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REPORT No. 49/20
PETITION 39-09
ADMISSIBILITY REPORT

CATALINA AYALA MURRIETA AND ENRIQUE MENOSCAL VERA
ECUADOR

Approved electronically by the Commission on April 24, 2020.

Cite as: IACHR, Report No. 49/20. Admissibility. Catalina Ayala Murrieta and Enrique Menoscal Vera.
Ecuador. February 24, 2020

I. INFORMATION ABOUT THE PETITION

Petitioner	Catalina Ayala Murrieta and Enrique Menoscal Vera ¹
Alleged victim	Catalina Ayala Murrieta and Enrique Menoscal Vera
Respondent State	Ecuador
Rights invoked	Articles 8 (fair trial), 9 (ex post facto laws), 21 (property), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights; ² Articles XVII (recognition of juridical personality and civil rights), XVIII (fair trial), XXIII (property) and XXIV (petition) of the American Declaration on the Rights and Duties of Man ³ ; and Article 6 (work) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition	January 21, 2009
Additional information received during initial review	April 16, June 25 and October 2, 2009; March 21 and June 15, 2011; February 24, March 1 and 11, April 3 and May 3, 2012; February 8, 2013; January 10, 2014.
Notification of the petition	April 9, 2015
State's first response	July 27, 2015
Additional observations from the petitioner	April 9, 2015; January 28, 2016; August 3, 2016; August 22, 2018
Additional observations from the State	March 23, 2016; November 17, 2017

III. COMPETENCE

<i>Ratione personae:</i>	Yes
<i>Ratione loci:</i>	Yes
<i>Ratione temporis:</i>	Yes
<i>Ratione materiae:</i>	Yes, American Convention (instrument of ratification deposited on December 28, 1977)

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 (fair trial), 9 (ex post facto laws), 21 (property), 24 (equal protection) and 25 (judicial protection) of the American Convention on Human Rights in relation to articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).
Exhaustion or exception to the exhaustion of remedies	Yes, in the terms of Section VI
Timeliness of the petition	Yes, in the terms of Section VI

¹ The petition was originally filed by José Leonardo Vera acting as General Manager of the company IEM BUSINESS S.A. denouncing alleged violations of the rights of the company, its workers and shareholders. However, by means of notes received on March 31, 2011 and April 25, 2012, Catalina Ayala Murrieta and Enrique Menoscal Vera requested that the name of the original petitioner be replaced with theirs, claiming to be the beneficial owners of IEM BUSINESS S.A. and the victims of human rights violations.

² Hereinafter, "the American Convention".

³ Hereinafter, "the American Declaration".

⁴ Hereinafter, "the San Salvador Protocol".

⁵ The observations from each party were duly transmitted to the other party.

V. SUMMARY OF ALLEGED FACTS

1. Catalina Ayala Murrieta and Enrique Menoscal Vera (hereinafter “the petitioners” or “the alleged victims”) denounce alleged violations to their human rights adducing that their company IEM BUSINESS S.A. was arbitrarily confiscated from them and they have been denied access to justice through an unappealable mandate issued by the Constituent Assembly.

2. The alleged victims point out that they were the beneficial owners of the IEM BUSINESS S.A. legal person, indicating that they control the totality of the shares of the legal persons IEM BUSINESS CORP⁶ and KAM FINANCIAL GROUP S.A. which were the only shareholders in IEM BUSINESS S.A.

3. The petitioners point out that on July 8, 2008, the General Manager of the Deposits Guarantee Agency of Ecuador (hereinafter AGD) issued resolution AGD-UIO-GG-2008-12 where it ordered “The seizure of all property owned by those who were administrators and shareholders of Filanbanco S.A. until December 2, 1998 ”and ordering, among other things, “the seizure of companies owned and those that are publicly considered as owned by their administrators and shareholders, including all their assets and real assets”. The resolution included a non-exhaustive list of assets to be seized in which the legal entity IEM BUSINESS S.A. was included.

4. The alleged victims argue that they never worked for or were shareholders of Filanbanco S.A. and, for that reason, there existed no justification for the seizure of the company. They argue that the inclusion of their company in resolution AGD-UIO-GG-2008-12 was due to a clerical error on the part of Internal Revenue Service that mistakenly include the company IEM BUSINESS S.A. as part of the economic group of the Isaías family, known as “Isaías-Eica, Canal 10 CETV” in which the Deposits Guarantee Agency based its decision to order the seizures. They point out that, on March 18, 2008, well before the seizure of their company was ordered, they had complained to the Internal Revenue Service about this mistake. They point out that, on September 18, 2018, the International Revenue Service issued an official letter recognizing that IEM BUSINESS S.A. has “for tax purposes withdrawn from the economic group Isaías-Eica, Canal 10 CETV”. They add that on August 27, 2009, the National Secretariat of Management Transparency ratified that their company did not belong to the aforementioned economic group.

5. The petitioners also argue that resolution AGD-UIO-GG-2008-12 is illegitimate because the competence of the Deposits Guarantee Agency to seize assets was included in the Ecuadorian legal order in 2002, and thus its application to a situation that took place in 1998 violates the universal principle of non-retroactivity of the law.

6. The petitioners point out that on July 8, 2008, the General Manager of IEM BUSINESS S.A. filed an action for the protection of constitutional rights against the AGD to vacate the order to seize the company established under Resolution AGD-UIO-GG-2008-12. They point out that on July 9, 2008, the National Constitutional Assembly passed, overstepping its mandate, the Constitutional Mandate No. 13 (hereinafter, “Mandate No. 13”), declaring in its article 2 that:

“resolution AGD-UIO-GG-2008-12 of July 8, 2008, issued by the General Manager of the Deposits Agency is not susceptible of actions for the protection of constitutional rights or of any other of special character and, had such an action been filed, it will be immediately archived, without possibility of suspending or preventing the application of the aforementioned resolution. Judges or magistrates that hear any kind of constitutional action in relation to this resolution and others adopted to execute it, implement it or to fulfill completely, shall declare them inadmissible, under penalty of removal from office and notwithstanding the possible criminal liability that may arise”

7. The petitioners explain that the competent judge abstained from hearing the action for the protection of constitutional rights filed by IEM BUSINESS S.A. on the bases of Mandate No. 13 and that on July

⁶ The petitioners point out that they hold control of the totality of the shares of K & E INTERNATIONAL INVESTMENT CORP, which is the sole shareholder of IEM BUSINESS CORP.

17, 2008, the company filed an appeal, that was rejected by the Third Chamber of the Constitutional Tribunal on the same grounds. They indicate that on July 29, 2008, the General Manager of IEM BUSINESS S.A. filed an administrative appeal for reconsideration before the AGD, requesting that resolution AGD-UIO-GG-2008-12 be modified to exclude the company from the list of legal persons to be seized. They argue that AGD did not reply to the appeal within the two month period established by law and that, despite multiple requests, it did not agree to recognize that the administration's failure to respond constituted administrative silence favorable to the appellant and finally rejected the appeal on January 10, 2009, on the grounds of Mandate No. 13. The petitioners then appealed this rejection before the Board of AGD, which considered the appeal inadmissible on April 3, 2009.

8. The alleged victims argue that on December 8, 2009, acting on their "own rights" they filed an extraordinary appeal for review against the seizure of the shares of IEM BUSINESS S.A. before the Board of AGD. They argued the extraordinary appeal was admissible on the basis that Mandate No. 13 only prohibited constitutional actions but not administrative ones. They allege that this appeal was not responded to and, thus, on September 10, 2020, they requested the Ministry of Finance to issue a document accepting that the appeal had been automatically approved by not having been resolved within the two month period established by law and on the basis of norms related to the right to petition and to administrative silence. On April 21, 2011, they filed an identical request before the Management and Public Law Execution United of the AGD-CFN-No Más Impunidad Trust (hereinafter, "UGEDEP") to which the assets, rights and competences of AGD had been transferred.

9. On April 27, 2011, petitioner Enrique Menoscal Vera⁷ filed a protective action against UGEDEP, arguing that this entity violated his constitutional rights by omission in not opportunely resolving the extraordinary appeal for review. On June 30, 2011, this action was dismissed by the Sixteenth Judge of Criminal Guarantees of Guayas on the basis of Mandate No. 13, and the petitioner thus filed an appeal on July 7, 2011. On May 9, 2012, the Second Civil and Commercial Chamber of the Provincial Court of Justice of Guayas ruled in favor of the petitioner revoking the judgment of first instance and granting the protective action, so it ordered the release of the actions of IEM Business SA and recognized the right to reparation in favor of Enrique Menoscal Vera as plaintiff.⁸ Then, the legal representative of the UGEDEP filed a protective action against the sentence favorable to the alleged victims, which was declared inadmissible by the Constitutional Court for the Transition Period on October 4, 2012. On June 24, 2014 the Sixteenth Judge of Criminal Guarantees of Guayas sent the sentence of May 9, 2012 to the Constitutional Court where it was selected for review on October 16, 2014 and drawn to the First Review Chamber without said Chamber, according to the latest information in file, having pronounced itself on the matter.

10. The alleged victims indicate that, although they obtained a sentence in their favor, it has not been executed and they are exposed to the possibility that the Constitutional Court may revoke it invoking Mandate No. 13, and they therefore consider that their rights continue to be violated. They allege that the State has not demonstrated a willingness to comply with the sentence, on the contrary, it initiated a disciplinary process against the judges who dared to rule in their favor. They consider that, although the process concluded without sanction for the judges, it constitutes a precedent under which no other judge will dare to rule in their favor for fear of possible disciplinary sanctions. They indicate that they have not attempted to require the execution of the sentence through an action of non-compliance because they know that it could be rejected based on Mandate No. 13 and that the judges would fear ruling in their favor. In addition, they consider that Article 46.2 (c) of the American Convention is applicable to their situation because more than 8 years have elapsed since the shares of IEM Business SA were confiscated, without the situation being remedied despite the interposition of multiple actions

11. They also allege that Article 46.2 (b) of the American Convention must be applied to their petition because access to remedies and actions to which they were entitled was denied based on Mandate No.

⁷ Declaring to be acting "by my own and personal rights, as well as the rights which I represent as legitimate shareholder of the IEM BUSINESS S.A. company".

⁸ One of the judges in the Chamber filed a dissent, considering that the action was inadmissible on the grounds established by Mandate No. 13.

13. They consider that Mandate No. 13 violates by itself the right of access to justice enshrined in both the American Convention and the American Declaration, highlighting that this was recognized by the United Nations Human Rights Committee in deciding the substance of a communication presented by the Isaías family.⁹ In addition, they argue that the mandate violates their right to equality before the law because it does not allow them to access the legal mechanisms to which all other citizens have access. They emphasize that the mandate does not distinguish between natural and legal persons by prohibiting any constitutional action against resolution AGD-UIO-GG-2008-12, so it is their own rights that are violated. They indicate that the mandate remains in force and that there are no remedies to challenge it, being ratified by the Constitutional Court, which, on June 21, 2012 denied an unconstitutionality action filed by Roberto Isaías Dassum against the mandate.

12. Likewise, they denounce the violation of their right to property. They argue that, although the State invoked the precautionary procedural figure of the seizure, what really took place was the confiscation of the actions of IEM Business S.A., without compensation for those who held the property and without there being a cause of social interest that justified it. They allege that this confiscation deprived them of the use and enjoyment of their assets and that they lost control of the company, since the State arbitrarily proceeded to appoint a new legal representative for it, despite the existence of a conflict pending resolution. They argue that the trust established by the State for the administration of “seized” assets has only responded to its interests, ignoring the rights of shareholders and workers. They indicate that, while they managed the company, they complied with all the fiscal obligations and with the Intendancy of Companies but that the administration designated by the State breached these obligations resulting in the Intendancy ex officio ordering the dissolution and liquidation of the company, so they fear that the legal person may be canceled. They add that the State proceeded to announce the auction of assets of the company, despite having knowledge that judicial proceedings were pending.

13. The alleged victims allege that in addition to being shareholders they worked for IEM Business S.A. and thus, their right to work, like that of the other workers of the company, has also been violated by the illegal confiscation of the company. They add that, they have also been affected in their personal assets because, having the State taken control of the company, they have incurred expenses to maintain the farm and pay its workers. They emphasize that resolution AGD-UIO-GG-2008-12 was issued for the seizure of the assets of natural persons (former shareholders of Filanbanco S.A.). They consider that this evidences that the rights violated by that resolution correspond to natural persons and not to legal persons or companies.

14. The State, for its part, considers that the petition must be inadmissible as it refers to the economic rights of legal persons, over which the Commission does not have competence *ratione personae* to rule. It points out that the one who initially filed the petition before the Inter-American Commission was José Leonardo Vera in his capacity as General Manager of IEM Business S.A. and that it was he who initially filed domestic remedies against resolution AGD-UIO-GG-2008-12 on behalf of the company. It indicates that it was not until long after the petition was filed before the IACHR that Catalina Ayala Murrieta and Enrique Menoscal Vera requested to be considered as petitioners in their capacity as shareholders of IEM Business S.A. Similarly, it highlights that these people were not part of the domestic remedies filed against the resolution with the sole exception of an administrative appeal and a constitutional action. For all these reasons, it is clear that the purpose of the petition is the defense of the economic interests of a legal entity.

15. The State also requests that the petition be considered inadmissible because domestic remedies are not exhausted. They indicate that the alleged victims have not exhausted the action of non-compliance which would constitute an appropriate and effective remedy in the face of the alleged failure to execute the sentence of May 9, 2012, favorable to their claims. It indicates that this action allows the Constitutional Court, once the breach has been verified, to take all the measures it deems pertinent to ensure the execution, such as dismissal of the competent judges or initiation of administrative, civil or criminal proceedings against them. It points out that there are precedents that account for the effectiveness of this action to remedy the improper compliance with constitutional resolutions. It emphasizes that the fact that the

⁹ UN, Human Rights Committee, Roberto Isaías Dassum y William Isaías Dassum v. Ecuador, Communication No. 2224/2013, U.N. Doc CCPR/c/116/D/2224/2013 (2016).

Constitutional Court has selected the sentence for review does not suspend its effects, so the action for noncompliance is appropriate. It considers that none of the exceptions to the exhaustion of domestic remedies is applicable and that the mere doubt of the alleged victims as to whether may produce favorable results to their claims does not excuse their lack of exhaustion. It alleges that the fact that the petitioners have obtained a judicial decision in their favor, as well as that the judges who made that decision were acquitted in the disciplinary process against them, demonstrates that the petitioners' arguments regarding an alleged lack of judicial independence lacks foundation.

16. In addition to the action of non-compliance, the State indicates that its legal system allows the State to be sued if it incurs responsibility in the provision of its services or for the actions or omissions of its officials, this being another action that the alleged victims may exercise if they consider that the State violated their human rights.

17. The State adds that the petitioners have not been prevented from accessing domestic remedies and there has been no unjustified delay in deciding the actions they filed. It argues that the measure taken with respect to the company IEM Business S.A. It was not an arbitrary action but a seizure, a legitimate procedural figure for precautionary and evidentiary purposes. It also indicates that the selection of sentences for review is an exclusive power of the Constitutional Court and constitutes a mechanism that aims to develop jurisprudence with general effects.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

18. The Commission observes that the petitioners claim the applicability to their petition of the exception to the exhaustion of domestic remedies provided for by article 46.2(b) of the American Convention as they consider that Mandate No. 13, which cannot be appealed due to it having been issued the Constituent Assembly, constitutes on and by itself an unreasonable and discriminatory barrier to access to justice. Likewise, it takes note that the State maintain that none of the exceptions to the exhaustion of domestic remedies rules applies to the instant petition and that the remedies have not been exhausted given that the petitioners have not attempted an action of non-compliance regarding the decision which non-execution they complained about.

19. The Commission notes that one of the claims of the petitioners is that Mandate No. 13 illegally and discriminatorily deprived them of access to remedies to which they would normally have had a right in order to file complaints with regards to possible violations of their constitutional rights. The Commission takes note that the State has not indicated that there exist domestic remedies that may allow the petitioners to challenge this mandate. Therefore, the Commission concludes that the exception to the exhaustion of domestic remedies established under article 46.2(a) of the American Convention is applicable to this aspect of the petition. Considering that the petition was filed while Mandate No. 13 and the resolution over which it produced effects were in force, the Commission considers that it was filed timely within the meaning of article 32.2 of its Rules of Procedure.

20. With regards to the rest of the alleged violations denounced, the Commission notes that a judgment was passed on May 9, 2012, which could remedy them if complied with. According to the latest information available on file, the judgment is in force but has not been implemented. The State has argued that the non-compliance action is an adequate and effective remedy to ensure compliance with the judgment and which has not been exhausted by the alleged victims. The petitioner has pointed out that it has not filed this action as it considers that no judge would have the independence to rule in their favor, given that Mandate No. 13 establishes the penalty of dismissal for judges acting against it and there exist previous cases in which judges that ruled in their favor were subjected to disciplinary procedures. The Commission considers that, in relation to this aspect of the petition, the matter of the exhaustion of domestic remedies is inextricably linked to the allegation that the mere being in force of Mandate No. 13 is by itself a violation of the American Convention by interfering with judicial independence and access to justice and, therefore, the matter of the previous exhaustion of such remedy must be addressed together with the merits of the case. Therefore, the Commission will analyze this aspect of the exhaustion of domestic remedies in this case together with its merits.

VII. COLORABLE CLAIM

21. The State has argued that the Commission lacks competence *ratione personae* to hear this petition, which it considers deals with the economic rights of legal persons. In that regard, the Commission notes that Mandate No. 13 prohibits the filing of any kind of constitutional action against resolution AGD-UIO-GG-2008-12, including claims about possible violations of constitutional and conventional rights of natural persons, such as the ones raised in the instant petition. Likewise, the Commission also notes that the judgment of May 9, 2012, whose non-compliance is denounced, was issued in favor of Enrique Menoscal Vera and recognized a right of reparation in his favor and in his condition of plaintiff. Therefore, the Commission concludes that these aspects of the petition concern the rights of natural persons.

22. The alleged victims also claim violations of their human rights as natural persons as a result of an alleged arbitrary confiscation of the actions of IEM Business S.A. The Commission notes that the alleged confiscation originated in a resolution issued for the seizure of the assets of natural persons (who were shareholders of Filanbanco S.A. until 1998). The point raised by the alleged victims is not that they had or were attributed this condition. On the contrary, they argue that the company IEM Business S.A. was wrongly included in the list of properties to be seized despite not being related to the natural persons against whom the resolution was directed. The alleged victims have indicated that they were the beneficial owners of this company but from the information provided by them it appears that they did not exercise ownership of the shares directly but through other legal persons. The Commission recalls that it is not competent to address the rights of legal persons, such as those that in this case would be the owners of the shares of IEM Business S.A. However, this does not imply that the Commission cannot examine at the merits stage the allegations of the alleged victims that the measures taken over the shares of IEM Business S.A. resulted in the violation of their rights as natural persons.¹⁰

23. The Commission observes that the instant petition includes allegations regarding Mandate No. 13 having illegally and discriminatorily restricted the alleged victim's access to justice; that a sentence issued in their favor has not been executed after more than 5 years have elapsed since its issuance; that the measures adopted by the State with respect to the shares of IEM Business S.A. unlawfully impacted their personal assets and their right to work; and that by remaining in force Mandate No. 13 interferes with the judicial independence of the Constitutional Court that is to review the judgment pronounced in favor of the interests of the alleged victims.

24. Attending to these considerations and having examined the elements of fact and law brought forward by the parties, the Commission considers that the petitioner's allegations are nor manifestly groundless and require a study on the merits as the alleged facts, if proven, could constitute violations of Articles 8 (judicial guarantees), 9 (ex post facto laws), 21 (property), 24 (equal protection) and 25 (judicial protection) of the American Convention in relation to its Articles 1.1. (obligation to respect rights) and 2 (domestic legal effects). The Commission will also examine at the merits stage the pertinent allegations

25. With respect to the alleged violations of the American Declaration, the Inter-American Commission has previously established that, once the American Convention enters into force in relation to a State, it is it and not the Declaration that becomes the primary source of law applicable by the Commission, as long as the petition refers to the alleged violation of rights identically enshrined in both instruments and does not constitute a continuous violation. In the instant case, the Commission considers that the alleged violations of the American Declaration do not extend beyond the reach of articles 8, 21 and 25 of the American Convention. Therefore, the Commission will examine these allegations under the American Convention.

26. With regards to the allegations about violations to article 6 of the San Salvador Protocol, the Commission notes that the competence established under article 19.6 of said treaty to establish violations in the context of an individual case is limited to articles 8 and 13. With regards to all other articles, and in conformity with article 29 of the American Convention, the Commission may consider them in interpreting and applying the American Convention and other applicable instruments.

¹⁰IACHR, Report No. 122/10, Petition 475-00. Admissibility. Carlos Arturo Betancourt Estrada and others. Colombia. October 23, 2010, para. 29.

VIII. DECISION

1. To declare the instant petition admissible with regards to articles 8, 9, 21, 24 and 25 of the American Convention in relation to its articles 1.1 and 2

2. To accumulate with the study of the merits the decision concerning the exhaustion of domestic remedies and the timeliness of the petition of the part of the petition that refers to the alleged confiscation of the IEM Business SA shares, the alleged lack of enforcement of the AGD-UIO-GG-2008-12 judgment, and the alleged lack of independence of the Constitutional Court;

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

Approved by the Inter-American Commission on Human Rights on the 24th day of the month of February, 2020. (Signed): Joel Hernández, President; Antonia Urrrejola, First Vice President; Flávia Piovesan, Second Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Margarete May Macaulay, Julissa Mantilla Falcón, and Stuardo Ralón Orellana, Commissioners.