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Stockholders' Human Rights Insufficiently Protected by the IACHR

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Versión en español aquí.

The principle that a state incurs international responsibility when it expropriates the property of foreign investors without adequate compensation is well established in international law. Provisions relating to the protection of property abroad may be found in international agreements dating back to the late 19th century; but in the wake of the conclusion of thousands of bilateral and regional investment and trade agreements during the 1990s and early 2000s, by now provisions relating to the protection of cross-border investments are commonplace in most countries around the globe.

Far less has been established, however, about the international responsibility that a state may incur when it decides to expropriate without due compensation the property of its citizens. Except for domestic investors in Europe, virtually all others around the globe have been restricted to whatever remedies may be available under the local laws of their respective states. In the case of Europe, the European Convention on Human Rights (entered into force in 1953) provided that "every natural or legal person is entitled to the peaceful enjoyment of his possessions," the EU Charter of Fundamental Rights (2012) conditioned any deprivation on "fair compensation being paid in good time", and the European Court of Human Rights has put teeth on those clauses through its landmark rulings.

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December 1948, included several articles enumerating fundamental

rights of an economic nature, with Article 17 spelling out the right to own property from which no one is to be arbitrarily deprived. However, while subsequent regional treaties and declarations —the **American Convention on Human Rights** (1978), the African Charter on Human and Peoples' Rights (1981), the Arab Charter on Human Rights (2004), and the Association of Southeast Asian Nations Human Rights Declaration (2012)— also recognize **rights to property**, they do so in limited ways. Only the Arab charter includes a free-standing right to private ownership and, generally, their protections against expropriation and regulatory takings are weak, with neither the African nor the Arab nor the ASEAN charters making mention of a **right to compensation**.

Article 21 of the **American Convention** provides that "everyone has the right to the use and enjoyment of his property", and that "no one shall be deprived of his property except upon payment of **just compensation**". Nevertheless, in Latin America, periodic waves of nationalism and populism, political instability, and market-unfriendly economic policies, combined with chronically squatted and untitled land in urban and rural areas, have weakened **property rights** and undermined the rule of law. Even in nations where the right to property is enshrined in their constitutions, governments have trampled over it to confiscate their own nationals' property, whether directly through expropriations without fair and timely compensation, or indirectly through burdensome taxes, price controls, currency debasements, and other damaging state interventions that diminish asset values and drive some business owners into liquidation.

And even when the right to property appears to be well established, it is usually difficult to enforce because of inordinately long court delays, recourse to many stages of appeal, occasional or endemic corruption, and weak judicial independence. In some circumstances and jurisdictions, private parties may be able to avoid some of the drawbacks of protracted litigation by agreeing to arbitration. However, in most countries, it is practically impossible to file suit and win against a sitting government for property takings or for causing investment losses —even if the litigation involves abuses committed by past administrations.

A small number of Latin American stockholders in companies and banks have sought justice beyond their borders by filing petitions for eventual consideration by the Inter-American Court of Human Rights [the Court], whose decisions are legally binding on states. However, only a handful of those Article 21 petitions have resulted in cases on which the Court has ruled. Consequently, there is hardly any inter-American jurisprudence to guide investors or governments on what is and is not permissible when it comes to the "use and enjoyment" of property.

Petitioners face two major hurdles. First and foremost, under a settled interpretation of the American Convention and related regional instruments —and even the civil codes of a variety of countries in Latin America— natural persons are recognized to

enjoy human rights, but legal persons are not. The Convention's preamble states that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality." Its Article 1[1] establishes that states must "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms", and its Article 1[2] specifies that "for the purposes of this Convention, 'person' means every human being."

Nevertheless, in 2001, in *Cantos v. Argentina*, the Court recognized the potential injustice that could arise from ignoring that behind every **legal person** there stands a human being with protected rights:

> "[I]f a landowner acquires a harvesting machine to work his fields and the government confiscates it, he would be protected by Article 21. But if, instead of a landowner, it was a case of two poor farmers who formed a company to buy the same harvester and the government confiscated it, they would not be able to invoke the American Convention because the harvester in question would be owned by a company."

Therefore, the Court accepted that there is a difference between the rights of the shareholders of a company and those of the company itself. The ruling on *Cantos* stated that "although the figure of legal entities has not been expressly recognized by the **American Convention**, […] this does not mean that, in specific circumstances, an individual may not resort to the **Inter-American System for the Protection of Human Rights** to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law".

The second hurdle is that all rights-related complaints must first pass muster with the Inter-American Commission on Human Rights (the Commission, or **IACHR**). Its staff of attorneys and consultants makes an initial determination of whether petitions include a possible violation of protected rights, remedies under domestic law have been duly exhausted, and all necessary formalities have been met, as per Articles 46 and 47 of the American Convention. Most petitions fail: for example, in 2020, 78 percent were rejected at this initial stage. Those which pass this initial examination move on to formal admissibility and merit stages, involving a thorough staff analysis, consultations with the relevant government —including to reach a friendly settlement— and failing resolution, Commission attorneys reach their conclusions taking into advisement briefs prepared by both sides.

In early 2016, acting on a request of Panama's government, the Court delivered a welcome **advisory opinion** interpreting the rights of legal persons in the Americas. It stated that legal persons are not entitled to hold rights under the Convention, except for organizations representing indigenous communities or workers (e.g., labor unions). However, it acknowledged that in some cases natural persons may exercise their rights through legal persons, such as in the case of media companies, and that

this potential overlap "must be analyzed in each case". Finally, the Court concluded that natural persons may exhaust local remedies through legal persons when the local recourses available can only be submitted by the latter, as when seeking protection for a corporation's property. In these instances, natural persons fulfill the requirement of exhaustion of local remedies and are allowed to submit an individual petition.

Until this opinion was issued, Commission staff had refused to admit complaints presented either by legal persons (including labor unions) or in cases where domestic remedies were exhausted by a **legal person** rather than by an individual. An early and infamous example is the 1991 Commission's rejection of a petition filed against Peru on behalf of 105 individual shareholders of the Banco de Lima, for the 1987 attempt to expropriate that and all banks without any public-interest justification, prior payment of **just compensation**, or regard for procedures outlined in Peru's constitution. Commission attorneys had concluded that "what is at issue here are not the individual **property rights** of the individual shareholders, but rather the collective property rights of the […] Banco de Lima".

One would expect, therefore, that in the wake of the Court's 2016 opinion, the Commission's staff attorneys would have updated their assessments and decision-making whenever handling alleged violations of the Convention's Article 21. Unfortunately, there is no evidence of that. In 2019, a petition (*Michelsen et al. v. Colombia*) by the shareholders of Bermúdez y Valenzuela S.A., a finance company that ostensibly was unfairly taken over and shut down by Colombia's banking regulator in 1999, was ruled inadmissible because the domestic remedies pursued sought justice for the company and not for its stockholders.

Similarly, in 2020, a petition (*Vieitez v. Argentina*) by the main shareholder of a family business, Pasadena S.A., that starting in 1988 went through an allegedly irregular bankruptcy process, was ruled inadmissible because the petitioner had acted as Pasadena's shareholder and had claimed for the company's rights instead of his own. And in recent weeks, a petition (*Cerviño v. Argentina*) by the owner of a family business, ASCHA S.A., the victim of arbitrary judicial decisions in proceedings during 2002-2014, was ruled admissible only insofar as he was the purported target of a harassment and intimidation campaign that was not investigated by the police —but not because of his claims under Article 21 relating to ASCHA S.A., a business entity different from the petitioner.

The Commission's handling of these three petitions was uniform: their reports read as if they had been written prior the issuance of the Court's 2016 **advisory opinion**. Tellingly, none of them even mentioned the existence of said Court opinion, relying instead on outdated criteria and language found in old Commission reports from 2005 and 2010. While petitioners argued that their companies were mere vehicles for pursuing and protecting their human rights, especially under the

Convention's Article 21, the Commission's attorneys did not concede that natural persons may exercise their rights through legal persons and that this potential overlap "must be analyzed on a case-by-case basis". They also did not acknowledge that the petitioners had fulfilled the requirement to exhaust domestic remedies and should have been allowed to submit an individual petition, because when local remedies can only be accessed and exhausted through legal persons, then the natural persons who do must be deemed to have fulfilled their requirements.

In conclusion, the Commission's attorneys appear to have been handling petitions involving alleged violations of **property rights** in a dogmatic and superficial manner. Until the Commission incorporates the letter and spirit of the Court's 2016 **advisory opinion** into its petition admissibility assessments, the human rights of Latin American stockholders will remain insufficiently protected by the **Inter-American Human Rights System**.

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