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REPORT No. 129/19
PETITION 153-10
ADMISSIBILITY REPORT

ROGELIO MONTEMAYOR SEGUY
MEXICO

Approved electronically by the Commission on August 14, 2019.

Cite as: IACHR. Report No. 129/19]. [Admissibility. Rogelio Montemayor Seguy. Mexico. August 14, 2019.

I. INFORMATION ABOUT THE PETITION

Petitioner	Rogelio Montemayor Seguy
Alleged Victim	Rogelio Montemayor Seguy
Respondent State	México ¹
Rights invoked	Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (privacy) and 23 (participate in government) of the American Convention on Human Rights; ² and Articles V (protection of honor, personal reputation, and private and family life), XIV (work and fair remuneration), XVI (social security), XVIII (fair trial), XX (vote and participate in government) and XXVI (due process of law) of the American Declaration on the Rights and Duties of Men ³ and other international instruments. ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition	February 3, 2010
Notification of the petition to the State	April 4, 2016
State's first response	August 7, 2016
Addition observations from the petitioner	June 12, 2017

III. COMPETENCE

<i>Competence ratione personae</i>	Yes
<i>Competence ratione loci</i>	Yes
<i>Competence ratione temporis</i>	Yes
<i>Competence ratione materiae</i>	Yes, American Convention (deposit of instrument of ratification on March 24, 1981)

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	Articles 5 (humane treatment), 8 (fair trial), 11 (privacy), 23 (participate in government), 25 (judicial protection) and 26 (economic, social and cultural rights) of the American Convention, in relation to articles 1.1. (obligation to respect rights) and 2 (domestic legal effects).
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, August 25, 2009
Timeliness of the petition	Yes, February 3, 2010

V. SUMMARY OF ALLEGED FACTS

1. Rogelio Montemayor Seguy (hereinafter "the petitioner" or "the alleged victim") affirms that he was the Director-General of Petróleos Mexicanos (PEMEX) on the dates in which Vicente Fox Quesada was campaigning for the country's presidency. He alleges that he was publicly threatened on multiple times during the election campaign by Fox Quesada, for example by warning the petitioner that he "should be careful not to put his hand in the jar, as the first thing we are going to do is to conduct an audit to ensure that

¹ In accordance with article 17.2.a of the Commission's Rules of Procedure, Commissioner Joel Hernández García, a Mexican national, did not take part in the discussion or decision of the instant petition.

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

³ Hereinafter, the "American Declaration" or the "Declaration".

⁴ Articles 3, 6 and 7 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); Universal Declaration of Human Rights, and International Covenant on Civil and Political Rights.

⁵ Observations from each party were duly notified to the opposing party.

resources from PEMEX and Mexicans have not been used as petty cash for Labastida's campaign". He adds that such threats continued after Fox Quesada was elected, citing as an example that the Secretary of Comptrolling and Administrative Development spoke about the petitioner announcing, at the beginning of 2002, that "... we have meat in the pan and we are going to fry good sized fish...". He argues that since that date he was the victim of persecution by the State institutions in order to establish a precedent and punish whom they considered a political adversary.

2. He points out that he was subjected to three distinct criminal prosecutions, all of them related to administrative collective bargaining agreements that, during his term as Director-General, were agreed to between PEMEX and the Mexican Republic Oil Workers Union, which were legally concluded and paid. On April 12, 2002, a criminal prosecution was initiated against him for the crime of embezzlement that resulted in an arrest order against him, which was ultimately revoked on October 10, 2006 by the Fourth Criminal District Court of the Federal District, which considered in an amparo trial -action for protection of constitutional rights- that the information gathered in the previous inquiry was insufficient to prove that the petitioner had diverted funds from PEMEX to benefit a third party that did not have a labor relationship with the company.⁶ He was also prosecuted for the crime of undue exercise of attributions and faculties, with the criminal court in charge concluding on September 11, 2004, that the presence of the elements of the crime had not been established.⁷ Similarly, he was prosecuted for an electoral crime and his capture was ordered on October 4, 2002. He filed an amparo that resulted in the court concluding that the petitioner's constitutional rights had been violated as there was no evidence "to establish that the participation of the petitioner in the conclusion of the agreement in question constituted a scheme to divert public funds to the Institutional Revolutionary Party (PRI)".

3. The petition points out that, on the basis of the same facts, he was subjected to a responsibility administrative procedure by the General Direction of Responsibilities and Asset Situation of the Secretariat of the Public Function (former SECODAM) which was started on 2002 and resulted in this organ issuing a resolution on April 27, 2005, sanctioning him with: 20 years disqualification from employment, office or commission in the public service, as well as a pecuniary sanction.⁸ Against this resolution, the petitioner filed a motion for annulment⁹ on July 1, 2005 before the Federal Tribunal of Fiscal and Administrative Justice¹⁰ who confirmed the validity of the sanctions on November 17, 2007. Then, on February 21, 2008, the petitioner promoted a direct amparo action against the resolution resulting in a decision on January 12, 2009 in which the Third Collegiate Court on Administrative Matters of the First Circuit reviewed the legality and constitutionality of the impugned resolution and granted the amparo with respect to the pecuniary sanction¹¹ but denied it with respect to the disqualification.¹² In disagreement with this decision, the petitioner filed an appeal for review before the Supreme Court of Justice arguing that the Secretariat lacked constitutional jurisdiction and that it did not comply with the constitutional standards of an impartial and independent tribunal.¹³ On May 20, 2009, the Supreme Court upheld the judgment appealed,

⁶ Consequently, the competent criminal court rescinded the arrest order and issued a release order in favor of the petitioner on November 16, 2006.

⁷ This decision was later confirmed on appeal by the Fourth Unitary Criminal Tribunal on December 14, 2004.

⁸ The Secretary based the imposition of the sanctions on the Federal Law on Responsibilities of Public Servants.

⁹ The petitioner alleged that the Secretary of the Public Function lacked constitutional competence to initiate disciplinary procedures and impose sanctions on a former PEMEX Director-General.

¹⁰ The petitioner highlights that this tribunal does not belong to the Judicial Power and its under the Executive Branch for budgetary purposes.

¹¹ The court considered that the impugned resolution did not sufficiently detail the legal bases used for the imposition of the pecuniary sanction.

¹² The Court considered that the petitioner's arguments regarding the Secretariat of the Public Function were groundless given that, in its opinion, there's a separation between the political responsibility and the administrative responsibility of public servants; because of which the fact that the statute of limitations for the initiation of an impeachment process against the petitioner had expired, having transpired more than a year since he had left his office, did not imply that he couldn't be held administratively liable in accordance with article 113 of the Constitution.

¹³ To these effects, he argued that article 64 of the Federal Law on Responsibilities of Public Servants, regulating procedure before the Secretary of the Public Function, was unconstitutional.

so on July 1, 2009, the Federal Court of Fiscal and Administrative Justice issued a new judgment against the petitioner, imposing only the sanction of disqualification.¹⁴

4. The State did not question the facts as described by the petitioner. However, it requested that the petition be declared inadmissible as it considers that the claim of the petitioner is for the Commission to act as an appeals court, in contradiction to its subsidiary nature.

VI. EXHAUSTION OF LOCAL REMEDIES AND TIMELINESS OF THE PETITION

5. The petitioner considers that the domestic remedies were exhausted with the judgment issued by the Federal Court of Fiscal and Administrative Justice on July 1, 2009, which imposed him a sanction disqualifying him from public service for a term of 20 years, and that this is not susceptible to subsequent challenge¹⁵. It also notes that since this judgment was notified on August 25, 2009, his petition was filed in a timely manner¹⁶. The State, for its part, has not made reference to remedies that have not been exhausted by the petitioner that could be suitable for his claims to be addressed at the domestic level, nor argued that the petition has been filed extemporaneously.

6. On account of the information on file, the Commission considers that local remedies were exhausted with the judgment of July 1, 2009, and hence this petition meets the requirements of Article 46.1 (a) of the American Convention. Since this judgment was notified to the petitioner on August 25, 2009 and the present petition was filed on February 3, 2010, the Commission considers that it meets the deadline for presentation established in Article 46.1 (b) of the Convention.

VII. COLORABLE CLAIM

7. The petitioner considers that his right to have access under conditions of equality to public service had been violated as a result of being sanctioned with disqualification from public service for 20 years by a merely administrative authority and despite never having been convicted by a criminal judge. Likewise, that his right to work was violated due to him being barred from public service, the licit and freely chosen activity that corresponded to his vocation and to which he had devoted the totality of his academic and professional life. He also argues that the administrative procedure that resulted in this sanction did not meet due process standards,¹⁷ among other reasons because: 1) the sanctioning authority lacked competence because the Constitution establishes that the determination of liability of whoever had occupied the position of director of PEMEX had to be carried out through impeachment;¹⁸ 2) the prohibition of double-jeopardy was violated as he had been judged and acquitted by a criminal judge over the same facts (highlighting that the crimes for which he had been accused carried with them a disqualification penalty had he been convicted); 3) the sanctioning authority was hierarchically and budgetary subordinated to the Federal Executive and, therefore, lacked independence; 4) the sanctioning authority was not impartial as it acted as “judge” to ascertain liability and impose sanctions on the basis of its own investigation; 5) the Federal Tribunal of Fiscal and Administrative Justice which decided the annulment action filed against the sanction also lacked independence due to being budgetarily subordinated to the Executive Power; 6) the public statements of the President of the Republic and the head of SECODAM denoted their personal interest in the process and their prejudgment and partiality against him.

¹⁴ The petitioner adds that, on December 9, 2009, the Secretary of the Public Function issued a resolution reestablishing, under a different legal argumentation, the previously annulled pecuniary sanction.

¹⁵ The petitioner argues that it would not be appropriate to challenge this new ruling as there are already pronouncements by the Third Collegiate Tribunal on Administrative Matters of the First Circuit and the Supreme Court of Justice of the Nation confirming the legality and constitutionality of the sanction of disqualification.

¹⁶ The petitioner acknowledges that, at the time of filing his petition, local remedies were not exhausted with respect to the pecuniary sanction imposed against him and declares that it is not part of the object of his petition, which is limited to the disqualification sanction.

¹⁷ He also points out that, although these finally resulted in his innocence being corroborated, due process was also violated in the various criminal proceedings that were brought against him.

¹⁸ The petitioner cites article 109 of the Constitution which at the time of the events established that “The sanctions indicated in article 110 would be imposed through an impeachment process to the public servants detailed in the same article, when they incur in the exercise of their functions in actions or omissions w detrimental to the fundamental public interests or the good of their office”; as well as article 110 which established that “Could be subjected to an impeachment process... the General Directors and their equivalents of decentralized bodies, enterprises in which State participation corresponds to the majority, corporations and associations similar to these” and “the sanctions will consist on the destitution of the public servant and his disqualification to perform functions, employment, offices or commissions of any nature on the public sector”.

8. The petitioner adds that the sanction that was imposed on him did not meet the standards of legality and proportionality because: 1) the law on which the sanction was based established that disqualification from 10 to 20 years would be applicable to “serious behaviors of public servants” without any other provision providing parameters for the interpretation of the term “serious”, which therefore granted an unacceptable degree of discretion and arbitrariness to the sanctioning authority; 2) it is cruel and unusual for an administrative authority to apply a 20 years disqualification sanction when applicable criminal law established a maximum of 14 years disqualification as punishment for those committing the acts that he was charged with; 3) unlike criminal law, the law that was applied to him did not provide parameters for individualizing and calibrating the penalty; 4) the application of the maximum 20 years penalty was disproportionate as there was no recidivism nor any other kind of aggravating circumstance justifying it.

9. For its part, the State points out that the petitioner improperly requests that the Commission act as a fourth instance to review decisions of the domestic authorities, on account of his mere disagreement with them. It highlights that the petitioner had the opportunity to file all the judicial remedies that he considered prudent, which were resolved timely through duly reasoned judgments.

10. The Commission has reviewed all factual and legal elements submitted by the parties. The mere fact that administrative and criminal authorities reach different conclusions with regards to a person's liability over the same facts does not, in and on itself, constitute a violation of the American Convention. However, taking into account the precedents of the Inter-American Court¹⁹, as well as its own²⁰, the Commission considers that the alleged application to the petitioner of a sanction of disqualification from public service by an authority that did not possess the nature of a criminal judge requires a study of the merits as the alleged facts, if corroborated, could amount to a violation of article 23(2) of the American Convention. Similarly, the Commission considers that the allegations of the petitioner with regards to the lack of competence, independence and impartiality of the authority that sanctioned him, his prejudgment through public statements from public officials and the failure of the sanction applied to meet the standards of legality and proportionality, are not manifestly unfounded and required to be examined on the merits as the allegations, if corroborated, could be characterized as violations of articles 5 (humane treatment), 8 (fair trial), 11 (privacy), 23 (participate in government) and 25 (judicial protection) of the American Convention in relation to articles 1.1. (obligation to respect rights) and 2 (domestic legal effects). As to the alleged undue restrictions to the petitioner right to choose his profession freely and to follow his vocation, the Commission will examine these arguments on the merits' stage under article 26 (economic, social and cultural rights) of the American Convention.

11. As for the alleged violations to article 7 (personal liberty) of the American Convention, the Commission considers that the file does not allow to ascertain arguments or sufficient grounds to conclude, *prima facie*, its possible violation.

12. With regards to the alleged violations to the American Declaration, the Inter-American Commission has previously established that, once the American Convention enters into force in relation to a State, it is it and not the Declaration that becomes the primary source of applicable law for the Commission, to the extent that the petition refers to the alleged violation of identical rights in both instruments and does not involve a situation of continuous violation. In the instant case, the Commission considers that the alleged violations of the American Declaration do not go beyond the scope of protection of articles 8, 11, 23, 25 and 26 of the American Convention. Therefore, the Commission will examine these allegations in light of the American Convention. With regards to the alleged violations of articles 3, 6 and 7 of the Protocol of San Salvador, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the IACHR lacks competence *ratione materiae* to issue a decision on their violation in the framework of analyzing an individual petition, although it may have recourse to the standards established in these instruments to interpret the rules of the Convention in light of its article 29.²¹

¹⁹ I/A Court H.R., Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 1, 2011. Series C No. 233, para. 107-109.

²⁰ IACHR, Report N° 130/07 (Merits), Case 13.044, Gustavo Francisco Petro Urrego, October 25, 2017, para. 122-123.

²¹ IACHR, Report No. 26/17. Petition 1208-08. Admissibility. William Olaya Moreno and family. Colombia. March 18, 2017, para. 9.

13. With regards to the State's allegations in relation to the fourth instance formula, the Commission recognizes that it lacks competence to review judgments passed by national courts acting within their sphere of competence and applying due process of law and judicial guarantees. Nevertheless, it reiterates that, within its mandate, it is competent to declare admissible a petition and decide on the merits when it refers to domestic processes that may have violated rights recognized by the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to articles 5, 8, 11, 23, 25 and 26 of the American Convention, in accordance with articles 1.1. and 2 of the same instrument;

2. To find the instant petition inadmissible in relation to article 7 of the American Convention.

3. To notify the parties of the decision; to continue with the analysis on the merits and to publish this decision and to 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 14th day of the month of August, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva and Flávia Piovesan, Commissioners.