

OEA/Ser.L/V/II
Doc. 375
29 December 2023
Original: Spanish

REPORT No. 349/23
PETITION 471-13
REPORT ON INADMISSIBILITY

CONSORCIO DEL URUGUAY S.A. AND ITS STOCKHOLDERS
AND REPRESENTATIVES
URUGUAY

Approved by the Commission electronically on December 29, 2023.

Cite as: IACHR, Report No. 349/23, Petition 471-13. Inadmissibility. Consorcio del Uruguay S.A. and its stockholders and representatives. Uruguay. December 29, 2023.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Juan José Scandroglío Quintana, Eduardo Bertoni and Stefanía Garrido ¹
Alleged victim:	The Consorcio del Uruguay S.A. and Juan José Scandroglío Quintana, Cecilia Artagaveytia, Álvaro Macedo
Respondent State:	Uruguay
Rights invoked:	Articles 13 (freedom of thought and of expression) and 25 (right to judicial protection) of the American Convention of Human Rights ² , in relation to articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)

II. PROCEEDINGS BEFORE THE IACHR³

Filing of the petition:	March 22, 2013
Additional information received at the stage of initial review:	November 3, 2015, and May 30, 2019
Notification of the petition to the State:	June 10, 2019
State's first response:	August 30, 2019
Additional observations from the petitioner:	July 22, 2020, April 21 and December 17, 2021, and May 2, 2023
Additional observations from the State:	January 16 and November 15, 2021, and October 7, 2022

III. COMPETENCE

Competence <i>Ratione personae</i>:	No
Competence <i>Ratione loci</i>:	N/A
Competence <i>Ratione temporis</i>:	N/A
Competence <i>Ratione materiae</i>:	N/A

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	N/A
Exhaustion of domestic remedies or applicability of an exception to the rule:	N/A
Timeliness of the petition:	N/A

¹ When the petition was filed, Edison Lanza was also listed among the sponsoring counsel, he resigned from this position on August 7, 2014 after being appointed Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights,

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

³ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

Allegations of the petitioner party

1. The petition alleges that the Central Bank of Uruguay (hereinafter "the CBU") issued orders against a company related to the alleged victims, subjecting it to prior censorship with respect to the dissemination of "true factual information" relevant to a competing company. It also claims that although the acts of censorship were judicially declared null and void, the State has not fully redressed the human rights violation it caused.

2. The petitioner explains that Consorcio del Uruguay S.A. (hereinafter "the Consortium") is a legal entity that operates within the framework of the financial system which is regulated, controlled and supervised by the CBU. It also indicates that in 2009 a new company (hereinafter "the competitor") entered the Uruguayan market for the collection of pre-savings for the acquisition of real estate. Unlike the Consortium, which was subject to regulations similar to those of banks, the competitor company was not subject to any type of control because it operated under the unregulated figure of "management trust".

3. According to the petition, the competing company had engaged in an intensive advertising campaign of a misleading nature. Among other things, the competitor's website indicated that its participation certificates were "investor grade", when they were not. Thus, when the competing company's certificates were finally rated at the Consortium's insistence before the CBU authorities, the private rating agency CARE rated them as "medium speculative, medium risk". The petition alleges that the competing company concealed from the public the rating they had received from CARE, depriving the holders of their certificates and potential investors of important information about the degree of risk they would face. It also points out that the competitor's offering was directed to families and small savers and not to professional or institutional investors.

4. According to the information provided, on June 5 and 14, 2012, the Consortium filed two complaints before the CBU so that the latter would take action to stop the misleading advertising of the competitor company. It explains that such complaints were rejected in the first instance by the legal advisors of the CBU and the Superintendency of Financial Services. It argues that in such context of inaction by the CBU, and because the misleading advertising persisted, the Consortium decided to publish in the media between June 18 and July 5, 2012, four notices informing the public about the omissions of the competing company and the risk rating it had received. The competitor also published media releases responding to the Consortium's notices. Following these events, on July 7, 2012, the BCU issued an administrative act in which it ordered the following.

To instruct Consorcio del Uruguay S.A. to absolutely refrain from making public communications in any media - press, radio, television, internet, and any other media - in which reference is made directly or indirectly to [*the competing company, the characteristics of the Trust managed by it*] and the participation certificates and debt securities issued by said trust. This instruction includes the prohibition of quoting or paraphrasing the constituent documents of said business and the opinions expressed by third parties on said financial instruments and the business to which they refer.

5. The petition explains that five days after the issuance of such act, the Consortium informed the CBU that a Federal Court of Argentina had declared that the activity of the competing company in that country was being carried out in an irregular manner and had demanded it to cease the solicitation of new contracts. The Consortium also asked the CBU whether the order it had been given included a prohibition to publicize the Argentine court's ruling, to which the CBU issued a second administrative act on July 20, 2012, in which it stated:

In this regard, we confirm that such instruction also includes the absolute prohibition of making public communications in any media -press, radio, television, Internet, and any other media- in which reference is made to the shareholders of [*the competing company*], the

companies related to the latter, the shareholders of such related companies and the business carried out by such companies.

6. The petitioner considers that the administrative actions taken by the CBU against the Consortium constituted a form of “prior censorship” incompatible with the American Convention. It further explains that the CBU justified the measures taken against the Consortium on the grounds that its publications about the competing company encouraged uncertainty and distrust and undermined the stability and functioning of the Uruguayan financial system. However, in the petitioner's opinion, the stability of the financial system is not a legal right superior to freedom of expression that can be invoked to justify acts of censorship.

7. The petitioner also argues that the publications that motivated the censorship were limited to disseminating “true” information in a descriptive form without added value judgments; therefore, far from generating uncertainty or distrust, what they did was to provide more elements that investors could evaluate in order to make a decision. It considers that, on the contrary, what threatened the stability of the financial system was the misleading advertising that the competitor had been carrying out; speculating that the real motivation of the act of censorship was to prevent the errors committed by the CBU in tolerating such misleading advertising from coming to light.

8. To the above, it adds that the CBU justified the prohibition to disseminate the judgment against the competitor in Argentina with the argument that such judgment lacked relevance for the Uruguayan market. The petition questions the logic of prohibiting in a democracy the publication of a true fact based on an alleged lack of relevance; adding that, in any case, it was clearly relevant for investors in Uruguay to know that a financial company had been suspended in its country of origin for acting outside the law.

9. In the petitioner's opinion, restrictions on freedom of expression such as those imposed in the acts issued by the BCU required a regulation issued by law governing advertising aimed at promoting financial products.⁴ In this sense, it emphasizes that the legal opinion issued by the CBU, which preceded the first of the acts denounced as censorship, acknowledged the lack of regulations on the matter by referring to the “future possibility of issuing regulatory norms to channel conduct in this area”. The petition explains that, after the aforementioned opinion, but before the resolutions against the Consortium, the CBU issued a note to regulate financial advertising in which it established the possibility of advertising risk ratings by complying with certain requirements. In spite of this, the measures against the Consortium were issued without indicating that the publications made by the Consortium had violated the limits established by that note.

10. The petitioner considers that the orders issued by the CBU were particularly drastic for radically suppressing any message related to the competing company, in any media and regardless of its content or context. This, despite the fact that the Consortium could have been subjected to subsequent sanctions if it had violated the duty of truthfulness; and any dispute for damages caused by the Consortium's publications could have been left to be resolved between the particular companies involved.

11. The petitioner also argues that although the orders of the CBU were directed against the Consortium, they affected the rights of the three individuals listed as alleged victims in the petition. In this regard, it indicates “[s]ince the three complainants are the owners of the shares of the affected company and its then director, it is an unquestionable point ‘... the effective injury to the right of the referred natural persons...’ (in the explicit terms used by Advisory Opinion no. 22/2016)”.

12. To this, it adds that the acts of censorship also affected the workers and directors of the Consortium, and the population of Uruguay in general, who were allegedly affected by the radical suppression of information relevant to decision-making in a matter of public interest. It further alleges that it would be contrary to the jurisprudence of the Inter-American System, and of other international systems for the

⁴ La parte peticionaria señala que la publicidad comparativa estaba expresamente permitida en Uruguay bajo la ley de Relaciones de Consumo y asevera que las publicaciones del Consorcio se ajustaban estrictamente a las disposiciones de esa ley.

protection of human rights, to condone the violation of human rights such as freedom of expression by invoking a fictitious figure such as legal persons.

13. The petitioner also points out that it was eight months after the Consortium filed its complaints that the CBU finally ordered the competitor and CARE to publish on their respective websites a corrected report incorporating the phrase "medium speculative". The meaning of the note "medium speculative grade" was also published on the websites of CBU, CARE and the competitor. It indicates that such publications did not have any consequence on the stability of the financial system, arguing that this evidences that the publications that the Consortium had made and that motivated the censorship did not represent any threat to that system. It further explains that, although such publications were made, the administrative acts of censorship issued against the Consortium remained in force.

14. The petitioner also reports that on August 6, 2012, the Consortium filed an action for the protection of constitutional rights against the acts of the CBU, which was rejected. The Court of First Instance for Administrative Litigation Matters reportedly considered the action to be inadmissible because it had not been exhausted nor demonstrated the ineffectiveness of the ordinary challenge channel (administrative challenge and annulment action before the Court of Administrative Litigation Matters). This decision was appealed by the Consortium and the decision was confirmed on October 3, 2012, by the Fourth Civil Court of Appeals.

15. The petitioner argues that the rejection of the action for the protection of constitutional rights, without a ruling on whether the CBU violated human rights, demonstrates that the alleged victims did not have access to an effective remedy. It adds that the action was the only remedy available for the expeditious protection of fundamental and human rights, since the other jurisdictional channels to challenge the acts in question could lead to a process of more than five years and did not provide an adequate and effective remedy to elucidate an urgent matter such as an ongoing situation of radical censorship.

16. After the final rejection of its action for the protection of constitutional rights, the Consortium filed, unsuccessfully, administrative challenges against the acts of the CBU. Then, it judicially petitioned for the nullity of the administrative act. Finally, on June 1, 2017, the Court of Administrative Litigation (hereinafter "the CAL") ruled in favor of the Consortium, decreeing the nullity of the act.

17. The petitioner considers that the judgment of the CAL, although important, does not satisfy the claim of the petition nor does it exhaust its object, It argues that the judgment does not constitute a comprehensive reparation, among other reasons, because the judgments of the CAL constitute a simple declaration of abstract nullity and do not establish any type of reparation for those affected by the annulled act. Therefore, the only way left for the Consortium would be to request patrimonial reparation in a separate judicial proceeding. In addition, it indicates that there was no domestic remedy that could have been exhausted by the individuals affected by the acts of the CBU, and that they were forced to file domestic remedies through the Consortium. In this sense, it indicates that the individuals "*could not invoke a legitimate interest or personal right aggrieved by the CBU's censure, beyond the fact that they were its ultimate addressees. Therefore, they cannot be required to have availed themselves of those administrative and judicial remedies, since the domestic legislation prevents them from having access to them*".

Position of the Uruguayan State

18. The State, for its part, considers that the petition should be inadmissible because it refers to the rights of a legal person; because it was filed without the exhaustion of domestic remedies; and because it became moot as a result of events subsequent to the petitioner's initial brief,

19. Uruguay argues that the petition is directly related to the actions of the CBU with respect to a legal person supervised by the CBU; the natural persons referred to as victims in the petition are presented as "representatives and owners" of that legal person. Therefore, the petition would be inadmissible under the jurisprudence of the Inter-American Court according to which the American Convention only establishes rights in favor of natural and not legal persons. In this regard, the State emphasizes that none of the physical or natural

persons who present themselves as alleged victims have filed any lawsuit or claim at the domestic level for the facts set forth in the petition.

20. The State also indicates that the claims of the petitioner were finally resolved in favor of its interests after the CAL issued a judgment in favor of the Consortium. The State provides a copy of the judgment in which it is noted that the CAL concluded that:

The assumption on which the adopted decisions are based is not acceptable, that is, that the powers granted to the CBU imply conferring powers to curtail or place limits on constitutionally protected rights, whether it is understood that what is affected is the freedom of enterprise and not the freedom of expression of thought. [...]

Second, directly related to the foregoing and without prejudice to it, the restrictions imposed by law on constitutionally recognized rights must be interpreted restrictively, especially when their exercise is directly related to the functioning of the model of democratic society enshrined in the Charter.

And, in this sense, the attitude adopted by the Regulatory Entity has apparently been the opposite, and, by means of the instruction, it has attributed to itself powers limiting fundamental rights in clear ignorance of the scope of the legislator's attribution and, in short, of the express limits within which the legislator delimited the scope of action of the Central Bank. [...]

None of the norms mentioned by the respondent, either in the acts appealed against or in its answer to the complaint, confer on it the power to restrict rights whose limitation is the exclusive competence of laws enacted for reasons of general interest. [...]

21. The State considers that the aforementioned decision put an end to the subject matter of the petition, and that it evidences that domestic remedies had not been exhausted at the time the petition was presented to the Commission. It also emphasizes that the decision of the CAL extinguished the administrative act of the CBU; that the judgment of the CAL has been complied with by the CBU and has not been resisted by the State. Furthermore, that since the issuance of the CAL's judgment, the alleged victims have had the right to file a reparation action before the relevant judicial authorities if they wish to recover damages that the annulled act may have caused them; and that it was only in February 2022 that the Consortium filed a claim for damages against the CBU requesting compensation in excess of 21 million dollars for damages allegedly caused by the limitation to their freedom of expression.

22. The State has also transmitted to the Commission a report submitted by the CBU, in which it emphasizes that the alleged victims had at their disposal (and did not use) legal mechanisms to request the administrative authorities or the CAL to suspend the administrative act that they considered violated their rights. In this report, the CBU also noted that the administrative acts issued in relation to the Consortium did not involve prior censorship or a violation of freedom of expression. The report also states that the CBU acted in accordance with the law in force and within the limits of its competence and powers to regulate the activity of the financial system. The report also states that the Consortium's advertising activity was focused on obtaining greater economic benefits, and therefore the information provided by the Consortium was biased and self-serving. It also indicates that the Consortium and the competitor had engaged in a media war consisting of biased communications, affecting the national financial system as a whole. For these reasons, the report argues that the limitation of certain aspects of the freedom of expression of companies that make up a financial system is admissible given the particularly sensitive nature of the financial sector.

23. The report also highlights that the restrictions on advertising activity were applied equally to the two companies involved in the media war. The report also states that the CBU only communicated its instructions to the two companies without imposing censorship on any media outlet, and that the measures adopted by the CBU were acts taken after the fact following the communications made by the companies.

24. In its communication of November 15, 2021, the State sent a copy of another report submitted by the CBU. This report highlights that the CBU has published on its web page the decision of the CAL that annulled the acts complained of by the petitioner and that since that decision was issued, it has taken it into account to guide its administrative actions. This report also argues that the petitioner does not explain in what specific way the CBU's actions have affected the rights of the individuals named as alleged victims in the petition, maintaining that the Consortium has not been the victim of retaliations following the decision of the CAL, and highlighting that the company continues to operate in Uruguay without any type of limitation, threat, or special suspicion.

VI. ANALYSIS OF THE RATIONE PERSONAE COMPETENCE OF THE IACHR

25. As a logical first step before considering any aspect of admissibility, the Inter-American Commission must refer to its competence to rule on this case. Thus, the Commission notes that the State maintains that the facts that give rise to the petition refer exclusively to actions taken by the CBU with respect to a legal person supervised by it. In turn, the petitioner argues that the acts of the CBU affected the rights of natural persons, including the three it presents as alleged victims.

26. In this regard, the Inter-American Commission emphasizes that Article 1(2) of the American Convention clearly establishes: *"For the purposes of this Convention, "person" means every human being"*. This provision is consistent with the object and purpose of the American Convention as expressly defined in the Preamble of said treaty, which refers emphatically to concepts such as *"the essential rights of man"*, *"the attributes of the human personality"* and the *"ideal of free men"*. This approach is consistent throughout the treaty.

27. Thus, the Inter-American Court in its Advisory Opinion 22 of February 26, 2016, concerning precisely the ownership of rights of legal persons in the Inter-American Human Rights System, indicated that outside of the European System, *"there is currently no clear trend in international human rights law, interested in granting rights to legal entities or in allowing them access as victims to the individual petition processes established by treaties"* (para. 62). Later, after analyzing different interpretation techniques, the Court concluded that *"an interpretation of Article 1(2) of the American Convention, in good faith, in accordance with the natural sense of the terms used in the Convention [...] and taking into account the context [...] and its object and purpose [...], it is clear that legal entities are not holders of Convention-based rights [...]"* (para. 70).

28. In the same Opinion, the Court also held:

[...] regardless of the specificity of each case, this Court considers that the exercise of the right through a legal entity must involve an essential and direct relationship between the natural person who requires protection by the Inter American system and the legal entity through which the violation occurred, since a simple link between both is not enough to conclude that the rights of natural persons and not of legal entities are effectively being protected. Indeed, it must be proven beyond the simple participation of the natural person in the activities of the legal entity, that said participation is substantially related to the rights alleged as violated [...] (para. 119).

The Court therefore holds that, due to the multiple forms of legal entities that can arise, such as companies or commercial companies, political parties, religious associations or nongovernmental organizations, it is not feasible to establish a single formula that serves to recognize the existence of the exercise of rights of natural persons through their participation in a legal entity, in the same way as it has done with the right to property and freedom of expression. Therefore, the Court will determine how to prove the link when it analyzes claims that rights have been violated in a specific contentious case. [...]

29. In view of these criteria, the Commission notes that there is no dispute that: i) the acts of the CBU that are alleged to violate the American Convention were directed exclusively against the Consortium in its capacity as a legal person; and ii) all the remedies that have been filed at the domestic level in relation to

those acts concern the rights of the Consortium as a legal person, and no remedies have been filed at the domestic level in relation to the rights of the natural persons who are presented as alleged victims. In this regard, the Commission recalls that according to domestic law, legal persons are entities separate from the natural persons behind them, with their own rights and obligations, and a patrimony separate from that of their shareholders or owners, such arrangement allowing them to exercise their commercial functions.⁵ Thus, the Commission has established constant and invariable jurisprudence on the inadmissibility of petitions filed by corporate legal persons under the condition of direct victims, or where the exhaustion of domestic remedies was carried out by them and not by the natural persons who appear as petitioners before the Commission.⁶

30. The Commission further notes that the petitioner argues that the rights of the three individuals were affected by CBU's actions, but without explaining the specific manner in which this occurred. Thus, the petitioner has highlighted the relationship of these individuals with the Consortium as shareholders or directors, but has not proven that the CBU's actions restricted their ability to disseminate in their personal capacity the information they wished to disseminate; or that there was an essential relationship between these individuals and the Consortium with respect to the exercise of their freedom of expression and their ability to disseminate the information whose dissemination was restricted by the CBU's actions. The petitioner has also failed to explain the specific role that the alleged victims played within the Consortium in determining the corporate communications and publications of that legal entity. The mere fact that the natural persons presented in this petition have a shareholding relationship with the company does not in itself mean that their right to freedom of expression has been violated. It is a different matter to establish whether or not the rights of the company as a legal person were violated, which has been amply argued by the petitioners, but which falls outside the competence *ratione personae* of the Inter-American Commission.

31. The petitioner has also failed to provide specific information on damages suffered by the three individuals as a result of the actions taken against the consortium. On the contrary, it has acknowledged that they were unable to file domestic remedies in their own right because "they could not invoke a legitimate interest or personal right aggrieved by the CBU's censorship". The IACHR notes that this is precisely because the prohibition issued by the CBU, which was later lifted, was directed at the Consortium as a legal entity.

32. Therefore, the Commission concludes that it lacks competence *ratione personae* to hear the present case, in the terms of Article 1(2) of the American Convention.

VII. DECISION

1. To find the instant petition inadmissible.
2. To notify the parties of this decision; 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 29th day of the month of December, 2023. (Signed:) Esmeralda Arosemena de Troitiño, Vice President; Roberta Clarke, Second Vice President; Julissa Mantilla Falcón, Stuardo Ralón Orellana, Carlos Bernal Pulido and José Luis Caballero Ochoa, Commissioners.

⁵ IACHR, Report N° 40/05 (Inadmissibility), Petition 12.139, José Luis Forzanni Ballardó, Peru, March 9, 2005, paras. 35 and 40. Another relevant international precedent regarding the importance of distinguishing between the rights of a legal person and those of natural persons linked to it, in order to establish possible violations of the rights of natural persons, is the judgment of the International Court of Justice in the case of Ahmadou Sadio Diallo (Republic of Guinea vs. Democratic Republic of the Congo) of November 30, 2010. Available at: 103-20101130-JUD-01-00-EN.pdf (icj-cij.org)

⁶ The following cases among others: IACHR, Report No. 62/22. Petition 1096-12. Inadmissibility. Julio Carrizosa Mutis and family (Corporación Grancolombiana de Ahorro y Vivienda). Colombia. March 7, 2022, paras. 14 y ss. IACHR, Report No. 40/05 (Inadmissibility), Petition 12.139, José Luis Forzanni Ballardó, Peru, March 9, 2005, paras. 35 and 40. IACHR, *Banco de Lima*, Report No. 10/91, Case 10.169, Peru, 1990-1991 Annual Report, p. 452 and ss. IACHR, *Tabacalera Boquerón*, Report No. 47/97, Paraguay, 1997 Annual Report, p. 229 y and ss. IACHR, *Mevopal, S.A.*, Report No. 39/99, Argentina, 1999 Annual Report. IACHR, *Bernard Merens y Familia*, Report No. 103/99, Argentina, 1999 Annual Report. IACHR, *Bendeck- COHDINSA*, Report No. 106/99, Honduras, 1999 Annual Report.