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REPORT No. 38/19

PETITION 384-07

REPORT ON INADMISSIBILITY

ANTONIO REINALDO PEIXOTO PEREIRA
BRAZIL

Approved electronically by the Commission on April 18, 2019.

Cite as: IACHR, Report No. 38/19, Petition 384-07. Inadmissibility. Antonio Reinaldo Peixoto Pereira. Brazil. April 18, 2019.



I. INFORMATION ABOUT THE PETITION

Petitioner:	Antonio Reinaldo Peixoto Pereira
Alleged victim:	Antonio Reinaldo Peixoto Pereira
Respondent State:	Brazil ¹
Rights invoked:	Articles 1 (obligation to respect rights), 2 (domestic legal effects), 8 (right to a fair trial), 9 (freedom from Ex Post Facto laws), 21 (right to property), 24 (right to equal protection), 25 (right to judicial protection) and 26 (progressive development) of the American Convention on Human Rights ² ; and Articles 3 (obligation of nondiscrimination), 6 (right to work) and 9 (right to social security) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	March 29, 2007
Additional information received at the stage of initial review:	May 17, 2007
Notification of the petition to the State:	June 15, 2007
State's first response:	September 4, 2007
Additional observations from the petitioner:	November 13, 2007; February 22 and April 28, 2008; January 12, 2009; July 16 and 27, August 7, September 23, and October 2, 12, and 19, 2012; August 15, 2013; April 3, 10 and 29, and August 11, 2014; December 16, 2017
Additional observations from the State:	January 2, April 9 and June 18, 2008; July 2, 2013; January 17, 2014

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 (adopted on September 25, 1992) and Protocol of San Salvador (deposit of instrument on August 21, 1996)

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	None
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, November 28, 2013
Timeliness of the petition:	Yes, in the terms of Section VI

¹ In accordance with the provisions of Article 17.2.a of the Commission's Rules of Procedure, Commissioner Flávia Piovesan, of Brazilian nationality, did not participate in either the discussion or decision in the present case.

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

³ Hereinafter the "Protocol of San Salvador".

⁴ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. Mr. Antonio Reinaldo Peixoto Pereira (hereinafter "the alleged victim" or "Mr. Pereira") indicates that he was an official of the Bank of Brazil from December 1, 1969, until July 31, 1995, when he joined the Voluntary Retirement Program ("*Plano de Desligamento Voluntário*" hereafter "PDV") proposed by the bank. The PDV consisted of the payment, by the bank, for every year of work in the institution, plus 40% of the balance of the worker's account together with the Retirement Fund ("*Fundo de Garantia por Tempo de Serviço*", hereinafter "FGTS"). He alleges that he has contributed continuously to the National Social Security Institute (hereinafter "INSS") between December 1, 1969, and April 30, 2000, completing a total of 35 years and 5 months of contributions. Of these, 25 years and 8 months were made as an employee of the Bank of Brazil and the rest as a voluntary contributor to comply with legal requirements.

2. According to the alleged victim, the law in force at the time required only a minimum length of contribution consisting of 30 years for men and 25 for women, without setting a minimum age. As he understood that he had the right to retire, he made his request to the INSS on two occasions, on December 1, 1999, and June 21, 2000. These requests were both rejected allegedly on the grounds of an amendment made to the requirements for his retirement in an illegal and retroactive manner. In this regard, he indicates that on December 16, 1998, the adoption of Constitutional Amendment No. 20/98 (hereinafter "EC 20/98") abolished proportional retirement and changed retirement rules for everyone. In the new regime, the insured could choose between retirement by age or by contribution period, in addition to establishing a transitional rule to deal with individuals who were about to retire at that time. This rule had three requirements: a minimum age of 53 years for men; at least 30 years of contribution; and the so-called "pedágio", an additional 40% over the years lacking to complete the minimum number of years of work required by law. He states that by requiring a minimum of 53 years of age, EC 20/98 retroactively affected his acquired rights.

3. Therefore, he states that he filed five separate complaints, three against the INSS (filed in 2000, 2003, and 2006) and two against the Union (filed in 2001 and 2007), with the purpose of obtaining his proportionate retirement or cancelling the retirement contract signed between the parties, receive compensation for the damages suffered, declare unconstitutional law EC 20/98 and prove that he was coerced into accepting the PDV. After filing various appeals for the said lawsuits, he alleges that all were denied by courts of second instance and/or higher. Additionally, he states that during the course of these actions, disciplinary complaints were submitted to the National Council of Justice (hereinafter "CNJ") for the alleged delay in issuing decisions and the conduct of the judges. However, he alleges that the CNJ decided that there had been no delay in processing his claims and attributed any delay to the alleged victim's conduct in the proceedings. Finally, he argues that the differentiated retirement regime for public servants and workers in the private sector is discriminatory.

4. The State, for its part, argues that the alleged victim had not acquired the right to proportional retirement at the time EC 20/98 was enacted. Consequently, his first request, dated December 1, 1999, was dismissed for lack of minimum period of contribution and the second, of June 21, 2000, for his not having reached the minimum age required. It indicates that Mr. Pereira merely had an expectation in law and that the enactment of EC 20/98 did not constitute a violation of his rights. It also maintains that States have the power to amend the rules applicable to their social security system and that the amended requirements did not affect the alleged victim's right to property.

5. The State adds that Mr. Pereira was been able to present his arguments against the enactment of EC 20/98, that the proceedings have been of a reasonable duration and were carried out in accordance with the guarantees of due process. In this regard, it indicates that the authorities have already decided several claims filed by Mr. Pereira and that during these proceedings he has been able to present evidence and exercise his rights of defense. It also alleges that the length of proceedings is due to Mr. Pereira's own activity. It therefore alleges that the case concerns the alleged victim's dissatisfaction because his claims were rejected and that the alleged victim has made no complaints about the impartiality of the judicial bodies or the lack of opportunity to present arguments and evidence. It asserts that Mr. Pereira is claiming before the IACHR as a court of fourth instance.

6. With respect to the allegation about the supposed omission of the courts to rule on the alleged unconstitutionality of EC 20/98, the State argues that the judicial bodies have repeatedly indicated that the State has not violated the alleged victim's rights since its decisions are reflected in law EC 20/98. According to the State, these decisions contain an implicit response to the petitioner's allegation regarding the unconstitutionality of EC 20/98. It points out that under Brazilian law constitutionality is the rule and, contrary to the unconstitutionality that is an exception, it does not require to be expressly declared. It emphasizes that it is impossible to return to the alleged victim the amounts paid to the INSS during 30 years, taking into account the universal nature of social security, that is, it covers not only retirement, but also other benefits and services, such as health and social care. The State also indicates that the alleged victim agreed to the PDV of Bank of Brazil in 1995, without questioning its legality.

7. To conclude, the State sustains that the petition is inadmissible due to a ... of a violation of rights protected by the American Convention, in addition to claiming that the alleged victim uses the Inter-American Human Rights System as a "fourth instance" to domestic courts. Lastly, it maintains that the IACHR lacks jurisdiction *ratione materiae* to analyze and declare alleged violations of the rights enshrined in Articles 3, 6 and 9 of the Protocol of San Salvador.

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

8. The alleged victim argues that domestic remedies were exhausted with the decision of the Special Chamber of the STJ of September 18, 2013, in the proceedings for the claim filed on July 19, 2000. The State, in turn, does not address the exhaustion of domestic remedies, however, submits that the alleged victim wishes to use the Inter-American System to review the merits of domestic rulings.

9. The Commission recalls that the analysis of the requirement of exhaustion of domestic remedies is made in light of the situation of these remedies at the time when the Commission decides on the admissibility of a petition. In this regard, the Commission confirms that, according to information provided by the parties and publicly available information: i) the year 2000 claim ended on November 28, 2013; ii) the 2001 lawsuit ended on October 19, 2015; iii) the 2003 lawsuit was definitively archived on November 11, 2011, due to the withdrawal of the alleged victim; iv) the 2006 lawsuit ended on May 13, 2010 and; v) the 2007 lawsuit ended on October 28, 2015.

10. In view of the fact that the purpose of these claims was to hold the State liable for alleged damages suffered due to the enactment of EC 20/98 and the denial of access to his retirement, the Commission considers that the State was aware of this situation due to several internal proceedings already resolved, satisfying the requirement of Article 46.1.a of the American Convention. Therefore, it considers that the domestic remedies were exhausted on October 19, 2015, and that the admissibility requirement regarding the filing period is satisfied.

11. Regarding the challenge to the constitutionality of EC 20/98, the Commission notes that the courts of first and second instance, when resolving the 2000 and 2001 lawsuits, decided this point. Thus, the Commission understands that the alleged victim did everything in his power to challenge the constitutionality of this amendment, given that domestic law does not provide an autonomous remedy for him to redress the situation. Thus, on this point, the Commission also considers the requirement of Article 46.1.a of the American Convention to have been satisfied.

VII. ANALYSIS OF COLORABLE CLAIM

12. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that the facts outlined by the alleged victim do not characterize violations to the rights enshrined in articles 8,9, 21, and 25 of the American Convention. In this regard, the Commission observes that the claim turns out to be an issue relating to the enactment of EC 20/98 which modified the retirement requirements in Brazil and the alleged injuries suffered by the alleged victim as a result to these modifications, everything examined and resolved by the local judiciary authorities

involved, as seen in the copies of case files sent. In this regard, it should be noted that the Commission is not authorized to review judgments rendered by national courts that operate within their jurisdiction and apply the due legal safeguards unless it is found that one of the rights protected by the American Convention⁵ and, in the case in question, there was no occurrence of an exception. Therefore, from the information submitted, the Commission does not identify a possible violation against rights guaranteed in the Convention. Further, the Commission holds that Mr. Pereira does not show sufficient evidence to *prima facie* identify a violation against rights enshrined in article 26 of the American Convention.

13. Regarding an alleged violation of the duration of internal proceedings, the Commission points out that the petitioner's allegations are confined to supposed delay on the part of judicial authorities to reach a resolution regarding complaints from 2000 and 2001. As concerns the duration of the complaint from 2000, the information available does not indicate a delay in resolving the appeal filed by the alleged victim in 2001 could be exclusively attributed to the State since, in multiple occasions, when the case was about to reach a resolution, the alleged victim presented new judicial remedies and/or additional proof. Also, Mr. Pereira does not indicate that there might have been a delay on the part of the authorities in ruling on the other appeals filed by him within the framework of this complaint, until its conclusion in September of 2013. Regarding the complaint from 2001, the information available also does not indicate that the responsibility for the duration of this proceeding exclusively attributed to the State. Further, the Commission notes that over the processing of the proceedings, the alleged victim neither complained about the duration nor presented allegations on the alleged delay in resolving the proceedings after the second instance ruling.

14. In conclusion, regarding the claims about violations of rights protected in the Protocol of San Salvador, specifically articles 3, 6, and 9, the Commission indicates that, pursuant to article 19.6 of that treaty, the IACHR lacks competence *ratione materiae* under its individual petitions system to establish violations of the articles of the Protocol of San Salvador mentioned by the alleged victim.

VIII. DECISION

1. To find the instant petition inadmissible;
2. To notify the parties of this decision; 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 18th day of the month of April, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli and Luis Ernesto Vargas Silva, Commissioners.

⁵ CIDH, Report No. 88/13, Petition 404-00. Marcelo Fabián Nievas and family. Argentina. November 4, 2013, par. 58.