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Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioners: Sir Clare K. Roberts, Florentin Melendez, Paolo Carozza. Commissioner Paulo Sergio Pinheiro, of Brazilian nationality, did not participate in the deliberations or the decision on this petition, in keeping with Article 17(2) of the Commission’s Rules of Procedure.
Dated:	12 November 2009
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I. SUMMARY

1. On June 3, 2005, the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission” or “the IACHR”) received a petition alleging the international responsibility of the Federative Republic of Brazil (“the State” or “Brazil”) for eliminating the exemption for retired public employees and pensioners with respect to the contribution to social security, or social security tax (*contribuição previdenciária*), which occurred as of December 19, 2003, after the promulgation of Constitutional Amendment No. 41/03. It alleges that the State is responsible for violations of the right to property and the rights to judicial guarantees and judicial protection, to the detriment of certain Brazilian retirees and pensioners.

2. The petition was filed by the Movimento dos Servidores Públicos Aposentados e Pensionistas – Instituto MOSAP, made up of the Associação dos Auditores do Distrito Federal – AAFIT; Associação de Docentes Aposentados e Pensionistas de Docentes da Universidade Federal do Ceará – ADAUFC; Associação Nacional dos Delegados de Polícia Federal – ADPF; Associação dos Fiscais de Tributos Estaduais – AFISVEC; Associação de Docentes da Universidade Federal do Rio Grande do Sul – ADUFRGS; Associação dos Funcionários do Instituto de Pesquisas Econômicas Aplicadas – AFIPEA; Associação dos Juizes do Rio Grande do Sul – AJURIS; Associação Nacional dos Servidores da Previdência Social – ANASPS; Associação Nacional dos Auditores Fiscais da Previdência Social – ANFIP; Associação Nacional dos Procuradores Federais – ANPAF; Associação dos Aposentados da Fundação Universitária de Brasília – APOSFUB; Associação Nacional dos Procuradores da Previdência Social – ANPPREV; Associação Nacional dos Servidores Aposentados e Pensionistas do

Tribunal de Contas da União – ASAP-TCU; Associação Nacional dos Fiscais Federais Agropecuários – ANFFA/ASFAGRO; Associação do Fisco de Alagoas – ASFAL; Associação dos Oficiais de Justiça do Estado de São Paulo – AOJESP; Associação dos Procuradores Federais do Estado do Rio de Janeiro – APAFERJ; Associação Paulista dos Fiscais de Contribuição Previdenciária Social – APAFISP; Associação dos Servidores Federais em Transportes – ASDNER; Associação dos Serventuários de Justiça dos Cartórios Oficializados do Estado de São Paulo – ASJCOESP; Associação dos Servidores Públicos do Paraná – ASPP; Associação dos Servidores Inativos e Pensionistas do Senado Federal – ASSISEFE; Federação Nacional das Associações dos Aposentados e Pensionistas das Instituições Federais de Ensino – FENAFE/ASPI-UFF; Federação Nacional dos Auditores Fiscais da Previdência Social – FENAFISP; Federação Brasileira de Associações de Fiscais de Tributos Estaduais – FEBRAFITE; Sindicato Nacional dos Auditores Fiscais do Trabalho – SINAIT; Sindicato dos Servidores do Poder Legislativo Federal e do Tribunal de Contas da União – SINDLEGIS; Sindicato Nacional dos Técnicos da Receita Federal – SINDIRECEITA; Sindicato dos Servidores do Departamento de Polícia Federal – SSDPF/RJ; União Nacional dos Analistas e Técnicos de Finanças e Controle – UNACON; and the União do Policial Rodoviário do Brasil – UPRB (hereinafter “the petitioners”).[FN2] The petitioners are associations and unions that represent retired and pensioned civil servants and they have filed the petition on behalf of their members, who are the alleged victims.

[FN2] Subsequently, on September 15, 2005, the following were also accredited as co-petitioners: the Associação dos Policiais Civis Aposentados e Pensionistas do Distrito Federal – APCAP/DF; Associação dos Professores Aposentados do Magistério Público do Estado de São Paulo – APAMPESP; Associação dos Procuradores Federais do Estado no Rio de Janeiro – APAFERJ; Associação dos Fiscais de Rendas do Estado do Estado do Rio de Janeiro – AFRERJ; Associação dos Funcionários Públicos do Estado de São Paulo – AFPESP; Associação dos Funcionários Aposentados e Pensionistas do Banco Nossa Caixa – AFACEESP; Associação dos Aposentados da CEPLAC – AACEP; Sindicato dos Servidores das Justiças Federais no Estado do Rio de Janeiro – SISEJUFE/RJ; Associação dos Servidores da Justiça do Rio Grande do Sul – ASJ; Associação Nacional dos Aposentados e Pensionistas do Serviço Público Federal – APSEF; Federação Nacional do Fisco Estadual – FENAFISCO; Associação Nacional dos Peritos Criminais Federais – APCF; Sindicato dos Trabalhadores do Poder Judiciário Federal no Estado de Minas Gerais – SITRAEMG; Associação dos Auditores Fiscais do Trabalho no Estado do Rio de Janeiro – AFAITERJ; and the Associação dos Servidores Aposentados e Pensionistas da Câmara dos Deputados – ASA-CD. On March 4, 2006, the following were also accredited as co-petitioners: the Sindicato dos Servidores do Poder Legislativo e do Tribunal de Contas do Distrito Federal and the Sindicato dos Servidores da Justiça Eleitoral no Ceará. On September 5, 2007, Ana Almeida dos Santos, Antônio Lopes da Silva, Celeida Maria Oliveira, Maria Inácio Nascimento and Oswaldina Lima Danbisky were also accredited as co-petitioners. On June 17, 2008, the following were also accredited as co-petitioners: the Associação dos Aposentados Fazendários Estaduais do Ceará – AAFEC; Associação dos Delegados de Polícia do Estado de Santa Catarina – ADPESC; Sindicato Nacional dos Docentes das Instituições de Ensino Superior – ANDES; Associação Nacional dos Procuradores da República – ANPR; Associação dos Aposentados da Comissão Nacional de Energia Nuclear – APOSEN; Sindicato dos Auditores de Finanças Públicas do Estado do Rio Grande do Sul – SINDAF; Sindicato dos Servidores

Públicos da Justiça do Trabalho da 15ª Região – SINDIQUINZE; Sindicato dos Servidores da Sétima Região da Justiça do Trabalho – SINDISSÉTIMA; Sindicato dos Trabalhadores do Poder Judiciário Federal dos Estados do Pará e Amapá – SINDJUF-PA/AP; and the Sindicato dos Policiais Federais no Estado de São Paulo – SINPRF-SP. On October 20, 2008, the Sindicato dos Servidores do Poder Legislativo e do Tribunal de Contas do Distrito Federal – SINDICAL and the Associação dos Servidores Inativos Técnico Administrativos da Universidade de Santa Maria – ASITA were also accredited as co-petitioners. Finally, on August 10, 2009, the Associação dos Aposentados e Pensionistas da Universidade Federal de Sergipe – ASAPUFS and the Associação dos Aposentados e Pensionistas da Universidade Federal do Espírito Santo – ASAUFEFES were also accredited as co-petitioners. In their most recent communications, the petitioners have been represented by the organization Fórum Brasileiro de Direitos Humanos.

3. The petitioners argue that the State has violated the fundamental rights of the alleged victims by promulgating Constitutional Amendment No. 41/03, due to the collection of the social security contribution from the retired public employees and pensioners, who prior to that amendment were exempt from the payment of that tax. Accordingly, they argue that the Brazilian State has violated the right to private property, political rights, the progressive development of economic and social rights, and judicial guarantees and protection, provided for, respectively by Articles 21, 23, 26, 8, and 25 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”).

4. The State, for its part, filed a timely objection of failure to state facts that tend to establish a violation, pursuant to Article 47.b of the American Convention. In this respect, the State notes that the mere fact that the judicial decision issued by the Federal Supreme Court (Supremo Tribunal Federal), has been contrary to the petitioners’ interests does not automatically mean that there has been a violation of the right to judicial protection. To the contrary, according to the State, that judgment was issued in keeping with the principles of defense and equality of arms, through a decision that was properly reasoned in detail, within a reasonable time. In addition, the State argues that Constitutional Amendment No. 41/03 was motivated by the social security deficit and the increase in life expectancy for Brazilian citizens, as well as the need to maintain the financial balance of the State and to ensure the right of all citizens to receive a pension, therefore, it was a just and reasonable measure proportional to the suitable end indicated supra.

5. In this report, the Inter-American Commission analyzes the available information and the parties’ positions in light of the provisions of the American Convention and concludes that the petition does not state facts that tend to establish a violation of the rights guaranteed by the American Convention. Therefore, pursuant to Article 47.b of the American Convention, the IACHR decides that this petition is inadmissible. The Inter-American Commission also decides to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States (OAS).

II. PROCESSING BY THE COMMISSION

6. The complaint was received on June 3, 2005. On November 15, 2006, the Inter-American Commission informed the petitioners and the State that this petition had been joined to petitions

P-989-04 (Sindicato dos Médicos do Distrito Federal), P-1133-04 (Sindicato Nacional dos Auditores Fiscais da Receita Federal), and P-115-05 (Waldomiro Augusto de Almeida et al.), in keeping with Article 29.1.d of the Inter-American Commission's Rules of Procedure considering that they address similar facts. In addition, the IACHR asked the petitioners whether they had designated a common representative before the Inter-American Commission. On that date, the IACHR transmitted the pertinent parts of the joined petitions to the State and set a term of two months for it to submit observations. On February 22 and 23, 2007, the State submitted its response with respect to the joined petitions.

7. In addition, the IACHR received communications from the petitioners with respect to the joinder of the petitions and the impossibility of designating a common representative on December 28, 2006 and February 10, 2007.

8. On September 10, 2008, the IACHR informed the petitioners and the State that it decided to divide petitions P-644-05, P-989-04, and P-1133-04[FN3], as provided for in Article 29.1.c of the Commission's Rules of Procedure, to facilitate the processing of the matters for the parties. Accordingly, this report corresponds only to petition P-644-05.

[FN3] Based on the desire expressed by the petitioners, petition P-115-05 continued to be joined to petition P-1133-04.

9. On August 28, 2008, the petitioners requested a working meeting during the 133rd Regular Period of Sessions of the IACHR. On September 17, 2008, the IACHR notified the petitioners that it was not possible to grant them the working meeting requested.

10. The IACHR received additional information from the petitioners on the following dates: September 15, 2005, August 24, 2006, October 20, 2006, February 10, 2007, July 11, 2007, August 16, 2007, September 5, 2007, December 27, 2007, March 3, 2008, July 15, 2008, September 10, 2008, October 24, 2008, March 23, 2009, August 10, 2009, and November 10, 2009. Those communications were duly forwarded to the State.

11. The IACHR received additional observations from the State on the following dates: June 4, 2007, June 11, 2007, July 12, 2007, April 18, 2008, July 2, 2008, June 17, 2009, and July 16, 2009. Those communications were duly forwarded to the petitioners.

III. THE PARTIES' POSITIONS

A. The petitioners

12. The petitioners allege that the State violated the Brazilian Constitution and human rights conventions and treaties by promulgating Constitutional Amendment No. 41/03, by virtue of the collection of the social security contribution from retired public employees and pensioners, who prior to that amendment were exempt from the payment of that tax. Accordingly, the petitioners argue that the State violated "res judicata, the perfect legal act, the acquired right, and juridical

security,” as well as the following human rights of the alleged victims: the right to private property, the progressive development of social rights, the right to judicial guarantees, and the right to judicial protection, provided for, respectively, at Articles 21, 26, 8, and 25 of the American Convention.

13. According to the petitioners, in addition, that contribution is confiscatory in nature, as it imposes excessive taxes on the alleged victims. The petitioners emphasize that the collection of the contribution to social security from the retirees and pensioners is unjust and does not answer to the correct definition of solidarity, insofar as it seeks to correct institutional vices of the Brazilian social security system to the detriment of a specific group of society: retired public employees and pensioners. In this respect, the petitioners add that said justification for Constitutional Amendment No. 41/03 is false, first because the amount obtained after the contribution of the retirees and pensioners is laughable, and second due to the fact that there is no deficit in the social security system, but a surplus.

14. As regards Constitutional Amendment No. 41/03, the petitioners note that a direct action was filed to challenge its constitutionality (hereinafter “ADI 3105-2003”) before the Federal Supreme Court on December 31, 2003[FN4] for it to examine whether that amendment was in violation of the Brazilian Constitution. According to the petitioners, on February 18, 2005, the Federal Supreme Court issued a judgment contrary to the claims of the alleged victims, and reaffirmed the constitutionality of Constitutional Amendment No. 41/03. Therefore, the petitioners allege they have exhausted domestic remedies.

[FN4] ADI 315-2003 was filed by the Associação Nacional dos Membros do Ministério Público – CONAMP (petitioners in P-115-05).

15. In addition, with respect to the decision of the Federal Supreme Court, the petitioners indicate that the judgment was politically motivated, considering the pressure brought to bear by the Executive branch, therefore, they allege that the highest court in the country did not act impartially or independently on analyzing said motion alleging unconstitutionality.

16. Accordingly, the petitioners argue that Article 8.1 of the American Convention was violated by the lack of impartiality of the Federal Supreme Court in its decision with respect to the action alleging unconstitutionality lodged for the purpose of calling into question the constitutionality of Constitutional Amendment No. 41/03. Moreover, they allege that the right to private property of the alleged victims was violated in view of the deprivation of their property without payment of fair compensation, pursuant to Article 21 of the Convention. In effect, the petitioners note that the collection of the social security contribution represents a taking from the alleged victims of a substantial amount from their pensions.

17. In addition, the petitioners reason that Article 25 of the American Convention has been violated in the instant case due to the decision made by the Federal Supreme Court in ADI 3105-2003. Finally, they observe that the State has also violated Article 26 of the American

Convention by virtue of the delay that the collection of that tax has represented in the amount of the pensions that the alleged victims receive.

18. Finally, in their communication of August 10, 2009, the petitioners add arguments with respect to the alleged violation of Article 23 (political rights) of the American Convention, in relation to Article 8.1 (judicial guarantees) of the same instrument. In that respect, the petitioners argue that Article 23 must be understood in its material meaning, as the duty of Executive and Legislative authorities to act in keeping with the will of their constituents or voters and in the public interest. In addition, according to the petitioners, the actions of the Executive and Legislative branches must respect the principles of independence and impartiality in keeping with Article 8.1, which did not happen in the approval of Constitutional Amendment No. 41/03, considering that it allegedly occurred in the context of the corruption scheme widely known in Brazil as the “mensalão”; and, therefore, in violation of due legislative process.

19. In view of the foregoing, the petitioners argue that the admissibility requirements set out at Articles 46 and 47 of the American Convention have been met, and they ask that the Inter-American Commission find this petition admissible.

B. The State

20. The State alleges that the petitioners, not satisfied with the decision adopted by the Federal Supreme Court in case ADI 3105-2003, have submitted this petition to the IACHR in effect seeking a review of the judgment handed down domestically. In addition, the State notes that the mere fact that the judicial decision referred to supra was contrary to the interests of the petitioners does not automatically mean that there has been a violation of the right to judicial protection. To the contrary, according to the State, that judgment was handed down in keeping with the principles of defense and equality of arms, through a decision that was properly explained in detail, within a reasonable time.

21. The State observes that the Inter-American Commission cannot review judgments handed down by the domestic courts when they act within their jurisdiction in keeping with pre-established laws. According to the State, the petitioners ask the IACHR to examine mere allegations of errors of fact and of law. In addition, the State argues that it has acted in keeping with has been established by the highest judicial authority in the country.

22. The State alleges that the exemption from payment of a tax or a fee that the majority of the population pays does not constitute an individual right in the meaning of the American Convention. In addition, the State notes that the allegation as to the existence of an acquired right cannot stand (acquired right to exemption from paying the social security tax) considering that the regime in force prior to Constitutional Amendment No. 41/03 was based on factual circumstances that no longer exist in Brazil. In that regard, the State argues that it was precisely the social security deficit and the increased life expectancy of Brazilian citizens, as well as the need to maintain financial balance in the State, that led to the promulgation of that amendment to the Constitution of Brazil.

23. The State notes that the social security contribution is a tax based on the solidarity of all in order to finance the right of all citizens to receive a pension. In effect, the social security tax – before the subject of an exemption – for retired public employees, according to the State, does not tend to establish a violation of fundamental rights, due to the fact that it is in the nature of a social tax, based on solidarity and on the right of all citizens to receive a pension after their retirement.

24. Along the same lines, the State observes that the Universal Declaration of Human Rights establishes: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others....” (Article 29.2). Accordingly, the State observes that in the decisions adopted with respect to social rights and the right to property, the public interest prevails in relation to the individual interest.

25. In addition, the State emphasizes that retirees and pensioners who receive a pension whose amount is less than R\$ 1,440,00 (one thousand four hundred forty reais) continue to be exempt from that tax; therefore, the constitutional amendment in question has taken into account the most vulnerable retirees and pensioners.

26. Based on all the foregoing, the State argues that the facts described by the petitioners do not tend to establish violations of rights guaranteed in the American Convention. Therefore, the State asks the IACHR to find this petition inadmissible, pursuant to Article 47(b) of the American Convention. In this regard, the State notes that the tax from retired public employees and pensioners is necessary to protect and ensure the right of all citizens to social security.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

27. The petitioners are persons and groups of persons (gathered together in legally-recognized associations and unions), therefore they have standing to lodge complaints with the Inter-American Commission pursuant to Article 44 of the American Convention. The petition establishes as alleged victims certain individuals, all of them retired public employees and pensioners, with respect to whom the State undertook to respect and ensure the rights enshrined in the American Convention. The State ratified the American Convention on September 25, 1992. Therefore, the Inter-American Commission is competent *ratione personae* to examine the petition.

28. The IACHR is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of human rights protected in the American Convention that within the jurisdiction of the Brazilian State, which is a State Party to that treaty.

29. In addition, the Inter-American Commission is competent *ratione temporis* as violations are alleged of rights protected in the American Convention, which was already in force for the State as of the date of the facts alleged when Constitutional Amendment No. 41/03 was promulgated on December 19, 2003. Finally, the Inter-American Commission is also competent

ratione materiae, as the petitioners allege possible violations of rights protected by the American Convention.

B. Other admissibility requirements

1. Exhaustion of domestic remedies

30. Pursuant to Article 46.1 of the American Convention, for the purposes of a petition being admitted by the Inter-American Commission, one must have exhausted domestic remedies, in keeping with generally recognized principles of international law.

31. The Inter-American Commission notes that it is not controverted that the decision of the Federal Supreme Court with respect to ADI 3105-2003, of February 18, 2005, exhausted the domestic remedies available in Brazil. In addition, the Inter-American Commission understands, according to the information submitted by both parties, that the remedy in question is the suitable one given the circumstances of the alleged facts.

32. In that way, the Inter-American Commission considers that the requirement of prior exhaustion has been met in the instant case, considering that a final judicial decision was already handed down on the facts of this petition, in keeping with the requirement set out at Article 46.1.a of the Convention.

2. Deadline for lodging a petition

33. Article 46.1.b of the American Convention requires that the petition be "lodged within a period of six months from the date on which the party alleging violation of the rights was notified of the final judgment." In the instant case, the Inter-American Commission stated its position *supra*, i.e. that domestic remedies were exhausted by the decision of the Federal Supreme Court of February 8, 2005. The petition was submitted on May 3, 2005, within six months, therefore the requirement set out at Article 46.1.b of the American Convention has been met.

3. Duplication of procedures and *res judicata*

34. It does not appear from the record that the subject matter of the petition is pending before any other international procedure, or that it reproduces a petition already examined by this or any other international organization. Accordingly, the requirements established at Articles 46.1c and 47.d of the Convention should be considered to have been met.

4. Characterization of the facts alleged

35. The Inter-American Commission must determine whether the facts described in the petition tend to establish violations of the rights enshrined in the American Convention, pursuant to the requirements of Article 47.b, or whether the petition, pursuant to Article 47.c, must be rejected as "manifestly groundless" or "obviously out of order." At this stage of the procedure, the IACHR must conduct a *prima facie* evaluation, not for the purpose of establishing alleged

violations of the American Convention, but for examining whether the petition alleges facts that potentially could constitute violations of rights guaranteed in the American Convention. This examination does not entail any prejudgment on the merits.

36. In this respect, the Inter-American Commission observes that this petition alleges that Constitutional Amendment No. 41/03, of December 19, 2003, violates the American Convention, and argues that the decision of the Federal Supreme Court on the constitutionality (specifically of Article 4, first part) of that amendment also violates the American Convention. Therefore, the IACHR will first examine the contents of said Constitutional Amendment No. 41/03 and the changes produced by it in the Brazilian Constitution.

37. Article 4 of Constitutional Amendment No. 41/03 reads as follows:

The retired public employees and pensioners of the federal government, the states, the Federal District, and the municipalities, including their institutions and foundations, who are receiving benefits as of the date of publication of this amendment, as well as those included in what is provided for in Article 3 herein, will contribute covering the cost of the [social security] regime with a percentage equal to that established for the incumbent public employees serving in existing posts.[FN5]

[FN5] Translated from the Portuguese-language original:

Os servidores inativos e os pensionistas da União, dos Estados, do Distrito Federal e dos Municípios, incluídas suas autarquias e fundações, em gozo de benefícios na data de publicação desta Emenda, bem como os alcançados pelo disposto no seu art. 3º, contribuirão para o custeio do regime de que trata o art. 40 da Constituição Federal com o percentual igual ao estabelecido para os servidores titulares de cargos efetivos.

38. Upon Constitutional Amendment No. 41/03, therefore, Article 40 of the Constitution of Brazil establishes:

The incumbent public employees in existing posts of the federal government, the states, the Federal District, and the municipalities, including their institutions and foundations, are assured the contributory and solidarity-based social security regime, by contribution of the respective public entity, the incumbent and retired public servants, and the pensioners, observing the criteria that preserve financial and actuarial equilibrium and what is provided for in this article.[FN6]

[FN6] Translated from the Portuguese-language original: “Aos servidores titulares de cargos efetivos da União, dos Estados, do Distrito Federal e dos Municípios, incluídas suas autarquias e fundações, é assegurado regime de previdência de caráter contributivo e solidário, mediante contribuição do respectivo ente público, dos servidores ativos e inativos e dos pensionistas, observados os critérios que preservem o equilíbrio financeiro e atuarial e o disposto neste artigo.” Prior to Constitutional Amendment No. 41/03, that article established: “Incumbent public employees in existing hold positions in the federal government, state governments,

Federal District, and municipalities, including their institutions and foundations, are assured the contribution-based social security regime, observing the criteria that preserve the financial and actuarial equilibrium and provided for in this article.”

39. Therefore, based on that constitutional amendment, retired public employees and pensioners, who previously were exempt from the payment of the tax called contribuição previdenciária, came to have an obligation to pay it, like all other active public employees.

40. In that regard, the vote of the justice initially writing for the court in ADI 3105-2003 -- Justice Ellen Gracie[FN7]-- indicated that what was done by way of that constitutional amendment “was to extend the social security tax to a group of persons in respect of whom [that tax] was not hitherto levied.”[FN8] In addition, she indicated that no violation can be gleaned in terms of social security guarantees, as the amendment “ensures for the current retirees and pensioners the maintenance of the retirement benefit and pensions in the conditions in which they were granted, providing for review in the same proportion and on the same date when the salaries of active public employees are increased.”[FN9]

[FN7] Despite these considerations, Justice Ellen Gracie voted along with Justices Carlos Britto, Marco Aurélio, and Celso de Mello, to find Constitutional Amendment No. 41/03 unconstitutional. The majority of the 11 justices, i.e. the other seven, voted to uphold the constitutionality of the amendment in relation to the facts of this petition (i.e. the first part of Article 4). Accordingly, Justice Cezar Peluso wrote the final decision of the majority of the collegial body (Acórdão).

[FN8] See Vote of Justice Ellen Gracie, in the decision of the Federal Supreme Court in ADI 3105-2003/DF, p. 144.

[FN9] See Vote of Justice Ellen Gracie, in the Federal Supreme Court decision in ADI 3105-2003/DF, p. 142.

41. Similarly, the justice who wrote the decision of the majority (Acórdão) --Cezar Peluso-- determined:

That being a pensioner or retiree represents a consolidated individual juridical situation which, regulated by legal rules in force on the date said situation attains, cannot be affected, in the substantive core of that personal status, by supervening law, which cannot prejudice the corresponding acquired rights, is obvious and unquestionable.[FN10]

[FN10] See Vote of Justice Cezar Peluso, in the Federal Supreme Court decision in ADI 3105-2003/DF, p. 203.

42. Nonetheless, Justice Cezar Peluso clarified, in relation to Constitutional Amendment No. 41/2003, that there is no “subjective right which, acquired at the moment of the retirement of a

public employee, exempts him or her from the constitutional obligation to pay the social contribution on retirement income.”[FN11]

[FN11] See Vote of Justice Cezar Peluso, in the Federal Supreme Court decision in ADI 3105-2003/DF, p. 203.

43. The IACHR observes that prior to Constitutional Amendment No. 41/2003, Article 195 of the Constitution of Brazil already recognized the principle of solidarity in terms of social security: “the cost of social security will be covered by the whole society, directly and indirectly, in keeping with the law...”[FN12] In addition, Justice Joaquim Barbosa emphasized that “the principle of solidarity, ... when confronted with the supposed acquired right not to pay the social security tax, must necessarily prevail.”[FN13] He added that “Amendment 41/2003 did not suppress rights nor abolish principles that may be considered integral to an intangible essential core.”[FN14]

[FN12] Translation from the Portuguese-language original: “A seguridade social será financiada por toda a sociedade, de forma direta e indireta, nos termos da lei...” (Emphasis added.)

[FN13] See Vote of Justice Joaquim Barbosa, in the Federal Supreme Court decision in ADI 3105-2003/DF, p. 169.

[FN14] See Vote of Justice Joaquim Barbosa, in the Federal Supreme Court decision in ADI 3105-2003/DF, p. 169.

44. In effect, the content of the decision by the Federal Supreme Court in ADI 3105-2003 indicated that the salaries received by retirees are not immune from taxes, especially taxes that are paid by the whole society. In that regard, the summary (Ementa) of the decision by the Federal Supreme Court in ADI 3105-2003 indicates:

Non-existence of a norm for absolute tax immunity.... In the legal order in force, there is no express or systematic norm that attributes to the individual juridical condition of retired public employee the effect of generating for such persons an individual right such as the receipt of the respective salaries and pensions being excluded ad aeternum from the impact of the tax law which, prior or subsequent, subjects them to the levying of the social security tax.[FN15]

[FN15] See Decision of the Federal Supreme Court in ADI 3105-2003/DF, p. 123.

45. Accordingly, Justice Cezar Peluso affirmed in clear-cut terms that “one thing is the pension per se, as a source and set of intangible individual rights; another thing is the imposition of taxes on amounts received as retirement pay.”[FN16]

[FN16] See Vote of Justice Cezar Peluso, in the Federal Supreme Court decision in ADI 3105-2003/DF, p. 208.

46. As regards the alleged violation of Article 21 of the American Convention, the IACHR observes that in a case similar to the instant case, with respect to Article 1 of Protocol 1[FN17] to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court found a case inadmissible since:

While payment of contributions into a social insurance scheme gives rise to a right to derive benefits from the scheme, Article 1 of Protocol No. 1 cannot be interpreted as giving an individual a right to a pension of a particular amount. In this case, the applicant retained all the rights attaching to his ordinary pension, stemming from the contributions he had paid into his pension scheme, so that the loss of his "veteran status" did not result in the essence of his pension rights being impaired.... The means employed therefore had an objective and reasonable justification in Poland's historical experience and they pursued a legitimate aim, namely to regulate the operation of the existing system of exceptional privileges: [inadmissible] manifestly ill-founded.[FN18]

[FN17] That article is similar to Article 21 of the Convention, and reads as follows: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." Article 21 of the American Convention establishes: "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."

[FN18] ECHR. Domalewsky v. Poland (No. 34610/97). Decision of June 15, 1999. Inadmissibility.

47. The IACHR observes that Article 21 of the American Convention expressly provides that: "the law may subordinate such use and enjoyment to the interest of society." Beyond the restriction expressly allowed by the American Convention, the Inter-American Commission observes that Constitutional Amendment No. 41/03 did not have as an aim, according to the appreciation of the Federal Supreme Court of Brazil, to reduce the amount of the salaries and pensions received by the alleged retiree and pensioner victims, but rather was justified by the purpose of ensuring all other current and future retirees and pensioners the right to receive a pension in the context of a contributory and solidarity-based system, in which all the participants, whether incumbent staff, retirees or pensioners, must contribute.[FN19] This contributory nature of the regime was established by Constitutional Amendment No. 20/98, of December 15, 1998; i.e., the persons who retired before that Amendment never paid the tax to finance social security; and those who retired between that date and the promulgation of Constitutional Amendment No. 41/03 would have contributed no more than five years[FN20].

[FN19] See Decision of the Federal Supreme Court in ADI 3105-2003/DF, p. 129, in the following terms: “the contribution [to social security] is inserted in a context of solidarity peculiar to social security, a system in which all the participants, whether incumbent staff, retirees or pensioners, must contribute, there being no motive for excluding some to the detriment of all others.”

[FN20] In that regard, the Commission takes note that, pursuant to the rule of Article 201, § 7(I) and (II) of the Brazilian Constitution, men have the right to retirement after 35 years of paying into Social Security and women have the right to retire after 30 years of paying into Social Security.

48. The Inter-American Commission notes that the decision of the Federal Supreme Court maintained the full salaries of retired public employees and pensioners up to the amount of 2,400 reais. In other words, the tax (contribuição previdenciária) is not levied up to that amount, therefore, persons who receive up to 2,400 reais continue to be exempt from payment of the tax. In addition, those who earn more than 2,400 reais have their contribuição previdenciária calculated at 11% of the amount in excess of 2,400 reais. In that sense, the decision of the Federal Supreme Court apparently respected the concept of “capacity to pay” (“capacidade contributiva”) and took into account the situation of the most vulnerable retirees and pensioners.[FN21] In effect, Constitutional Amendment No. 41/03 was not aimed at affecting the right to property of retired public employees and pensioners, but was promulgated to make it possible for the State to ensure the right to social security for all Brazilian citizens.

[FN21] In that respect, the Commission observes that (see Vote of Minister Cezar Peluso, in the Federal Supreme Court decision in ADI 3105-2003/DF, pp. 243 and 247).

49. In that sense, the elimination of the exemption from payment of that tax does not tend to establish a possible violation of Article 21 of the American Convention. Based on the foregoing, the IACHR finds the petition inadmissible in this respect, in keeping with Article 47.b of the American Convention.

50. With respect to the alleged violation of Article 26 of the American Convention, the Inter-American Commission has previously established that, “the right to a pension, as an integral part of the right to social security, also comes within the scope of Article 26 of the American Convention.”[FN22] Additionally, the IACHR has determined that the obligation derived from article 26 of the American Convention “means a correlative obligation not to back down in the advances achieved in this matter;”[FN23] nevertheless, it “does not exclude the possibility that a State imposes certain restrictions to the exercise of the rights enshrined in that norm.”[FN24]

[FN22] IACHR. Report No. 38/09. Admissibility and Merts. Case 12.670, National Association of Ex Employees of the Peruvian Social Security Institute et al (Peru), March 27, 2009. Para. 130.

[FN23] IACHR. Report No. 38/09. Admissibility and Mertis. Case 12.670, National Association of Ex Employees of the Peruvian Social Security Institute et al (Peru), March 27, 2009. Para. 139.

[FN24] IACHR. Report No. 38/09. Admissibility and Mertis. Case 12.670, National Association of Ex Employees of the Peruvian Social Security Institute et al (Peru), March 27, 2009. Para. 140.

51. In this regard, the IACHR emphasizes that the elimination of the exemption from payment of the contribuição previdenciária was reasonable since it ensured for the current retirees and pensioners the maintenance of the retirement benefit and pensions in the conditions in which they were granted (supra para. 40); it took into account the situation of the most vulnerable retirees and pensioners; and it was aimed at ensuring the right of all to receive a pension, in the framework of the solidarity system. That is to say, it was a constitutional reform designed to strengthen the social security system, and consequently ensure the right of all to social security.[FN25] It does not appear from this petition that Constitutional Amendment No. 41/2003 represented any regression or restriction on the right of the whole population to social security and a pension. As analyzed above, the Inter-American Commission reiterates that the constitutional reform had as its purpose to ensure the right to social security and to a pension for all citizens, including the alleged victims. Therefore, the IACHR declares that this petition is inadmissible in that respect, under Article 47.b of the American Convention.

[FN25] See, in this regard, I/A Court H.R. Case of Acevedo Buendía et al (“Discharged and Retired Employees of the Office of the Comptroller”) v. Peru. Judgment of July 1, 2009. Series C No. 198. Párr. 103; and Case of “Five Pensioners” v. Peru. Judgment of February 28, 2003. Series C, No. 98. Para. 147.

52. With respect to the alleged violations of judicial guarantees and judicial protection (Articles 8 and 25 of the American Convention), the Inter-American Commission recalls that the judgments handed down by national courts acting within the scope of their competence and applying the judicial guarantees due cannot be reviewed, unless it considers the possibility that a violation of the Convention has been committed.[FN26] Accordingly, although the Commission has the duty to see to compliance with the obligations assumed by the state parties to this international instrument, it cannot act as a high court by examining alleged factual or legal errors that national courts may have committed within their jurisdictional capacity. The Commission is not competent to review evidence that has been evaluated by national courts, unless there is unequivocal proof of the violation of the right to a fair trial established in the American Convention.[FN27]

[FN26] See, inter alia, IACHR. Report No. 8/98. Inadmissibility. Case 11,671, Carlos García Saccone (Argentina), March 2, 1998. Para. 53.

[FN27] IACHR. Report No. 92/08. Inadmissibility. Petition 12,305, Julio César Recabarren and María Lidia Callejos (Argentina), October 31, 1998. Para. 44.

53. Now the Inter-American Commission is competent to find a petition admissible and rule on the merits when it refers to the principles of due process. This notwithstanding, the Inter-American Commission observes that in the instant petition, according to the information submitted, the alleged victims had access to the courts and were heard by the Federal Supreme Court, which nonetheless handed down a judgment contrary to their interests. The petitioners have not submitted specific information to uphold their arguments alleging a lack of impartiality or independence of that court.

54. In light of the foregoing considerations, the Inter-American Commission considers that it may not examine the alleged international responsibility of the Brazilian State based on the interpretation that the Federal Supreme Court made of the facts and local law that gave rise to the instant petition. In addition, the petitioners failed to state a concrete foundation for their claims related to Article 23 of the American Convention.

55. In effect, the IACHR observes that the judgment of the Federal Supreme Court was explained in detail and at length, upholding the constitutionality of said constitutional amendment, due to the non-existence of a right to tax immunity and by virtue of the principle of solidarity, in order to ensure the right of the entire population to social security and a pension (social interest). Based on the foregoing, the IACHR finds this petition inadmissible in this respect, in keeping with Article 47.b of the Convention.

56. In consideration of all of the above, the IACHR concludes that the petitioners have not made a prima facie showing in relation to any of the American Convention violations alleged as required by Article 47.b therein.

V. CONCLUSIONS

57. The Inter-American Commission concludes that it is competent to analyze this petition and that the facts presented do not tend to establish possible violations of the American Convention and, accordingly, it finds the petition inadmissible for failure to meet the requirement set out at Article 47.b of the Convention, accordingly it is not necessary to move on to the consideration of the merits. Based on the arguments of fact and law set forth above,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible;
2. To notify the parties of this decision;
3. To publish this decision and include it in its Annual Report to the General Assembly of the OAS.

Done and signed in the city of Washington, D.C., on the 12th day of the month of November 2009. (Signed): Luz Patricia Mejía Guerrero, President; Victor E. Abramovich, First Vice-

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president; Felipe González, Second Vice- president; Sir Clare K. Roberts, Florentín Meléndez, and Paolo Carozza, members of the Commission.