

OAS/Ser.L/V/II.  
Doc. 37  
31 March 2019  
Original: Portuguese

**REPORT No. 32/19**  
**PETITION 1228-08**  
REPORT ON ADMISSIBILITY

HINDENBURGH DE MELO ROCHA ET AL.  
BRAZIL

Approved electronically by the Commission on March 31, 2019.

**Cite as:** IACHR, Report No. 32/19. Petition 1228-08. Admissibility. Hindenburgh de Melo Rocha et al. Brazil. March 31, 2019.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Hindenburgh de Melo Rocha
<b>Alleged victims:</b>	Hindenburgh de Melo Rocha et al. <sup>1</sup>
<b>Respondent State:</b>	Brazil <sup>2</sup>
<b>Rights invoked:</b>	Articles 8 (Fair Trial), 25 (Judicial Protection) and 26 (Social, Economic, and Cultural Rights), in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention on Human Rights <sup>3</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>4</sup>**

<b>Filing the petition:</b>	October 21, 2008
<b>Additional information received at the stage of initial review:</b>	January 3, May 21, and December 3, 2009; August 26 and September 21, 2010; November 29, 2011; January 30, 2012
<b>Notification of the petition to the State:</b>	June 19, 2013
<b>State's first response:</b>	April 9, 2014
<b>Additional observations from the petitioner:</b>	March 24, 2015
<b>Additional observations from the State:</b>	April 15, 2014; May 18, 2015
<b>Notification on the possible archiving of the petition:</b>	July 5, 2018
<b>Petitioner's response to the notification on the possible archiving of the petition:</b>	July 19, 2018

**III. JURISDICTION**

<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 Convention (document adopted on September 25, 1992)

**IV. DUPLICATION OF PROCEDURE AND LAWSUITS ADJUDICATED INTERNATIONALLY, CHARACTERIZATION, EXHAUSTION OF INTERNAL RECOURSES, AND FILING DEADLINE**

<b>Duplication of procedure and international <i>res judicata</i>:</b>	No
<b>Rights declared admissible:</b>	Articles 8 (Fair Trial), 21 (Property), 25 (Judicial Protection) and 26 (Social, Economic, and Cultural Rights), in relation to Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention

<sup>1</sup> Joaquim Adatao Leitão, Leones Fernandes de Mendonça, Severino Souza Bizinho, Luís Carlos da Silva Gomes, Maria Ruth de Mello Nunes, and Maurício Cavalcanti de Albuquerque.

<sup>2</sup> In accordance with Article 17.2.a of the Commission Regulations, Commissioner Flávia Piovesan, a Brazilian national, did not take part in either the debate or the ruling on the present matter.

<sup>3</sup> Hereinafter, "American Convention."

<sup>4</sup> The observations submitted by each party were transmitted to the opposing party

<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, according to Section VI
<b>Timeliness of the petition:</b>	Yes, according to Section VI

## V. ALLEGED FACTS

1. The petition in question concerns the unjustified delay in definitively resolving an ordinary civil action brought in 1996 by Hindenburgh de Melo Rocha (hereinafter, “Mr. Rocha” or “petitioner”), Joaquim Adauto Leitão, Leones Fernandes de Mendonça, Severino Souza Bizinho, Luís Carlos da Silva Gomes, Maria Ruth de Mello Nunes, and Maurício Cavalcanti de Albuquerque (hereinafter, “alleged victims”), all of them elderly, former employees of Banco do Nordeste S.A., and pensioners of the Banco do Nordeste do Brasil Employee Pension Fund (hereinafter, “CAPEF”), which is a private pension fund.

2. The petitioner states that on June 18, 1996, an ordinary civil action was initiated against CAPEF alleging unjust enrichment, with the aim of securing restitution to the alleged victims for monthly overcharges dating back to 1987. The case was brought before the Common Court, and the judge in the court of first instance issued, on June 19, 1996, a precautionary measure in favor of the alleged victims. CAPEF sought a review appeal against this judgment arguing that the damages awarded were based upon an actuarial appraisal dating from December 31, 1986, at which time the insufficiency of funds had been verified. The appeal was denied in a ruling on April 22, 2008, handed down by the Court of Appeals, because the charges had not been duly approved. Therefore, the lower court’s ruling was maintained.

3. On September 22, 2002, the merits of the case were ruled totally in favor of the alleged victims, ordering the restitution in full of the excess value paid into the pension fund. On October 4, 2002, CAPEF filed an appeal; notwithstanding, on October 6, 2009, it was decided that the case should be transferred to the Labor Court, which was done without the Court of Appeals ruling on the merits of the case. On February 24, 2010, the lawsuit was then transferred to the Labor Court, following a motion alleging conflict of jurisdiction, despite the fact that, according to the petitioner, similar cases had been heard at the Common Court based on an opinion issued by the Federal Supreme Court (hereinafter, “STF”). The petitioner cited Recommendation no. 45/2008, as presented by the Federal Office of the Public Prosecutor on September 17, 2008, relating to labor litigation brought by people in an identical situation, and in which the agency stated that the increase in the contribution percentage of the alleged victims was a violation of their right to life and elderly protections.

4. Nonetheless, the State claims that the instant petition refers to the 20% deduction by CAPEF, dating back to 1987, on the benefits of its insured clients, in violation of the statutory provisions which allow for a 10% deduction. For this reason, the State alleges that 104 beneficiaries brought an unjust enrichment case against CAPEF, for which a precautionary measure was handed down already in 1996. Following a ruling in favor of the seven alleged victims in the first instance in 2002, CAPEF filed an appeal. In the meantime, due to the jurisdictional conflict and the overturning of the Court of first instance’s ruling, the appeal was not ruled on. One should note, furthermore, that between the years 2004 and 2008, the parties tried to follow amicable solutions and arrangements. As such, in 2009, upon taking back up the consideration of the appeal after not having been able to reach an agreement, the Court of Appeals in line to hear the case ruled that the trial court did not have jurisdiction to decide the case, given that it was a matter of labor law. The cases were then remanded to the Labor Court.

5. The appeal was then converted to an ordinary motion and, faced with such a decision, CAPEF filed a motion for a retrial, arguing that since the Trial Court had been found to lack jurisdiction, the previous ruling should be overturned and the case retried in the first instance. In 2012, the case was remanded to the 9<sup>th</sup> Circuit of the Labor Court, which then led to a renewed conflict over jurisdiction. Following the decision of the Supreme Court on February 20, 2013, in a similar case, the trial court’s jurisdiction in cases concerning matters of retirement was confirmed.

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

6. Concerning the exhaustion of internal recourses, the petitioner argues that the case brought in 1996 has yet to receive a final judgment, claiming for the application of the exception outlined in Article 46.2.c of the American Convention. The State, for its part, maintains that the domestic remedies have not been exhausted, on the basis that the delay in judgment arises from the differing jurisdictional conflicts and the actions of the parties.

7. The Commission reaffirms that there are no convention-related or regulatory standards defining the specific lapse of time required to constitute “unjust delay,” such that each case must be evaluated individually.<sup>5</sup> At this particular case, the Commission finds that a determination of the reasonableness of time elapsed in the resolution of the lawsuit is a matter which should be ruled during the phase for the establishment of the merits. The Commission finds applicable the exception to the exhaustion of domestic remedies as outlined in Article 46.2.c of the American Convention, applies.

**VII. EXAMINATION OF COLORABLE CLAIM OF THE ALLEGED FACTS**

8. Based on the elements of fact and law submitted by the parties and the nature of the matter brought before it, the Commission finds that should the alleged facts be proven, they could tend to establish violations of Articles 8 (judicial safeguards), 21 (private property), 25 (judicial protection), and 26 (economic, social, cultural, and environmental rights), with regard to Articles 1.1 (obligation to honor rights) and 2 (duty to take internal measures to protect rights) of the American Convention.

**VIII. DECISION**

1. To declare the instant petition admissible with regard to Articles 8, 21, 25, and 26 of the American Convention;

2. To notify the parties of the instant decision; proceed to the examination of the merits of the matter; to publish this decision and include it in the IACHR’s Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 31<sup>st</sup> day of the month of March, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President (dissenting opinion); Antonia Urrejola, Second Vice President; Margarett May Macaulay, Francisco José Eguiguren Praeli, and Luis Ernesto Vargas Silva, Commissioners.

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<sup>5</sup> IACHR. Report No. 14/08. Petition 652-04. Standing. Hugo Humberto Ruiz Fuentes. Guatemala. March 5, 2008, ¶ 68.