

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 134/09; Petitions 1133-04, 115-05
Session:	Hundred Thirty-Seventh Regular Session (28 October – 13 November 2009)
Title/Style of Cause:	Pensioners of UNAFISCO v. Brazil
Doc. Type:	Decision
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, a Brazilian national, did not participate in the deliberations or the decision related to the present petition, in accordance with Article 17.2.1 of the Commission’s Rules of Procedure.
Dated:	12 November 2009
Citation:	Pensioners of UNAFISCO v. Brazil, Petition 1133-04, Inter-Am. C.H.R., Report No. 134/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
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I. SUMMARY

1. On October 26, 2004 and February 8, 2005, the Inter-American Commission on Human Rights (hereinafter the “Inter-American Commission” or the “IACHR”) received two petitions alleging the international responsibility of the Federative Republic of Brazil (“the State” or “Brazil”) for elimination of the exemption from payment of the Social Security contribution (contribuição previdenciária) applicable to retired and pensioned civil servants, which took effect on December 19, 2003, following promulgation of Constitutional Amendment No. 41/03. The petitioners allege that the State is responsible for violation of the right to property, the right to judicial protection, and the progressive development of economic, social, and cultural rights, to the detriment of certain Brazilian retirees and pensioners.

2. The petitions were filed by the Sindicato Nacional dos Auditores Fiscais da Receita Federal – UNAFISCO [National Union of Federal Revenue Tax Auditors], the Associação Nacional dos Membros do Ministério Público – CONAMP [the National Association of Members of the Office of Public Prosecutor], the Associação do Ministério Público de Pernambuco – AMPPE [Pernambuco Public Prosecutor’s Association], and, by the following individuals: André Felipe Barbosa de Menezes, Felipe Travassos Sarinho de Almeida, Muryllo José Salgado da Silva, Maria Bernadete Gonçalves Aragão, Fernando José de Oliveira Amorim, Maria Denise Travassos Sarinho de Almeida, and Waldomiro Augusto de Almeida (hereinafter “the petitioners”). The petitioners are associations and unions representing retired and pensioned civil servants, and they have lodged the petition on behalf of the members of those entities, in

addition to the seven individual retirees and pensioners, all of whom shall be considered as the alleged victims.

3. The petitioners allege that the State violated the fundamental rights of the alleged victims by promulgating Constitutional Amendment No. 41/03, which provided for collection of the Social Security contribution from retired and pensioned civil servants, who were exempt from payment of that tax prior to said amendment. As a result, they claim that Brazil violated Articles 16, 21, 25, and 26 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), and that it additionally failed to comply with its general obligations established in Articles 1.1 and 2 of that instrument.

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. PROCEDURES OF THE COMMISSION

6. The complaint was received on October 26, 2004. On November 15, 2006, the Commission informed the petitioners and the State that petition P-1133-04 had been joined to petitions P-989-04 (Sindicato dos Médicos do Distrito Federal), P-115-05 (Waldomiro Augusto de Almeida et al), and P 644-05 (MOSAP et al), in accordance with Article 29.1.d of the Commission’s Rules of Procedure, since said petitions addressed similar facts. In addition, the IACHR asked the petitioners whether they had designated a common representative before the Inter-American Commission. On the same date, the IACHR transmitted the pertinent parts of the joined petitions to the State, and granted it a period of two months to submit its observations. On February 22 and 23, 2007, the State submitted its response to the joined petitions.

7. Similarly, the IACHR received communications from the petitioners regarding the joinder of the petitions and the impossibility of designating a common representative on December 11, 2006, February 10, 2007, and February 29, 2008. On June 26, 2008, the

petitioners of petitions P-1133-04 and P-115-05 presented a communication to the Commission designating Antônio Roberto Barbosa as their spokesman for the two referenced petitions.

8. On September 10, 2008, the IACHR informed the petitioners and the State that it had decided to separate petitions P-1133-04[FN2], P-989-04, and P-644-05, pursuant to the provisions of Article 29.1.c of the Commission's Rules of Procedure, to facilitate processing for the parties. Consequently, this report pertains solely to P-1133-04.

[FN2] At the specific request of the petitioners (supra para. 7), petition P-115-05 continued to be joined to petition P-1133-04. Petition P-115-05 was received by the IACHR on February 8, 2005, together with a request for precautionary measures, and was registered as No. MC-29-05. The request for precautionary measures was denied in a decision dated February 17, 2005.

9. Moreover, the IACHR received additional information from the petitioners on the following dates: March 28, 2007; April 25, 2007; and, February 29, 2008. These communications were duly forwarded to the State.

10. The IACHR also received additional observations from the State on the following dates: June 4, 2007; June 11, 2007; July 12, 2007, April 13, 2008; and July 2, 2008. These communications were duly forwarded to the petitioners.

III. POSITION OF THE PARTIES

A. The petitioners

11. The petitioners allege that the State violated the Brazilian Constitution and human rights treaties and conventions by promulgating Constitutional Amendment No. 41/03, providing for the collection of the Social Security contribution from retired and pensioned civil servants, who had been exempt from payment of that tax prior to said amendment. Consequently, the petitioners argue that the State violated "res judicata, the 'perfect legal act,' vested rights, and legal certainty," as well as the right to property and the right of Brazilian retirees and pensioners to a pension without deductions.

12. According to the petitioners, collection of the Social Security contribution from retirees and pensioners is not consistent with the correct definition of solidarity, by virtue of the fact that it is an attempt to correct institutional defects of Brazilian Social Security, such as poor management of public resources and fraud. In this regard, the petitioners add that this justification for Constitutional Amendment No. 41/03 is false, since Social Security is in a surplus, and not a deficit, position.

13. In reference to Constitutional Amendment No. 41/03, the petitioners report that they filed a direct legal action of unconstitutionality (hereinafter "ADI 3105-2003") with the Supreme Federal Tribunal on December 31, 2003,[FN3] to determine whether said amendment violated the Brazilian Constitution. According to the petitioners, on February 18, 2005, said Tribunal

issued a decision denying the claims of the alleged victims, and upholding the constitutionality of Constitutional Amendment No. 41/03. As a result, the petitioners allege that they have exhausted domestic remedies.

[FN3] ADI 315-2003 was filed by the Associação Nacional dos Membros do Ministério Público – CONAMP (the petitioners of P-115-05).

14. Further to the adoption of Constitutional Amendment No. 41/03 and the Supreme Federal Tribunal's decision regarding its constitutionality, the petitioners indicate that both approval of the amendment and the judicial decision were politically motivated, and were the results of political collaboration between the Executive, Legislative, and Judicial Branches.

15. In conclusion, the petitioners maintain that the foregoing has also been highly detrimental to the life project of the alleged victims, and has constituted a violation of the progressive nature of the implementation of economic, social, and cultural rights. Thus, the petitioners allege that Articles 16, 21, 25, and 26 of the American Convention were violated by the State, and that Brazil also failed to comply with its general obligations established in Articles 1.1 and 2 of that instrument. By virtue of the foregoing, the petitioners maintain that the requirements for admissibility stipulated in Articles 46 and 47 of the American Convention have been met, and they request the Commission to declare the present petition admissible.

B. The State

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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

23. Employing the practice of adopting per curiam decisions, according to the decision of the IACHR in Report XX/09 with regard to P 644-05, dated November 12, 2009, the Commission concludes that it is competent to examine the present petition and that the facts presented do not tend to characterize possible violations of the American Convention. Therefore, the IACHR declares the petition inadmissible, due to failure to comply with the requirement stipulated in Article 47.b of this Convention, since the facts alleged do not tend to establish a violation of the Convention. Thus it is not necessary to continue with consideration of the merits of the case. Based on the factual and legal arguments mentioned 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 to include it in its Annual Report to the OAS General Assembly.

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