OEA/Ser.L/V/II
Doc. 175
24 October 2024
Original: Spanish

REPORT No. 166/24
PETITION 1344-09

REPORT ON INADMISSIBILITY

ALBERTO RAMÓN LEZCANO
ARGENTINA

Adopted electronically by the Commission on October 24, 2024.

Cite as: IACHR, Report No. 166/24. Petition 1344-09. Inadmissibility. Alberto Ramón Lezcano. Argentina. October 24, 2024.

I. INFORMATION ABOUT THE PETITION

Petitioning party:	Cecilia Asunción
Alleged victim:	Alberto Ramón Lezcano
Respondent State:	Argentina[1]
Rights invoked:	Articles 16 (freedom of association), 21 (right to property), and 25 (right to judicial protection) of the American Convention on Human Rights;[2] And Article 8.1.a (trade union rights) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador)

II. PROCESSING BY THE IACHR[3]

Filing of the petition:	October 29, 2009
Additional information received during the initial review stage:	June 24, 2010
Notification of the petition to the State:	April 26, 2022
State's first response:	February 24, 2023
Warning about possible archiving:	October 14, 2021
The petitioning party's response to a warning of possible archiving:	November 12, 2021

III. COMPETENCE

Competence *Ratione personae*:	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis:*	Yes
Competence *Ratione materiae:*	Yes, American Convention (instrument of ratification deposited on September 5, 1984), and Protocol of San Salvador (instrument ratification deposited on October 23, 2003)

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

Duplication of procedures and international res judicata:	No
Rights declared admissible:	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes
Timeliness of the petition:	Yes

[1] In keeping with Article 17(2)(a) of the Rules of Procedure of the IACHR, Commissioner Andrea Pochak, an Argentinian national, did not participate in the discussion or decision on this matter.

[2] Hereinafter "the American Convention" or "the Convention."

[3] Each party's observations were duly forwarded to the opposing party.

V. POSITIONS OF THE PARTIES

The petitioning party

1. The petitioning party complains that the judicial authorities did not make proper reparation for the dismissal of the alleged victim for trade union activities in the company where he worked.

2. The petitioning party describes how, on February 14, 2002, the alleged victim began working as a sailor on fishing vessels for the company Pescargen S.A. It points out that, despite his having been elected alternate representative in Congress (*congresal suplente*) of the Maritime Workers Union and despite the fact that, on March 15, 2005, he had exercised his right to strike, on March 17, 2005, his employer fired him, arguing that he had refused to perform the tasks for which he had been hired. Faced with this situation, the alleged victim protested his dismissal in writing, alleging that it reflected an anti-union attitude on the part of the company, since his dismissal was actually intended to reprimand him for having participated in a strike. However, Pescargen S.A. did not respond and maintained its position.

3. Consequently, in accordance with the provisions of Article 52 of the Trade Union Associations Law ("LAS"),[4] Mr. Lezcano understood that he had been indirectly dismissed, and based on this he asked the company to pay him a severance payment. However, in response to this communication, Pescargen S.A. broke its silence and sent him a letter in which it indicated that it had no knowledge that he had been appointed as a union representative and that it retracted the dismissal. The petitioning party explains that due to the deterioration of the employment relationship, Mr. Lezcano expressly rejected the aforementioned communication and the offer of reinstatement in his job, reiterating his position that his employment contract had been terminated and again demanding the payment of compensation. However, the company did not accept this request.

4. In view of this situation, Mr. Lezcano filed a lawsuit for dismissal against Pescargen S.A., requesting the payment of the special indemnities provided for in Article 52 of the LAS. As a result, on July 20, 2007, the National Labor Court of First Instance No. 59 of the Federal Capital declared the claim well founded and concluded that the plaintiff had been unjustifiably dismissed for having made legitimate use of his right to strike as a worker and union representative. As a result of this determination, the aforementioned court ordered the payment of the required indemnities, in an amount equivalent to 120,219.18 Argentine pesos (approximately US$. 39,032 at the time).

[4] Article 52. - Workers covered by the guarantees provided for in Articles 40, 48, and 50 of this Law may not be suspended or dismissed, nor may their working conditions be modified, unless there is a prior judicial decision excluding them from the guarantee, in accordance with the procedure established in Article 47. The intervening judge or court, at the request of the employer, within a period of five (5) days, may order the performance of a job to be suspended as a precautionary measure, when the permanence of the person in question in his position or the maintenance of the working conditions could cause danger to the safety of persons or property of the company.

The violation by the employer of the guarantees established in the articles mentioned in the preceding paragraph shall entitle the affected party to sue in court, by summary proceedings, for the reinstatement of his position, plus the salaries falling due during the judicial proceedings, or the reestablishment of the working conditions.

If a decision is taken to reinstate the employee, the judge may require an employer who does not comply with the final decision to abide by the provisions of Article 666 bis of the Civil Code, during the job stability period (*durante el período de vigencia de su estabilidad*). **[TRANSLATOR: please check my interpretation]**

The employee, except in the case of a non-elected candidate, may choose to consider the employment relationship terminated by virtue of the employer's decision placing him/her in a situation of indirect dismissal, in which case he/she shall be entitled to receive, in addition to severance pay, a sum equivalent to the amount of the wages he or she would have been entitled to for the remainder of the term for which he or she was appointed, plus the following year (*y el año de estabilidad posterior*). If the employee is a non-elected candidate, he/she shall be entitled to receive, in addition to the indemnities and wages due for the remainder of the term of appointment, the amount corresponding to one more year's remunerations.

The filing of actions for reinstatement or for reestablishment of the working conditions referred to in the preceding paragraphs interrupts the statute of limitations of the actions for collection of compensation and back wages provided for therein. The statute of limitations shall begin to run once a final judgment has been handed down in any of the cases.

5. However, Pescargen S.A. appealed this decision; and on March 26, 2008, Chamber VIII of the National Chamber of Labor Appeals partially revoked the appealed judgment. The petitioning party argues that although this instance recognized that the plaintiff had been unjustifiably dismissed, it only confirmed the payment of ordinary severance pay, without granting him the special compensation provided for in Article 52 of the LAS. As a result, it only ordered the payment of 11,548.35 Argentine pesos (approximately US$. 3,749). It points out that in order to support this determination, the aforementioned court considered that the employer had offered to reinstate the worker in his position with the payment of back wages, and that the worker had refused that measure of reparation. In the opinion of the Court, this showed that Mr. Lezcano attempted to exercise his right in an abusive manner. In the words of the Court: **[TRANSLATOR: Correct Spanish to "tribunal"]**

> When, as in this case, the set of objective and subjective elements is evident, it is essential to judge, from a duty-to-act-in-good-faith perspective in relation to both the union and the employer, the conduct of the person who invokes his status as a union representative, without having exercised the position, and receives from the employer the offer to retract the dismissal, reinstate him, and pay him the wages lost since notification of the termination of employment. That is, all the effects of a favorable judgment against the termination plus reinstatement, which we have called the parties' "own remedy" of the crisis originated by the direct dismissal. The negative answer entails, objectively, choosing to take advantage of the benefits derived from union stability, regardless of fulfillment of the tasks - in this case, virtually nonexistent - corresponding to a representative that constitutes the prerequisite for obtaining such benefits. If this is, as it was deemed to be, a right, its exercise in this case was dysfunctional, as it focused exclusively and abusively on the plaintiff's own benefit, a conduct that the law does not condone. [...] By refusing to accept the offer to continue his employment relationship that gave him one of the qualities required to be elected, he voluntarily placed himself outside the system. The employer cannot be blamed as it, in good faith, hastened to correct the formal error it had made and offered to compensate the loss of wages.

6. On April 18, 2008, Mr. Lezcano filed an extraordinary appeal against this decision, but on June 18, 2008, Chamber VIII of the National Chamber of Labor Appeals dismissed it. In addition, on June 9, 2008 he also filed a complaint appeal; which on October 21 of that year the Supreme Court of Justice of the Nation declared inadmissible, stating that the filing had exceeded by six pages the limit established in Article 4 of its rules of procedure. Finally, Mr. Lezcano appealed this decision by means of a motion for reconsideration. However, on May 5, 2009, the Supreme Court of Justice of the Nation rejected it, stating that "*final and interlocutory judgments may not be modified by the means attempted* [...] *without there being in the case at hand circumstances strictly authorizing a departure from that principle*." The petitioning party indicates that this last determination was notified on May 28, 2009.

7. Based on these considerations, the petitioning party essentially claims that the National Labor Court of Appeals did not grant the severance pay to which the plaintiff was entitled to by law, solely because the company offered him the opportunity to return to his job. It emphasizes that the judgment of said body contains several argumentative flaws, since it did not make any reference to the violation of the alleged victim's right to strike; and hence, it did not take into account the fact that the relationship with the employer was already broken. Finally, it argues that the subsequent judicial instances did not correct the deficiencies of this resolution due to mere formalities.

The Argentine State

8. For its part, the State requests the IACHR to declare this petition inadmissible, arguing that the petitioning party submitted it extemporaneously. It states that although on October 29, 2008 the Supreme Court of Justice of the Nation notified the rejection of the appeal filed by Mr. Lezcano, his representative only filed the present petition one year later, on October 29, 2009. According to Argentina, the six-month period provided for in Article 46(1)(b) of the American Convention must be analyzed from the date of notification of this decision and not from that of the motion for reconsideration, since the latter does not provide a reasonable basis for procedural continuity for the purpose of exhaustion of domestic remedies. The State argues that the use of a writ of reinstatement in a case such as this is improper by definition and that its use appears "unreasonable" and/or reckless.

9. Without prejudice to the foregoing, it added that the facts described in the petition do not constitute, even prima facie, possible violations of rights recognized in the American Convention or other inter-American treaties. It considers that it is clearly stated that Mr. Lezcano could have returned to the company and continued with his union mandate, but decided not to do so. It indicates that, as maintained by the National Chamber of Labor Appeals, in refusing to return to the company the alleged victim did not allege or prove that there was a deterioration of the employment relationship or an ostensible resistance of the employer to his reinstatement.

10. It adds that the labor courts protected Mr. Lezcano's right to strike and held the respondent company responsible for the dismissal due to the actions taken by the union. In this regard, the State emphasizes that the petitioning party's account does not prove a violation of the right to strike, since the domestic courts correctly resolved the present situation.

11. On the other hand, it argues that the domestic courts correctly substantiated their rulings, and that consequently the claims of the petitioning party only show its disagreement with the decisions adopted. In particular, the National Chamber of Labor Appeals explained in its decision that the purpose of the LAS is to protect union activity and, thus, a substitute indemnity is only applicable when there is a *"deterioration of the employment relationship"* and/or an *"ostensible resistance of the employer*" to reinstate the worker. In the case of the alleged victim, that body considered that the aforementioned circumstances did not apply, and that on the contrary, despite the fact that Mr. Lezcano was offered the possibility of continuing in the company exercising his union mandate, he rejected it, putting his own interest before his role as a union representative, by trying to obtain a disproportionate benefit, thereby contravening the objective of guaranteeing freedom of association set forth in the LAS and exceeding the limits imposed by good faith. In view of the foregoing, Argentina considers that the petition does not refer to any event that could imply impairment of rights to the detriment of the alleged victim.

12. Finally, the State raises the issue of what it calls "*the untimely forwarding of the petition*." It states that, although the Executive Secretariat of the IACHR received the petition on October 29, 2009, the document was only forwarded on April 26, 2022. In the State's opinion, the delay in processing the petition generates a serious problem that affects the proper exercise of its right to defense.

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

13. The Commission notes that the petitioning party essentially argues that the domestic bodies did not adequately analyze the anti-union dismissal suffered by the alleged victim and denied him adequate redress. In this scenario, the State does not argue that the alleged victim has failed to exhaust domestic jurisdiction and only argues that the petition is untimely. In its opinion, the six-month period provided for in Article 46(1)(b) of the Convention should be counted from the resolution of the complaint, since the remedy of reconsideration was inadmissible by definition and, therefore, did not constitute a reasonable basis for assessing procedural continuity.

14. Despite Argentina's arguments, the Commission notes that the State has not provided more exhaustive information or arguments to corroborate that the use of the remedy of reinstatement in a case such as the present one was clearly inappropriate, and in this sense, it has not met its burden of proving that Mr. Lezcano has made improper use of this mechanism. On the contrary, based on its precedents, the Commission considers that the filing of a motion for reconsideration to challenge the dismissal of the complaint based on mere formal issues relating to the number of pages of the brief, represented the last reasonable attempt to gain access to justice and obtain a definitive ruling analyzing the judgment of Chamber VIII of the National Chamber of Labor Appeals.[5] In this sense, it is observed that a logical procedural continuity is maintained, with the petitioner acting in good faith.

[5] IACHR, Report No. 245/23. Petition P-1359-11. Admissibility. Nelida Manopella and Guillermo Puy. Argentina. October 7, 2023

15. For the foregoing reasons, and taking into consideration that the authorities notified the rejection of the motion for reconsideration on May 28, 2009, and that the petitioner initiated this international complaint on October 29, 2009, the Commission concludes that the instant case meets the requirements set forth in Articles 46(1)(a) and (b) of the American Convention.

16. Finally, the Commission takes note of the State's claim regarding the allegedly extemporaneous transfer of the petition. The IACHR points out that neither the American Convention nor the Rules of Procedure of the Commission establish a deadline for forwarding a petition to the State from the time of its receipt and that the times allowed in the Rules of Procedure and in the Convention for other processing stages are not applicable by analogy.[6] In addition, in its Report on Admissibility No. 79/08,[7] the IACHR clarified that:

> the time elapsed from the time the Commission receives a complaint until it transfers it to the State, in accordance with the norms of the inter-American human rights system, is not, in and of itself, a reason for a decision to archive the petition. In this regard, the Commission reiterates that "in the processing of individual petitions before IACHR, there is no statute of limitations *ipso iure* based on the passage of time."

17. Likewise, reinforcing the above, the Inter-American Court of Human Rights has established precisely with respect to this point that:

> This Court considers that the criterion of reasonableness, on the basis of which procedural rules must be applied, implies that a time limit such as the one proposed by the State should be clearly provided for in the rules governing the procedure. This is especially true given the danger of jeopardizing the right of petition of alleged victims, established in Article 44 of the Convention, due to acts or omissions of the Inter-American Commission over which the alleged victims have no control of any sort.[8]

18. In this regard, the Inter-American Commission reiterates its commitment to the victims, based on which it makes constant efforts to guarantee at all times the reasonableness of the time periods in the processing of their cases; and an appropriate balance between justice and legal security.

VII. ANALYSIS OF COLORABLE CLAIM

19. First, the Commission reiterates that the criterion used to assess admissibility differs from the one needed to decide the merits of a petition. At the admissibility stage, the Commission must perform a *prima facie evaluation* and determine whether the petition provides grounds for an apparent or potential violation of a right guaranteed by the American Convention, not whether the violation has in fact occurred. This determination regarding violations of the American Convention constitutes an initial analysis that does not imply a prejudgment on the merits. For the purposes of admissibility, the IACHR must decide, pursuant to Article 47(b) of the American Convention, whether the facts alleged, if proven, could characterize a violation of rights, or whether, pursuant to paragraph (c) of the same article, the petition is "manifestly groundless" or "obviously out of order."

20. Without prejudice to the foregoing, the Commission reiterates that petitioners' mere disagreement with the domestic courts' interpretation of the relevant legal norms is not sufficient to establish violations of the Convention. The interpretation of the law, the relevant procedure, and the assessment of evidence are, among others, functions performed by the domestic jurisdiction, which cannot be replaced by the IACHR.[9] Thus, the Commission's role is to ensure compliance with the obligations assumed by the States parties

[6] See, for example, IACHR, Report No. 56/16. Petition 666-03. Admissibility. Luis Alberto Leiva, Argentina. December 6, 2016, par. 25.

[7] IACHR, Report No. 79/08, Petition 95-01. Admissibility. Marcos Alejandro Martin. Argentina. October 17, 2008, par. 27.

[8] I/A Court H.R., *Case of Mémoli v. Argentina.* Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 22, 2013. Series C No. 295 par. 32.

[9] IACHR, Report No. 83/05 (Inadmissibility), Petition 644/00, Carlos Alberto López Urquía, Honduras, October 24, 2005, par. 72.

to the American Convention, but it cannot act as an appellate court to examine alleged errors of law or fact that may have been committed by national courts acting within the limits of their competence.[10]

21. In the present case, the Commission considers that the petitioning party obtained reparation for the dismissal he allegedly suffered. Even though the latter is dissatisfied with the amount of money that was assigned to him in application of domestic law, he does not present arguments that, *prima facie*, demonstrate that the legal criteria used by the domestic bodies contravene any of the rights contemplated in the Convention.

22. For the aforementioned reasons, the Commission considers that the facts presented by the petitioner do not show, *prima facie*, a possible violation of rights and, consequently, based on Article 47(b) of the Convention, it is appropriate to declare this case inadmissible.

VIII. DECISION

1. To declare this petition inadmissible; and

2. To notify the parties of this decision; and 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 24th day of the month of October 2024. (Signed:) Roberta Clarke, President; Edgar Stuardo Ralón Orellana, Arif Bulkan (dissident vote), and Gloria Monique de Mees, Commissioners.

[10] IACHR, Report No. 70/08, (Admissibility), Petition 12.242, Pediatric Clinic of the Los Lagos Region, Brazil, October 16, 2008, par. 47.