, November 3, 2015, and September 9, 2016
Notification of the petition to the State:	November 11, 2016
State's first response:	February 9, 2017
Additional observations from the petitioner:	February 23, 2017
Additional observations from the State:	June 19, 2018

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (deposit of instrument of ratification done on July 28, 1978)

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

Duplication of procedures and International <i>res judicata</i>:	No.
Rights declared admissible	Articles 8 (right to a fair trial), 21 (private property), 24 (equality before law) 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention on Human Rights, in relation to its Articles 1.1 (obligation to respect rights) and 2 (obligation to adopt decisions of domestic law)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, it applies the exception of article 46.2.c of the Convention
Timeliness of the petition:	Yes, in terms of section VI

¹The petition refers to fifteen individualized alleged victims in the appendix of the present report.

²According to what is stated in article 17.2a of the Regulation of the Commission, Commissioner Julissa Mantilla Falcón, of Peruvian Nationality did not participate either in the debate or in the decision of the present matter.

³Hereinafter "The Convention" or "The American Convention."

⁴The observations of each party were duly transferred to the opposing party

V. FACTS ALLEGED

1. The requesting party denounces violations to the human rights of fifteen retirees and laid-off public officers of the former National Superintendence of Customs, which name today is National Superintendence of Customs and Tax Administration (hereinafter "SUNAT.") Principally, they claim that these persons have not received the payment of their pensions from SUNAT correctly, despite having in their favor a resolution constituted as *res judicata*. They allege that they have been trying to execute said resolution for more than sixteen years and that the Peruvian Judicial Branch has contravened judicial decisions leaving them without any protection, as part of a systemic pattern from the State against the retirees.

2. As indicated in the petition, the alleged victims left their charges between 1989 and 1992 under the voluntary cessation decreed and regulated by Legislative Decree No. 680 (hereinafter "Decree 680,") becoming pensioners under the regime of the Decree of Law No. 20530, which ordered the leveling of their pensions of unemployment and retirement with the remunerations of the active servers of the same entity for which they had worked. Notwithstanding, SUNAT had done a retroactive interpretation of Decree 680, in its article 6, incise c) and of its second transitory provision, in the sense of not recognizing the mentioned benefit of leveling of the alleged victims.

3. Before this situation, on May 3, 1995, sixty five members of the National Association of Unemployed and Retired persons of the National Superintendence of Customs (hereinafter "ANAT-SUNAT,") included the alleged victims, filed a claim for protection before the Third Court Specialized on Civil Matters of Callao (hereinafter "TJECC,") file No. 240-1995, requesting the inapplicability of Decree 680 and the leveling of their pensions with the ones of the active workers of SUNAT. Nonetheless, this organization declared the action of protection inadmissible through Resolution No. 6 of July 17, 1995.

4. This resolution was appealed by the alleged victims before the Civil Court of the Superior Court of Callao, which through Resolution No 21 from January 3, 1996 (hereinafter "Resolution 21") determined to revoke the appealed sentence and to declare inapplicability for the petitioners of article 6, incise c) and the second transitory provision of Decree 680. This Resolution 21 was submitted to consultation for its approval to the Constitutional and Social Court of the Supreme Court of Justice, who through decision of February 27, 1996, declared that the resolutions of this type of actions that fall back onto the second instance constitute *res judicata*.

5. As a consequence of these favorable decisions for the members of ANAT-SUNAT, TJECC requested SUNAT the payment of the leveled pensions without any limits or restrictions in terms of Law Decree No. 20530. However, according to the petitioners, SUNAT refused to level out the pensions of the petitioners and to pay the owed pensions.

6. In view of their refusal, on September 25, 1997, sixty five retirees, members of ANAT-SUNAT filed a compensation claim before TJECC for any damages against the Superintendent of SUNAT (File No. 00818-1997). This claim was declared inadmissible and appealed by ANAT-SUNAT, but it was declared inadmissible for not having been received within the time limits.

7. Additionally, as of 2001, the alleged victims, individually, filed additional claims on execution of Resolution 21 before TJECC. This court ordered in each case the execution of different expert evidence that would allow establishing the amount that should be paid on leveled and accrued pensions. In some of the cases, TJECC ordered to level out the pensions and to pay off the accrued ones, and in other cases, the procedure became longer because SUNAT appealed⁵. The petitioners indicate that even an alleged victim died during the process of execution of Resolution 21, and his wife recognized herself as the procedural successor.

⁵The alleged victims, individually, filed additional claims of execution of Resolution 21 before TJECC. This court ordered in each case the execution of different expert evidence that could establish the amount that should be paid for the concept of leveled out and accrued pensions and after this, many different scenarios occurred in each of the procedures: a) Three alleged victims claimed the [continues...]

8. The petitioners claim that despite the foregoing, SUNAT presented a claim for protection before the Constitutional Court (file No. 01601-2012-PA/TC), which through Resolution No. 190 from August 6, 2012 declared the infeasibility of leveling out the pensions of the alleged victims and therefore, declared null the actions taken in the procedure of execution of sentence of Resolution 21. The alleged victims claim that said procedure was not notified to them and that they were excluded from it even though the result would affect them directly. As a result of this decision, the procedures of the individual claims of execution that started in 2001 where there was, in some cases, accepted leveling in favor of the alleged victims, were nullified.

9. In sum, the petitioners claim: (a) that the alleged victims have been violated their right to effective remedy and to the principle of legality and non retroactivity while pretending to apply Legislative Decree No. 680 inappropriately; (b) that the alleged victims acquired a property right on the proprietary effects of right to pension and that it was violated; (c) that the progressive and non regressive right to the social security of the alleged victims has not been considered; and (d) that the procedure has exceeded any reasonable deadline because to this date, Resolution 21 has not been executed, which constitutes *res judicata*.

10. Furthermore, the petitioners allege that the practice of not being aware of the right to social security of thousands of pensioners in Peru and the denial of the State to comply with the judicial sentences of its own judges that order them to respect or restore the rights of the retirees is outdated and constitutes a systemic pattern of violation to the rights of the retirees.

11. For its part, the State alleges lack of exhaustion of domestic remedies. It alleges that the petition refers to the process of protection filed by the petitioners, which culminated and constituted *res judicata* with the expedition of Resolution 21 from January 3, 1996. And that afterwards, a procedure of execution has been continued; which has not culminated with a final decision. It indicates that the Commission is not an organization to solve disagreements regarding alleged violations that have not been established by the national courts or that are on the outlook for resolution. Besides, it states that the diverse procedures of execution that have been set out by the alleged victims, give the idea that they only want Resolution 21 to be executed under their own terms.

12. Further, the State affirms that the execution of the sentence of protection would not resolve the matter of leveling of the pension, only the inapplicability of article 6, incise c) and the second transitory provision of Decree 680, and that the constitutional protection has the effect to retract things to the previous status, not the one of making possible the installments and the leveling in a way that is opposite to the law. It argues that, instead, it was suitable to set out a contentious administrative lawsuit on which it would be possible to debate and prove its pretention, which was not done by the petitioners.

[...continues] execution of sentence on October 4, 1999, in this case the claim was declared groundless in all details by TJECC. They appealed before the Civil Court of the same court, but it was declared inadmissible. b) On July 24, 2001, four alleged victims filed a claim of execution. They received a positive resolution and during three years, they received leveled pensions before the nullity. c) Two alleged victims filed it on August 24, 2001. The expert evidence of this case was approved by the Second Civil Court of Callao until September 3, 2009. The procedure was not over yet when Resolution No. 190 declared the nullity. d) An alleged victim started the process on September 10, 2001. TJECC dictated resolution in favor on July 4, 2011 and required SUNAT the leveling of payment of accrued pensions. e) Another alleged victim filed a claim on October 31, 2001, which had a resolution in favor of leveling on August 12, 2009. Additionally, a contentious administrative procedure had started before the Fifth Labor Court of Callao to request SUNAT the payment of accrued pensions. This court referred the procedure to the Second Contentious Administrative Court of the Superior Court of Justice of Callao, but this same court returned it to TJECC when it was declared the nullity through Resolution 190. f) In this case, the alleged victim started the claim on November 27, 2001, and received resolution in favor to level out and pay pensions on May 3, 2010. g) The alleged victim filed the claim on December 14, 2001 and it had not been solved yet when the nullity was declared. h) On December 17, 2001, the alleged victim started the claim, but he died during the procedure and his wife declared herself as the procedural successor, who appealed for the expert evidence that TJECC had carried out, the procedure continued without resolution until it was declared null through Resolution 190. i) In this case, TJECC decided that the remuneration the alleged victim would have the right to receive would not include a differential remuneration, which was appealed before the First Civil Court of Callao by the alleged victim. Said court gave a favorable resolution for the alleged victim on June 4, 2007

In such a way that they did not activate the suitable via for this case. The State also asserts that there is not configuration of violation of alleged rights based on the facts that are narrated in the petition and requests that such petition be inadmissible.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITIO

13. The petitioners allege that there has been unjustified delay on the execution of Resolution 21 from January 3, 1996, such procedure was culminated and was declared as *res judicata* by the Social and Constitutional Court of the Supreme Court of Justice through sentence of February 27, 1996. To this day, it has not been complied such decision of protection that recognized the rights as retirees and pensioners of the alleged victims. In this regard, the State, instead of disputing this fact, supports its plea of lack of exhaustion of domestic remedies because it recognizes that a final decision in the process of execution of that Resolution 21 is still pending.

14. In accordance with these considerations, the Commission observes, in first place, that the alleged victims activated the suitable legal via to enforce their rights, being this action of protection, which has not been substantiated by the State and that, in fact, started to have verifiable effects on the judicial actions that TJEEC took afterwards. And then, as it emerges clearly from the self argumentation from the parties, they have not yet executed Resolution 21 from January 3, 1996 of the Civil Court of the Supreme Court of Callao. On this matter, the Commission concludes that it is applicable the exception established in article 46.2.c) of the American Convention.

15. Additionally, considering that the petition was presented on June 24, 2013 and that the effects of refusal of rights of the alleged victims from the administrative and judicial authorities have been extended to this day and considering that the alleged victims have been litigating claiming their rights to an internal level since 1995 to the previous years of the filing of the present petition, being seniors, the Commission considers that the petition was presented in a reasonable period in terms of article 32.2 of its Regulations, according to article 46.2 of the American Convention.

VII. ANALYSIS OF COLORABLE CLAIM

16. The State asserts that the described facts do not characterize a violation to the guaranteed rights by the American Convention, case foreseen in article 47.b of the same. Due to all the above, the Commission considers that it does not correspond to this phase of the procedure to decide if the alleged violations to harm the alleged victims took place. For the purpose of admissibility, IACHR must decide at this moment only if there are exposed facts that, if proven, would characterize violations to the American Convention as it is stipulated in article 47.b of said one, and if the petition is “manifestly unfounded” or if it is “evident in its total inadmissibility” according to incise (c) of the same article⁶.

17. In this way, after examining the elements of fact and of right exposed by the parties, particularly the fact that the alleged victims are seniors, which rights must be protected through positive measures from the State, and who have been claiming their rights for more than 25 years, the Commission concludes that the allegations from the petitioner party are not manifestly unfounded, and that the same, if proven true, could characterize violations to the protected rights in articles 8 (fair trial), 21 (private property), 24 (equality before law) 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention in relation to its Articles 1.1 (obligation to respect rights) and 2 (obligation to adopt decisions of domestic law).

⁵IACHR, Report No. 49/13, Petition 1225-14, Admissibility, Gerardo Cruz Pacheco, México, July 12, 2012, paragraph 42.

18. With regard to the alleged violations to article 9 (principle of legality and retroactivity) of the American Convention, the Commission estimates that the petitioner part has not presented enough proof or elements that allow to consider, *prima facie*, of the possible violation.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 8, 21, 24, 25 and 26 of the American Convention in relation with articles 1.1 and 2 of the same instrument;

2. To find the instant petition inadmissible in relation to Article 9 of the American Convention;
and

3. 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 9th day of the month of June, 2020. (Signed): Joel Hernández, President; Antonia Urrejola, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, and Esmeralda E. Arosemena Bernal de Troitiño, Commissioners.

Appendix 1

List of alleged victims

1. Alberto Saavedra Silva (represented by his widow Bertha Murillo Celi)
2. Alfonso Mideyros Gonzales
3. Aristides Vila Pérez
4. Clodoaldo Quijano Cajas
5. Emilio Solórzano Borrovich
6. Gaspar Luna Ramírez
7. Héctor Armando Fonseca Benavente
8. Humberto Francisco Corzo Torres
9. José Gonzales Moreno
10. Juan Gutiérrez Estrada
11. Lucio Lam Mejía
12. Luis Flores Rivera
13. Salvador Silva Fernández
14. Serapio Benito Sáenz Falcón
15. Víctor Manuel Valdivieso Castillo