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**REPORT No. 381/22**  
**PETITION 2954-18**  
REPORT ON INADMISSIBILITY

SEBASTIAN SILVA DÍAZ  
CANADA

Approved electronically by the Commission on December 21, 2022.

**Cite as:** IACHR, Report No. 381/22, Petition 2954-18. Inadmissibility. Sebastian Silva Díaz.  
Canada. December 21, 2022.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Sebastian Silva Díaz
<b>Alleged victim:</b>	Sebastian Silva Díaz
<b>Respondent State:</b>	Canada
<b>Rights invoked:</b>	No specific provisions invoked

**II. PROCEEDINGS BEFORE THE IACHR<sup>1</sup>**

<b>Filing of the petition:</b>	December 27, 2018
<b>Additional information received at the stage of initial review:</b>	March 4, 2022
<b>Notification of the petition to the State:</b>	March 4, 2022
<b>State's first response:</b>	June 1, 2022
<b>Notification of the possible archiving of the petition:</b>	September 20, 2021
<b>Petitioner's response to the notification regarding the possible archiving of the petition:</b>	September 21, 2021

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Declaration on the Rights and Duties of Man <sup>2</sup> (ratification of the OAS Charter on January 8, 1990)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	None
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	No, in terms of Section VI
<b>Timeliness of the petition:</b>	N/A

**V. ALLEGED FACTS**

1. The petitioner, a national of Chile complains that he was subjected to humiliating, racist, and discriminatory treatment by a Border Security Officer (“BSO”) when he arrived at the Vancouver International Airport on June 20, 2018 (on a flight from Mexico City). He was seeking to enter Canada as a tourist but was ultimately refused entry.

2. By way of background, the petitioner states that he travelled to Canada to take a vacation before returning to Mexico to start a master’s degree at the Pedagogical University of Mexico. The petitioner alleges that he was interviewed by a BSO who generally humiliated him in several ways. In this regard, the

<sup>1</sup> The observations submitted by each party were duly transmitted to the opposing party.

<sup>2</sup> Hereinafter “the American Declaration” or “the Declaration.”

petitioner mentions that the BSO: (a) rejected the petitioner's claim that he was intending to return to Mexico to commence a master's degree, insisting that the petitioner intended to remain in Canada; (b) laughed at the petitioner when he attempted to show him some papers (to prove his bona fides); and (c) raised his voice at the petitioner during the interview. The petitioner also alleges that BSO asked him to demonstrate the funds available on of his credit card. The petitioner indicates that the issuing bank was not able to provide the information requested by the BSO. In response to this, the petitioner claims that the BSO claimed, without justification, that the petitioner's mother was experiencing "problems" and that the petitioner wanted to help her. The petitioner alleges that this claim appeared to be based on his South American heritage and was therefore racist and discriminatory.

3. The petitioner claims that after four hours of being questioned, the BSO gave him the option of voluntarily withdrawing his application to enter Canada, or to contest his exclusion before a court. The petitioner states that he opted to voluntarily return to Mexico and signed a document to this effect. He was subsequently handcuffed by immigration authorities and taken to another room, pending his removal from Canada. He also indicates that his shoelaces were taken from him, as well as a hair tie. The petitioner states that he felt that he was humiliated by this action by the immigration authorities.

4. The petitioner states that he was detained for ten hours before he was placed on a flight to Mexico. He indicated that prior to his departure, he was initially taken to an underground room where he was measured and weighed by immigration officers. The petitioner states that he was given blankets and a towel; subsequently, he was taken to another room without his shoes.

5. Generally, the petitioner complains that he was treated like a criminal by the Canadian immigration authorities. On arrival in Mexico, the petition indicates that he made a complaint about this treatment to the Chilean Consul in Mexico. The petitioner met with the Consul, who promised to make inquiries of the Canadian immigration authorities. The petitioner states that the Consul received a response from an official of the Canadian Department of Immigration (CDI) which he shared with the petitioner. The petitioner provides feedback to many of the principal elements of the response from the CDI. According to the petitioner, the CDI correctly stated that he was seeking to visit Canada for forty days to do some backpacking during this time. However, the petitioner states that the CDI was concerned with the fact that his airline ticket showed a departure from Calgary (which is 1000 kilometers from Vancouver). The petitioner states that the CDI considered this to be an inconsistency. The petitioner refutes this, saying there was essentially nothing inconsistent about having a ticket that allowed him to depart from Calgary instead of Vancouver.

6. The petitioner agrees with the CDI that at the time of arrival in Canada, he only had 2000 Mexican pesos, which is approximately US\$ 136. The petitioner states that he was using this cash only to buy water or take a bus, since he could otherwise withdraw money from an ATM. According to the petitioner, the CDI said that the petitioner claimed that he had an ATM card with access to \$3000. However, according to the petitioner, the CDI determined that the card was a credit card and not a debit card. The petitioner states that it was determined that he had very little credit on the card.

7. The petitioner alleges that the CDI falsely claimed that he had stated (during his interview with the BSO on arrival in Vancouver) that he was having difficulties paying his rent in Mexico, and he had not yet enrolled in a university to pursue the master's degree. The petitioner states that prior to leaving for Canada, he had left his rented premises, and was staying with a friend. Regarding the enrollment at a university, the petitioner states that he provided information to the BSO, including dates for the master's degree program, as well as the telephone and name of the person in charge of the master's degree program. However, the petitioner states that this information was dismissed by the BSO, who considered that the petitioner had not provided any corroborating information or documentation.

8. According to the petitioner, the CDI indicated that the BSO had determined that he had no friends or references in Canada; and that after checking various emails on the petitioner's phone, concluded that the petitioner had lied about his intentions, and would probably try to stay in Canada. The petitioner acknowledges that he has no friends in Canada but asserts that he is not aware that this is requirement to enter Canada.

9. The petitioner indicates that apart from making a complaint to the Chilean Consul in Mexico, he took no other steps to redress his grievances.

10. The State of Canada, on its part, provides some background information to ground its position on the petition. In this regard, the State indicates that the entry of foreign nationals into Canada is governed by the Immigration and Refugee Protection Act. Under this law, the State indicates that as Chilean national, the petitioner was entitled to travel to Canada under an electronic travel authorization without first having to obtain a visa. However, the petitioner was required to demonstrate he would leave Canada at the end of any period authorized for his stay. The State acknowledges that the petitioner did indeed arrive from Mexico at Vancouver International Airport on June 20, 2018, when he was examined by a BSO, with a view to determining the purpose of his visit; as well as when he would depart.

11. The State indicates that the petitioner was ultimately not able to satisfy the BSO that he would leave Canada by the end of the period that might be authorized for his stay. The State generally asserts that the petitioner was given numerous opportunities to explain his stated purpose of travel to Canada. The State asserts that the petitioner was unable to provide reasonable answers further to routine questions regarding his purported trip. The State indicates that the petitioner was unable to explain how he would travel between the different points of his stated itinerary<sup>3</sup>, why he booked his return ticket from Calgary, in the province of Alberta, when the conclusion of his trip placed him more than 1,000 kilometers away in Garibaldi, in the province of British Columbia. He was unable, moreover, to explain how he would travel from Garibaldi to Calgary, to catch his return flight to Mexico. The State also indicates that the petitioner had a return ticket for ten days following his arrival yet was seeking to enter Canada for forty days.

12. The State also asserts that the petitioner was further unable to explain how he would cover his expenses for his purported trip and was unable to provide any evidence regarding his financial status, including evidence of past employment or bank records. According to the State, the Petitioner confirmed that he did not have any acquaintance in Canada who could support him during his stay; that he was in possession of only a small number of Mexican pesos and a debit card. The State indicates upon further investigation, it was determined that the petitioner had not been truthful about this. In this regard the State indicates that it found that the petitioner had a credit card, and not a debit card. The State asserts that the petitioner then declared that he did not have any money in his bank account in Mexico.<sup>4</sup>

13. The State also submits that the petitioner was untruthful whether he had applied for a study visa in Mexico (to pursue his master's degree). In this regard, the State alleges that the petitioner initially claimed that airline employees in Mexico had confiscated his study visa, but then later admitted that he had not yet applied for a study visa with the Mexican authorities.

14. The State indicates that following the inadmissibility finding, the petitioner was presented with two options: withdraw his application to enter Canada and return to Mexico or challenge the inadmissibility finding through Canada's domestic processes. With respect to the second option, the BSO explained that the evidence gathered during the examination could ultimately be referred to an immigration judge of the Immigration and Refugee Board of Canada. The State indicates that the immigration judge would assess the evidence and determine if the petitioner is inadmissible. According to the State, the Petitioner elected to withdraw his application and return to Mexico. The State indicates that the petitioner was then placed in detention at the airport because there was a flight departing to Mexico that same evening; and the BSO had reasonable grounds to believe that the petitioner may not appear for his departure.

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<sup>3</sup> The State indicates that the petitioner was in possession of a map of the provinces of British Columbia and Alberta with arrows charting an itinerary for a number of national and provincial parks in both provinces. When asked how he would be travelling between destinations, the petitioner responded that he would be backpacking. The petitioner was given numerous opportunities to provide a reasonable method of travel between destinations in his stated itinerary, but he was unable to do so.

<sup>4</sup> According to the State, the petitioner was asked about the amount of money he was carrying, to which he indicated he had 2,000 Mexican pesos, or approximately \$130 CAD. The State indicates that the petitioner stated that he had an ATM card with access to \$3,000 USD in his bank account. However, the State indicates that upon checking, it turned out that it was not an ATM card, but a credit card; and that there was no evidence that the petitioner had access to \$3,000 USD.

15. The State submits that the petitioner was given the opportunity to challenge the inadmissibility finding by the BSO but declined to do so. Instead, the petitioner opted to withdraw his application to enter Canada and to return to Mexico. In doing so, the State contends that the petitioner chose not to pursue the domestic remedies that were available to him. The State indicates that it was open to the petitioner to challenge the inadmissibility finding before the Immigration and Refugee Board of Canada ("IRB"). The State explains that the IRB is responsible for making decisions on immigration and refugee matters, including the issue of admissibility. The State indicates that admissibility hearings are presided by a member of the Immigration Division of the IRB; foreign nationals appearing for an admissibility hearing can represent themselves during the hearing or be represented by counsel; and foreign nationals who do not understand French or English, Canada's official languages, are provided with interpretation services.

16. According to the State, if the IRB determined that the petitioner was inadmissible, the petitioner would have been entitled to apply to the Federal Court of Canada for judicial review of that decision. The State indicates that the written decision of the IRB would have mentioned this possible recourse for the petitioner.

17. The State submits that it was open to the petitioner to raise his claims of discriminatory treatment before the IRB. The State also asserts that it was open to him to raise these claims during any application for judicial review before the Federal Court of Canada; and more particularly, he could have requested a declaration that this alleged treatment was contrary to the Canadian Charter of Rights and Freedoms<sup>5</sup> ("the Canadian Charter").

18. The State submits that these domestic remedies were effective and available, and that the petitioner failed to pursue or exhaust them pursuant to Article 31 (1) of the Commission's Rules of Procedure. Accordingly, the State had a responsibility to pursue these remedies prior to petitioning an international body. According to the State, the petitioner's failure to pursue or exhaust these remedies renders his petition inadmissible. Apart from these domestic remedies, the State mentions that the Canada Border Services Agency (CBSA) has a complaint mechanism. The State submits that it was open to the petitioner to make a complaint to the CBSA about the treatment that he alleged received while under examination at the Vancouver International Airport. According to the State CBSA aims to contact the complainant within 14 calendar days after receiving a complaint. Further, the State indicates that the CBSA manager or supervisor will contact the complainant by phone to acknowledge and discuss the complaint and obtain additional information to assist in the review of the complaint if needed. The State further submits that if the complaint is not successfully resolved following the initial contact, the CBSA will continue its review of the complaint; and that following the conclusion of the review, a written response is provided to the complainant.

19. The State contends that the petition does not establish a violation of rights and is manifestly groundless or out of order. In this regard, the State submits that while the petitioner may be disappointed that he was denied entry in Canada, this denial does not establish a violation of any right in the American Declaration; nor does it reflect racism or discrimination on the part of Canada. The State emphasizes that the denial of the petitioner's entry to Canada resulted from the petitioner's failure to meet the requirements of Canada's immigration legislation; and more particularly his failure to demonstrate that he would leave Canada at the end of any period authorized for his stay.

20. The State further submits that pursuant to the principle of sovereignty, it is well-established that States are entitled to determine who may enter their territory. In this regard, the State asserts that the Supreme Court of Canada has emphasized that the most central principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada<sup>6</sup>.

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<sup>5</sup> According to the State, the Canadian Charter is a constitutional instrument for the protection of human rights in Canada. The State further indicates that as part of the Canadian Constitution, it prevails over the laws of Parliament and decisions and actions of the government. The State further asserts that the Federal Court is empowered to remedy violations of rights guaranteed by the Canadian Charter.

<sup>6</sup> Citing *Chiarelli v Canada (Minister of Employment & Immigration)*, [1992] 1 SCR 711 at p 733.

21. The State submits that given the petitioner's failure to substantiate allegations that could tend to establish a violation of the American Declaration, the petition should accordingly be declared inadmissible on the basis that it is manifestly groundless or out of order.

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

22. In determining the admissibility of a petition, the Commission is required (in accordance with Article 31 (1) of its Rules of Procedure) to verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law. The Commission observes that the requirement of prior exhaustion of domestic remedies is intended to enable the national authorities learn of the alleged violation of a protected right and, if appropriate, to resolve the situation before it is brought before an international body.

23. The petitioner's complaint arises from being refused entry into Canada as a visitor after allegedly being subjected to treatment that he considered discriminatory. According to the record, the petitioner was refused entry because he was unable to satisfy the BSO that he would leave Canada by the end of the period that might be authorized for his stay. It appears undisputed between the parties, that the petitioner was offered the choice of voluntarily withdrawing his application to enter Canada or contesting the refusal before domestic tribunals. According to the State, the BSO explained to the petitioner that he could contest the refusal and the alleged discriminatory treatment before an immigration judge of the Immigration and Refugee Board of Canada. The State also indicates that the petitioner had other remedies available if the immigration judge issued an unfavorable decision against him, including judicial review before the Federal Court of Canada. The petitioner has not disputed this. Ultimately, according to the record, it appears undisputed that the petitioner chose to voluntarily withdraw his application to enter Canada, and therefore opted not to challenge the refusal before the domestic authorities. The petitioner states that upon return to Mexico, he complained about his treatment to the Chilean Consul to Mexico.

24. Having regard to the foregoing, it appears that: (a) the petitioner did have access to domestic remedies to address his complaint; (b) there is no evidence to suggest that these remedies were ineffective or unavailable. It therefore appears to the Commission that the petitioner failed to pursue or exhaust available domestic remedies; and that accordingly, the petition is inadmissible for failure to meet the requirement of Article 31(1) of the IACHR's Rules of Procedure.

## **VII. DECISION**

1. To find the instant petition inadmissible; and
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 21<sup>st</sup> day of the month of December, 2022. (Signed:) Julissa Mantilla Falcón, President; Margarete May Macaulay, Second Vice President; Roberta Clarke and Carlos Bernal, Commissioners.