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REPORT No. 172/17
PETITION 1718-11
REPORT ON ADMISSIBILITY

CRISSTHIAN MANUEL OLIVERA FUENTES
PERU

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 PERU
 DECEMBER 28, 2017

I. INFORMATION ABOUT THE PETITION

Petitioning party:	<i>Estudio para la Defensa de los Derechos de la Mujer</i> (DEMUS) (Study for the Defense of Women's Rights), Heartland Alliance for Human Needs & Human Rights and <i>Asociación Líderes en Acción</i> (Leaders in Action Association) ²
Alleged victim:	Crissthan Manuel Olivera Fuentes
State denounced:	Peru
Rights invoked:	Articles 8 (Fair Trial), 11 (Privacy), 13 (Freedom of Thought and Expression), 24 (Equal Protection) and 25 (Judicial Protection) of the American Convention on Human Rights, ³ in relation to its Articles 1.1 (Obligation to respect rights) and 2 (Obligation to adopt domestic legislative measures)

II. PROCEDURE BEFORE THE IACHR⁴

Date on which the petition was received:	November 29, 2011
Additional information received at the initial study stage:	June 29, 2012
Date on which the petition was transmitted to the State:	May 15, 2013
Date of the State's first response:	July 17, 2013
Additional observations from the petitioning party:	August 27 and December 2, 2013; May 30, 2014 and April 19, 2017
Additional observations from the State:	March 17, 2014 and April 11, 2016

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes; American Convention (deposit of ratification instrument on July 28, 1978)

¹ In accordance with Article 17.2.a of the IACHR Rules of Procedure, Commissioner Francisco José Eguiguren Praeli, a Peruvian national, did not participate in the discussion or the decision on this matter.

² By communication of March 26, 2014, it was informed that Heartland Alliance for Human Needs & Human Rights and *Asociación Líderes en Acción* would be co-petitioners.

³ Hereinafter "Convention" or "American Convention."

⁴ The observations presented by each party were duly transmitted to the opposing party.

IV. ANALYSIS OF 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	Articles 8 (Fair Trial), 11 (Privacy), 13 (Freedom of Thought and Expression), 24 (Equal Protection) and 25 (Judicial Protection) of the American Convention, in relation to its Articles 1.1 and 2
Exhaustion of domestic remedies or applicability of an exception to the rule:	May 30, 2011
Timeliness of the petition:	Yes; November 29, 2011

V. ALLEGED FACTS

1. The petitioners indicate that the alleged victim, Crissthian Manuel Olivera Fuentes, was discriminated against based on his sexual orientation. They assert that on August 11, 2004, he and his partner were at a coffee shop located in one of *Supermercado Santa Isabel* stores, owned by *Supermercados Peruanos S.A.* company, in the city of Lima, reading poems in a romantic attitude, without any physical contact. They indicate that the supermarket's security staff requested them to cease their romantic behavior, because a client who was with his under-aged daughter had complained about these romantic scenes. They claim that later the shop's supervisor along with four security guards approached to recall them to cease such behavior, because their romantic expressions could harm the children playing there. They submit that the supervisor asked them to leave unless they would buy something there, and that if they were to buy at the coffee shop, they had to refrain from their romantic behavior in order not to make other clients feel uncomfortable.

2. They assert that the alleged victim disseminated a press release denouncing the treatment received, after which *Reporte Semanal*, a program broadcast on *Frecuencia Latina* television network, made a report broadcast on August 22, 2004 consisting in the mounting of interventions at three supermarkets, including a different store of the same supermarket company at issue. The interventions consisted in that the alleged victim and his partner would go to the selected stores and that the journalist would go with his girlfriend and show the same behavior as the other couple. The aim was to show the differentiated treatment toward romantic behavior of people of diverse sexual orientation. They indicate that, in the framework of the intervention, the alleged victim and his partner were reprimanded by Santa Isabel supermarket's security staff, and expelled from the store, in contrast with the treatment received by the journalist and his partner.

3. They assert that on October 1, 2004 the alleged victim filed a complaint for discrimination based on sexual orientation, against *Supermercados Peruanos S.A.* before the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), based on Legislative Decree No. 716, Law of Consumer Protection. They indicate that on August 31, 2005 INDECOPI's Consumer Protection Committee found the claim groundless for considering that the alleged victim had failed to demonstrate the discriminatory treatment under the terms established in Article 7.b of the Law of Consumer Protection, and that, in the child's best interest, companies were entitled to request any couple to cease their romantic behavior. Likewise, said body dismissed the report that the alleged victim had presented as supporting evidence, on the grounds that the video recording belonged to another date than the one of the denounced alleged facts and that it was the result of acts provoked by the claimant. In view of this, the alleged victim filed an appeal. By a resolution dated May 17, 2006, the Chamber for the Defense of Competition of INDECOPI's Tribunal decided to uphold the lower judgment on the grounds that the alleged victim had failed to submit evidence of the facts occurred on August 11, 2004; and, on the same grounds, it dismissed the submitted report. Moreover, the Tribunal considered that the defendant's claim that the measure was adopted based on the principle of the child's best interest was out of order, for had the behavior been excessive, the harm would have been to all the other clients regardless of their age.

4. They claim that in view of said resolution, on September 13, 2006, the alleged victim filed a petition for the partial annulment of the trial judgment, before the Second Chamber Specializing in Administrative Law of the Superior Court of Lima. On June 10, 2008, said Chamber declared the petition out of order, as it considered that the submitted evidence was insufficient, for it had been collected by the claimant himself and the video recording was subsequent to the facts at issue. It also considered that, under Article 7.b of the Law of Consumer Protection, the burden of proof is an obligation to be met by the party alleging discrimination and that the security staff's action was rooted in the protection of the child's best interest. As to this last aspect, they allege that the Chamber ruled *extra petita*, since the judgment concerned an aspect not brought to its attention, thus leading to *reformatio in peius*. They assert that he appealed against said ruling, and that on June 14, 2010 the Civil Chamber of the Supreme Court of Justice confirmed the lower judgment, indicating that under Article 7.b of Legislative Decree No. 716 "the burden of proof was assigned to the person discriminated against," and that the presumption of innocence in favor of *Supermercados Peruanos S.A* should prevail in view of the lack of sufficient evidence. They submit that an appeal for annulment was filed against said decision, again alleging discrimination based on sexual orientation. On April 11, 2011, the Social and Constitutional Chamber of the Supreme Court of Justice declared this remedy out of order because this jurisdiction was not competent to undertake "new assessments of the evidence," a decision notified on May 30, 2011.

5. In regard to the exhaustion of domestic remedies, they indicate that the appeal for legal protection was inappropriate in this case since it did not allow for time for producing evidence nor could lead to corrective measures; that, therefore, the exhausted remedy was suitable to prove the act of discrimination. Furthermore, they assert that there is a narrow connection between the violation of Articles 11 and 13 of the Convention and the violation of the rights to a fair trial and to judicial protection, as well as of the right to non-discrimination based on sexual orientation. Consequently, the exhaustion of domestic remedies corresponds to the exhaustion of said rights.

6. As a result of the facts described above, the petitioners claim that Mr. Olivera was victim of discriminatory treatment on the part of the supermarket's staff, and that the administrative and judicial authorities failed to issue a proper and timely answer to his complaints, in the context of the unsuitable nature of Peru's current legal framework for proving acts of discrimination which, in this case, led to malicious and arbitrary burden of proof for the alleged victim. They add that on September 1, 2010, the Law of Consumer Protection applied in the framework of the investigation into the facts was amended by Law No. 29571, Code of Consumer Protection and Defense. They indicate that although the law recognizes the right to non-discrimination, it does not explicitly mention discrimination based on sexual orientation as a type of discrimination, and includes a provision similar to Article 7.b of the Law of Consumer Protection regarding the assignment of the burden of proof to the party discriminated against. Likewise, they allege violations of due process and judicial protection, since the proceedings before administrative and judicial authorities extended for 7 years, and the principle of prohibition of *reformatio in peius* was not respected, as the alleged victim did not have the opportunity to contest whether the child's best interest justified the differentiated treatment.

7. For its part, the State alleges that the petition is inadmissible. It asserts that the petitioner has failed to pursue and exhaust the remedies foreseen in the domestic legal framework concerning the alleged violation of the right to the protection of one's honor and dignity, and the right of liberty of expression and thought, in the administrative-law court, preventing thus that the competent bodies hear these claims. Moreover, it indicates that, for the defense of the rights, the petitioners chose the administrative remedy instead of constitutional appeal proceedings. Additionally, it asserts that INDECOPI is not competent to examine violations of said rights, because these do not pertain to the rights recognized to consumers; and that the administrative-law proceedings foreseen in Law No. 27584 is aimed at having the Judiciary have judicial control over public administration proceedings, without exceeding the decisions adopted there.

8. Furthermore, the State asserts that, by virtue of the subsidiarity principle of the Inter-American Human Rights System concerning a "fourth instance," international protection assists or complements protection given by the domestic legal framework; therefore, the IACHR cannot review decisions made by domestic courts acting within their powers and in accordance with applicable judicial

safeguards, unless there is a violation of the Convention. Thus, it claims that the petitioners' discontent with the judicial and administrative rulings issued by the competent domestic authorities does not entitle the IACHR to review said judgments.

9. In addition, concerning the alleged violation of Articles 8 and 25 of the Convention, it asserts that the difference between the unfavorable rulings in the judicial and administrative courts lies in the arguments given, which does not constitute a violation of the procedural safeguards recognized in the Convention, nor a purported infringement of the principle of prohibition of *reformatio in peius* because the judgment was still unfavorable. It claims that, in any case, the purported procedural error invoked was amended through the resolution of June 14, 2010, in which the claim of the child's best interest was dismissed and which was based on the evidence of the act of discrimination. It also indicates that the jurisdictional body is unable to include *ex officio* new evidence declared inadmissible by the administrative-law court; for the alleged victim had the opportunity to include and request evidence that he deemed necessary to support his complaint before INDECOPI. In addition, as to the purported violation of reasonable period, it asserts that the duration of the proceedings was due to the parties' procedural activity.

10. Likewise, with regard to the purported violation of Article 24 of the Convention, it indicates that the claim is not connected with the right to equal protection, since under Legislative Decree No. 716 the norms concerning the burden of proof rule the possibility that the claimant proves the act of discrimination by presenting circumstantial evidence. It asserts, therefore, that the "standard of circumstantial evidence" applied by the domestic authorities was not discriminatory, and that it was the lack of evidence of the alleged act of discrimination what motivated the court to declare the complaint groundless. It affirms that what the petitioners actually challenge concerns the opportunity to produce evidence and the assessment criteria applied, resorting to the IACHR as a fourth instance. In addition, states that the non-application of the Article 7.b of Legislative Decree No. 716 was not brought to the attention of judicial and administrative-law bodies by alleged victim. Moreover, it indicates that the principle of the child's best interest was part of the aspects discussed in the administrative proceedings, which entitled the judicial body to rule on said matter; but that the Second Chamber's main argument to declaring the complaint groundless was the lack of elements to irrefutably prove the act of discrimination and that, in any case, the Chamber did not discriminate on the basis of the sexual orientation of couples showing excessive romantic behavior.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

11. The petitioners claim that the alleged victim has exhausted the domestic remedies foreseen in the Peruvian legal framework, in the judicial and administrative-law courts. For its part, the State alleges lack of exhaustion of domestic remedies in regard to the claims concerning Articles 11 and 13 of the Convention, and it indicates that the alleged victim could have filed an appeal for legal protection, which he failed to pursue. In this regard, the IACHR notes that the remedies that the alleged victim exhausted in the domestic jurisdiction were appropriate for the purpose of the claims submitted. In addition, with respect to the State's claim that INDECOPI was not competent to assess the purported infringement of the right to the protection of one's honor and dignity because it is not a right recognized to consumers, the Commission believes that the substance of the matter presented in the instant petition was brought to the attention of judicial and administrative-law bodies, and that the competent authorities examined it and ruled on it without having, in view of their competence, limited or partially excluded the presented matter. In this regard, it is understood that the purported infringement of the rights enshrined in said rules appear to have been the result of the act of discrimination presented in the filed proceedings. In view of the foregoing, the Commission concludes that the alleged victim's exhaustion of domestic remedies took place when the resolution was notified on May 30, 2011, pursuant to Article 46.1.a of the Convention. Since the petition was filed on November 29, 2011, it meets the requirement established in Article 46.1.b of the Convention.

VII. COLORABLE CLAIM

12. In view of the elements of fact and law presented by the parties and the nature of the matter brought to its attention, the Commission believes that, if proved, the alleged facts concerning acts of

discrimination against the alleged victim as a result of the expression of his sexual orientation, as well as the alleged violations of due process in the framework of the submitted complaints all could establish possible violations of Articles 8, 11, 13,⁵ 24 and 25 of the American Convention, in connection with Articles 1.1 and 2 of the same treaty.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 11, 13, 24 and 25 of the American Convention, in connection with its Articles 1.1 and 2;
2. To notify the parties of this decision;
3. To continue with the analysis on the merits; and
4. 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 28th day of the month of December, 2017. (Signed): Margarete May Macaulay, First Vice President; Esmeralda E. Arosemena Bernal de Troitiño, Second Vice President; Paulo Vannuchi, James L. Cavallaro, and Luis Ernesto Vargas Silva, Commissioners

⁵ See, *mutatis mutandi*, IACHR, Report No. 64/16. Petition 2332-12. Admissibility. Vicky Hernández and Family. Honduras. December 6, 2016, par. 31; IACHR, Report No. 66/16. Petition 824-12. Admissibility. Tamara Mariana Adrián Hernández. Venezuela. December 6, 2016, par. 28; and IACHR, Report No. 73/16. Petition 2191-12. Admissibility. Alexa Rodríguez. El Salvador, December 6, 2016, par. 9.