

WorldCourts™

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 63/09; Petition 544-03
Session:	Hundred Thirty-Fifth Regular Session (3 – 8 August 2009)
Title/Style of Cause:	Alberto Nestor Vizental v. Brazil
Doc. Type:	Decision
Decided by:	President: Luz Patricia Mejia Guerrero; First Vice President: Victor Abramovich; Second Vice President: Felipe Gonzalez; Commissioner: Paolo Carozza. Pursuant to Article 17.2.a of the Rules of Procedure of the IACHR, Inter-American Commission Member Paulo Sergio Pinheiro, of Brazilian nationality, did not take part in the consideration and adoption of this Report.
Dated:	7 August 2009
Citation:	Nestor Vizental v. Brazil, Petition 544-03, Inter-Am. C.H.R., Report No. 63/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Terms of Use:	Your use of this document constitutes your consent to the Terms and Conditions found at www.worldcourts.com/index/eng/terms.htm

I. SUMMARY

1. On July 23, 2003 the Inter-American Commission on Human Rights (hereinafter “the IACHR” or “the Inter-American Commission”) received a complaint lodged by Alberto Néstor Vizental (“the petitioner” or “the alleged victim”), alleging violation of the rights protected by the American Convention on Human Rights (“the American Convention”) by the Federal Republic of Brazil (“Brazil” or “the State”) regarding an alleged denial of justice to the prejudice of the petitioner by agencies of the Judicial Branch of Brazil in a case of mortgage foreclosure.

2. The petitioner alleges violations of Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention, in relation to the general obligations set forth in Article 1.1 of that instrument.

3. The State argues that the petition does not meet the admissibility requirements of the American Convention, first because the alleged facts took place before September 25, 1992, the date on which Brazil deposited its instrument of ratification of the American Convention, and second because the mortgage foreclosure process reported by the alleged victim is still pending before the domestic judicial bodies.

4. After analyzing the information submitted by both parties, and verifying fulfillment of the admissibility requirements established in Articles 46 and 47 of the American Convention, the Commission declares this petition inadmissible because from the information provided no

elements can be identified that would tend to establish a violation of rights under the American Convention. Therefore, based on Article 47.b of the American Convention, the IACHR determines that the petition is inadmissible and also decides to notify the parties of this report, to publish it, and to include it in its Annual Report.

II. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION

5. The petition was received by the Inter-American Commission on July 23, 2003. On November 4, 2003, March 5 and October 25, 2004, the petitioner submitted additional information.

6. On February 17, 2005 the IACHR transmitted the relevant parts of the petition to the State, and granted Brazil a period of two months to provide information on the matter, as set forth in Article 30.3 of its Rules of Procedure.

7. On March 18, 2005 the State requested the IACHR to remit Portuguese translations of both the petition and its annexes. On March 31, 2005 the State's request was forwarded to the petitioner, along with a 30-day deadline for submission of a Portuguese translation of the material presented to the Inter-American Commission. On May 5, 2005, the translated information was received by the IACHR, and on May 11, 2005 the information in question was transmitted to the State.

8. On July 13, 2005 the State asked the Inter-American Commission for an extension until August 1, 2005 to submit its reply. On August 1, 2005, the State presented its response to the complaint, and on August 5, 2005, such response was transmitted to the petitioner.

9. The petitioner also submitted additional information on July 13, 2005, October 20, 2005, December 28, 2005, September 21, 2006, February 27, 2007, May 7, 2007, December 5, 2007, May 30, 2008, July 29, 2008, August 11, 2008, November 21, 2008, and May 4, 2009. These communications were duly transmitted to the State.

10. Likewise, the State presented additional information on February 22, 2006, March 7, 2006, December 19, 2006, December 29, 2006, January 10, 2008, January 22, 2008, April 7, 2008, March 3, 2009, and July 1, 2009. These communications were duly transmitted to the petitioner.

III. POSITIONS OF THE PARTIES

A. The petitioner

11. The petitioner and alleged victim is an Argentine citizen who reports an alleged systematic denial of justice by Brazilian judicial authorities. The petitioner asserts that, in 1987, he conducted commercial operations consisting of the exportation of bananas from Brazil to Argentina, for which he received letters of credit related to a loan made by a company owned by Mr. Lidney Castro Vallejo, a Brazilian national (the debtor). The collateral offered by the debtor for the loan was a mortgage in favor of the creditor (the petitioner) on real property owned by

Mr. Vallejo's parents in the Santos municipality, São Paulo state. The petitioner allegedly initiated two foreclosure judicial proceedings before the 5th Civil Court of Santos in 1987, under numbers 1915/87 and 2262/87, as a result of the debtor's default on the loan. These proceedings were then joined in a combined file for processing.

12. The petitioner asserts that, during the course of the foreclosure proceedings, both owners of the real estate, that is to say, the parents of Mr. Vallejo, Luciano Castro González and Laura Vallejo de Castro passed away. Therefore, during the probate hearings to settle their estate, the attorneys of the alleged victim appeared to assert his rights, as Mr. Vallejo was the heir beneficiary of the inheritance. Moreover, the petitioner argues that the debtor has attempted several judicial remedies in the course of the foreclosure proceedings, but those were all rejected, and a decision was handed down by the São Paulo Court of Justice with regard to the "liquidity and certainty of the respective extrajudicial letter of credit". From then on, the judicial phase of execution of the mortgage foreclosure was initiated, and the debtor filed once again several incidental motions and judicial remedies.

13. The petitioner states that on August 19, 1992 he submitted a pleading to the Court requesting that a date be set for the auctioning of the foreclosed real property, and pointed out that the liquidation of the debt amounted to seven million, sixty-five thousand, six hundred sixty-three reais, with thirty-seven cents (R\$ 7,065,663.37). After that, he asserts that the judicial files disappeared, which indicates that the State's judicial authorities were directly responsible in vigilando. The petitioner alleges that he went through numerous formalities to try and locate the files, and even a criminal investigation was instituted to no avail. Then, the petitioner observes that the authorities proceeded to reconstruct the file, which took some eight months.

14. Additionally, the petitioner states that he also appears as an interested third party in another mortgage foreclosure lawsuit against the same debtor pursued by Bank "Itaú" before the 4th Civil Court of Santos, under number 2728/87. These proceedings were reportedly also initiated in 1987. According to the petitioner, the judicial file of this lawsuit also disappeared, but no one was held accountable.

15. According to the petitioner, in the context of lawsuit nº 2728/87, the debtor filed once again several incidental motions and judicial remedies, all of which were rejected, and on two occasions, the judge even ordered a monetary appraisal of the property in question. The petitioner observes, in sum, that at the time of presentation of his petition, the judicial proceedings had been ongoing for 15 years without a final decision.

16. Therefore, the petitioner and alleged victim claims that his rights to judicial protection and to a fair trial have been violated, as there has been an unwarranted delay in the context of judicial foreclosure proceedings nº 1915/87 and 2262/87 (before the 5th Civil Court of Santos), and nº 2728/87 (before the 4th Civil Court of Santos). He argues that, notwithstanding the delay-oriented strategy adopted by the debtor, the failures of the Brazilian judicial system have also constituted a decisive factor for such violations. In this sense, the petitioner mentions the occurrence of strikes; the replacement of judges; ambiguous and arbitrary decisions which resulted in new remedies and measures; duplication of investigative measures; prolonged periods

of time without judicial activity; the disappearance of the judicial files, among others, all of which have supposedly contributed to the delay in the foreclosure proceedings.

17. According to the petitioner, the State has acknowledged its own failures, which allegedly can be inferred from the communication of July 2005 from the Office of the Attorney General (Advocacia-Geral da União) to the judicial bodies, in which that authority requested that the related judicial proceedings be processed with utmost priority. Similarly, the petitioner mentions the judgment rendered on August 9, 2005, in the context of lawsuit n° 1915/87, which states that “due to all the extremely serious incidents related to this file, and with a view to compensating the time elapsed, all judicial acts must be performed with the greatest urgency”. Likewise, the petitioner asserts that the State has recognized the failures of its judicial system, upon acknowledging that they were the reason for adoption of Laws N° 11.232/2005 and 11.382/2006, which reformed the Code of Civil Procedure.

18. In subsequent filings regarding the IACHR’s competence *ratione temporis*, the petitioner asserts that the Inter-American Commission does have such competence because the events are matters to be judged as part of a continuum in which the violation is consummated each moment.

19. Regarding the alleged lack of exhaustion of domestic remedies, the petitioner asserts that it is no longer a matter of suitable remedies for the enjoyment of rights; the current state of things has turned the judicial proceedings into an instrument of delay and dispossession, which violates Article 1 of the American Convention. Therefore, the exception set forth in Article 46.2.c of the Convention is applicable, because, according to the petitioner’s communication of August 11, 2008, twenty-one years have elapsed since the foreclosure began, and there is no final judgment.

20. The petitioner stresses that his behavior as a party in the mortgage foreclosure proceedings has been impeccable, while the behavior of the authorities has been negligent at best. He also alleges that the actions of the plaintiff’s attorney have been extremely competent, and that the significance of the litigation to the family finances of the plaintiff is substantial.

21. According to the petitioner, he has endured this denial of justice for more than twenty-one years, which has left him with no judicial protection for his rights, and the proceedings have been converted into a tool constantly wielded against him. Therefore, he requests that the petition be declared admissible.

B. The State

22. The State argues that the petition does not meet the admissibility requirements of the American Convention. First, the State explains that the judicial acts said to have harmed the alleged victim occurred in 1987, before Brazil ratified the American Convention on September 25, 1992. Therefore, the IACHR lacks competence *rationae temporis*, and if it were to declare the petition admissible, it would be violating Article 74 of the Convention.

23. Secondly, the State asserts that domestic remedies have not been exhausted in this matter. According to the State, the petition cannot be declared admissible because to date Brazilian courts are still processing the mortgage foreclosure instituted by the petitioner. As domestic

remedies have not been exhausted, it is not appropriate for the Brazilian State to submit itself to international control mechanisms, since these must only be accessed in subsidiary fashion if the complainant cannot find relief through domestic means.

24. Thirdly, the State also argues that the petition is potentially a case of using the Inter-American Commission as a fourth instance.

25. Specifically with respect to the domestic remedies relevant to this petition, the State mentions that in July of 1987, the petitioner initiated two judicial actions to execute an extrajudicial mortgage title before the 5th Civil Court of Santos, under numbers 1915/87 and 2262/87, which were joined in a combined file for processing. In 1987, the debtor filed remedies called embargos do devedor[FN2] questioning the mortgage foreclosure. Following that, in November of 1991, the judicial action was suspended due to the death of Laura Castro Vallejo, one of the owners of the mortgaged property, and the list of debtors was modified so as to include “the Estate of Laura Vallejo”. Then, in September of 1992, Luciano de Castro González, the other owner of the property, also passed away, so his “Estate” was also included as one of the debtors in this judicial execution proceeding.

[FN2] According to the Brazilian Code of Civil Procedure, Article 736: “The debtor, regardless of attachment, deposit or guarantee, may challenge the execution by means of embargos [do devedor]” (free translation of Portuguese original).

26. According to the State, in February of 1993, by means of a joint judgment, the embargos do devedor related to actions 1915/87 and 2262/87 were rejected at first instance, and the “liquidity and certainty of the respective extrajudicial letter of credit” was asserted. In September of 1995, the Court of Justice of São Paulo state upheld such judgment at second instance. The debtor then filed a special appeal on October 24, 1995, but the appeal was declared inadmissible on April 17, 1997. Following that, the debtor filed another remedy called agravo de instrumento[FN3] before the Superior Court of Justice (Superior Tribunal de Justiça), on May 16, 1997. Seven months later, this remedy was rejected and the files returned to the 5th Civil Court in order to proceed with the execution, which had been suspended during the examination of this last remedy by the Superior Court of Justice.

[FN3] According to the Brazilian Code of Civil Procedure, Article 544: “If the extraordinary appeal or the special appeal is considered inadmissible, one can present an agravo de instrumento, within 10 (ten) days, before the Supreme Federal Court or the Superior Court of Justice, according to the case” (free translation of Portuguese original).

27. The State reports that, in April of 1998, the petitioner requested that the execution advance and appraised the mortgaged property in the amount of three million, eight hundred and ninety-five thousand, eight hundred and sixty-four reais, with seventeen cents (R\$ 3,895,864.17). After that, the 5th Civil Court determined that a judicial appraisal be performed by a court-

appointed expert in order to determine the value of the property in question. Such appraisal was finalized on October 25, 2000 and later reformed on February 13, 2001. Despite the fact that both parties contested the value, the judge confirmed it on July 13, 2001. The debtor then filed another agravo de instrumento with regard to the decision to reject such impugnation. The Court of Justice of São Paulo state decided in favor of this remedy on September 25, 2001, and ordered the lower court to issue a new judgment regarding the value of the property, on the basis of the expert's responses to new questions. Such judgment was rendered on July 18, 2002, and the 5th Civil Court also ordered that a date be set for the public auction of the property. On October 3, 2002, a decision was published regarding such procedure.

28. Nevertheless, the State maintains that on October 16, 2002, the case file of the foreclosure disappeared after being removed from the 5th Civil Court by the debtor's attorney. The State stresses that although the Brazilian courts issued a search and seizure order on the documents, the attorney who signed out the case file was never located. The State also asserts that a criminal case was filed in order to determine responsibility for the disappearance of the judicial files, to no effect; after this incident, the reconstruction of the file began and was completed in September of 2003.

29. After the reconstruction of the file, the State observes that the parties debated over the amount of the debt and how to update it, and that a series of accounting estimates were carried out. In July of 2005, the 5th Civil Court summoned the petitioner to present a model notification of public auction so that the sale of the property in auction could be set.

30. The State reports that the petitioner (and creditor), Alberto Néstor Vizental, acquired the mortgaged property at the auction on October 19, 2005. The debtor then alleged the nullity of the auction proceeding through a remedy called embargos à arrematação"[FN4], which was rejected on April 11, 2006 because the debtor did not deposit the corresponding judicial fees. This decision was challenged by means of two remedies: embargos de declaração[FN5] and appeal. Both these remedies were rejected. The rejection of the Appeal was then questioned by means of an agravo de instrumento, which was decided in favor of the debtor. Later, the appeal was submitted for analysis by the Court of Justice of São Paulo state, and the judicial execution of the debt was accordingly suspended. The petitioner challenged the suspending effect granted due to the Appeal, and was successful. In turn, the debtor decided to file another agravo de instrumento before the Court of Justice of São Paulo state contesting the decision to strip the appeal of its suspending effect. Therefore, according to the State's communication of January 22, 2008, these judicial proceedings were still pending.

[FN4] According to the Brazilian Code of Civil Procedure, Article 746: "The debtor may, within 5(five) days from the adjudication, sale or acquisition in auction, present embargos [à arrematação] on the basis of nullity, or due to a reason of extinction of the obligation, as long as the latter is supervening to the mortgage..." (free translation of Portuguese original).

[FN5] According to the Brazilian Code of Civil Procedure, Article 535: "Embargos de Declaração may be interposed when: I – there is obscurity of contradiction in the judgment; II – the judge or tribunal omits mention regarding a fundamental element" (free translation of Portuguese original).

31. On the other hand, with regard to judicial action 2728/1987, filed on July 10, 1987 before the 4th Civil Court of Santos by “Itaú” Bank against the estate of Luciano Castro Gonzales and Laura Castro Vallejo, in which Mr. Alberto Néstor Vizental intervened on July 25, 2001 as a third party with a privileged interest in the mortgaged property, the State argues that this is also pending and proceeding normally. The State observes that the files disappeared in October of 2003, and that they had to be reconstructed, which was completed in May of 2004. According to the State’s communication of January 22, 2008, these judicial proceedings were also still pending. In this regard, the State mentions that since 2005, a related remedy had been under the examination of the Court of Justice of São Paulo state.

32. Lastly, in its communication of April 7, 2008, the State indicates that, in response to a specific request of the Federal Secretariat for Human Rights, the National Council of Justice Conselho Nacional de Justiça – CNJ instituted proceeding 2008.1000000.4436. This proceeding was initiated in order to determine possible responsibilities related to the judicial delay in the judicial actions related to this matter, and the State considers that this strengthens its argument that domestic remedies have not been exhausted.

33. In conclusion, the State asserts that judicial expropriation of assets is generally a tortuous process in all countries, in which the debtors, often insolvent, use all available means to prevent foreclosure on their property. In the present case, according to the State, complex issues are involved, including extrajudicial executive titles, mortgage foreclosure, a multiplicity of appeals and remedies, the disappearance of the case files, and others. All of the foregoing reveals that the procedural delay observed is justified by the need to ensure due process guarantees for both parties involved. Therefore, according to the State it is not appropriate to speak of an unwarranted delay. Moreover, the State maintains that responsibility for the alleged excessive delay in the administration of justice lies exclusively with the debtor in the proceedings, who used various procedural maneuvers in an attempt to postpone the transfer of title of the property he had offered as collateral on a loan.

34. By virtue of the above considerations, the State requests that the petition be declared inadmissible under Article 47 of the American Convention.

IV. ANALYSIS OF ADMISSIBILITY

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

35. The Inter-American Commission has competence *ratione personae* to review the petition because it indicates the alleged victim to be a person whose rights the State has undertaken to respect and guarantee under the Convention.

36. With respect to the facts described above, the Inter-American Commission has competence *ratione temporis* under the American Declaration and also under the American Convention, ratified by Brazil on September 25, 1992. The IACHR stresses that, as regards the facts that occurred before Brazil ratified the American Convention, the American Declaration is

a source of international obligation for all Member States of the OAS, according to the Court's jurisprudence and the Inter-American Commission's doctrine.[FN6]

[FN6] See IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A N° 10, paras. 35-45; IACHR, James Terry Roach and Jay Pinkerton v. United States, Resolution 3/87, Case 9647, September 22, 1987, IACHR, Annual Report 1986-87, paras. 46-49, Rafael Ferrer-Mazorra et al v. United States, Report N° 51/01, Case 9903, April 4, 2001. See also Statute of the IACHR, Article 20.

37. In that regard, the IACHR notes that the events that occurred subsequent to September 25, 1992, the date on which Brazil ratified the American Convention, or events that commenced previously but whose effects continued after that date, should be analyzed in light of the American Convention. The IACHR has confirmed "its practice of extending the scope of application of the American Convention to facts of a continuing nature that violate human rights prior to its ratification, but whose effects remain after its entry into force." [FN7]

[FN7] IACHR, Report N° 119/01 Case 11.500, (Uruguay), October 16, 2001, para. 36. See also IACHR, Report N° 95/98 (Chile), December 9, 1998, para. 27.

38. The Inter-American Commission has competence *ratione materiae* since the violations alleged refer to rights protected by the American Declaration and the American Convention.

39. The IACHR has competence *ratione loci* because the facts alleged occurred in the state of São Paulo, territory of the Federal Republic of Brazil, a State that has ratified the American Convention.

B. Characterization of the facts alleged

40. Article 47.b of the Convention establishes that the IACHR shall declare inadmissible any petition that "does not state facts that tend to establish a violation of the rights guaranteed by this Convention". In light of this, the Inter-American Commission must examine whether the alleged facts tend to establish a violation of Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention that might implicate Brazil's international responsibility.

41. In this regard, the IACHR notes that the denial of justice alleged in the petition supposedly took place in the context of mortgage foreclosure proceedings 1.915/87 and 2262/87 initiated by the petitioner on July 10, 1987 before the 5th Civil Court of Santos, and in mortgage foreclosure proceedings 2728/87, initiated by Itaú Bank before the 4th Civil Court of Santos, in which the petitioner intervened as a third party creditor with a collateral guarantee on July 25, 2001.

42. The IACHR observes that the petitioner has not demonstrated that the delay in the mortgage foreclosure proceedings is attributable to the State. In this regard, the Commission takes particular note that the judicial mortgage foreclosure process is a civil dispute that normally depends on the initiative of the parties; that is to say, on the debtor and the creditor. Moreover, it refers to a civil dispute over the collateral offered with regard to a loan which consisted of real estate belonging to two people, both of whom passed away in the course of the proceedings in question. Lastly, the information indicates that the judicial files that disappeared were allegedly signed out by the debtor's attorney, and the State's judicial authorities duly reconstructed them.

43. In light of the information presented by both parties, the Commission considers that it does not have the elements that are necessary to establish facts that tend to constitute a violation of the rights guaranteed by the American Declaration or the American Convention which might be attributed to the State. The proceedings in question refer to a dispute between private parties about a mortgage foreclosure. The petitioner has not presented concrete information to substantiate his allegations regarding the right to a fair trial, with due guarantees and within a reasonable time.

44. Therefore, the IACHR considers that this petition is inadmissible, in conformity with Article 47.b of the American Convention.

V. CONCLUSIONS

45. Based on the foregoing considerations of fact and law, the Inter-American Commission concludes that the petition is inadmissible according to Article 47.b of the American Convention, because it does not state facts that tend to establish a violation of the rights guaranteed by that Convention.

THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS DECIDES:

1. To declare the present petition inadmissible according to Article 47.b of the Convention.
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 7th day of the month of August 2009.
(Signed): Luz Patricia Mejía Guerrero, President; Víctor E. Abramovich, First Vice-president; Felipe González, Second Vice-president; and Paolo Carozza, commissioner.