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REPORT No. 34/18
PETITION 1018-07
REPORT ON ADMISSIBILITY

GUILLERMO JUAN TISCORNIA AND FAMILY
ARGENTINA

Approved by the Commission at its session No. 2125 held on May 4, 2018
168th Special Period of Sessions

Cite as: IACHR, Report No. 34/18, Petition 1018-07. Admissibility. Guillermo Juan Tiscornia and Family. Argentina. May 4, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Guillermo Juan Tiscornia and Carlos A. Cony Fernández Madero
Alleged victims:	Guillermo Juan Tiscornia and Family ¹
Respondent State:	Argentina
Rights invoked:	Articles 8 (Fair Trial), 11 (Privacy), 23 (Participation in Government) and 25 (Judicial Protection) of the American Convention on Human Rights, ² in relation to its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects); Article XIV (Work and Fair Remuneration) of the American Declaration of The Rights and Duties of Man, ³ and other international treaties ⁴

II. PROCEDURE BEFORE THE IACHR⁵

Filing of the petition:	August 9, 2007
Additional information received at the stage of initial review:	February 29, 2008; March 11 and October 22, 2008; February 3, August 21 and September 4, 2009; October 10 and October 11, 2011; April 11 and May 24, 2012
Notification of the petition to the State:	March 5, 2014
State's first response:	August 8, 2014
Additional observations from the petitioner:	October 22, 2014; February 2 and November 7, 2016; March 29 and May 5, 2017
Additional observations from the State:	February 31, 2015; January 23, May 30 and July 17, 2017

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 September 5, 1984)

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	Articles 8 (Fair Trial), 23 (Participation in Government), 25 (Judicial Protection) and 26 (Economic, Social and Cultural Rights) of the American Convention in relation to its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention; and article XIV (Work and Fair Remuneration) of the American Declaration

¹ Mr. Tiscornia's family is made up of: María Dolores Rentarías Arredondo de Tiscornia (wife), Matías Guillermo Tiscornia, María Dolores Tiscornia and Sofía María Tiscornia (children).

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

³ Hereinafter "the American Declaration" or "the Declaration."

⁴ Article 7 of the International Covenant on Economic, Social and Cultural Rights.

⁵ The observations submitted by each party were duly transmitted to the opposing party.

Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, on June 30, 2009
Timeliness of the petition:	Yes, under the terms of Section VI

V. ALLEGED FACTS

1. The petitioning party alleges that the Argentine State must be held internationally liable for illegally and arbitrarily removing Guillermo Juan Tiscornia, national judge of the Seventh National Criminal Economic Trial Court of the Federal Capital (“the alleged victim,” “the petitioner” or “Mr. Tiscornia”), by a jury trial in which the members of the jury had been selected by the executive branch. Likewise, the petitioners claim that the removal was decided in the framework of a public competitive selection procedure from which the alleged victim was excluded because his enmity with high-ranking officials led to the initiation of proceedings for his removal. Thus, Mr. Tiscornia requests his reinstatement to the job, compensation for the remunerations he should have earned had he not been removed, including the contributions to his retirement pension plan, and the restitution of his membership in the benefit society of the judiciary.

2. Mr. Tiscornia participated in the 168th Open Public Competitive Selection Procedure to apply to one of the two vacancies available at the Third National Criminal Economic Trial Court, ranking fifth in the order of merit. However, on May 17, 2007 he was excluded from said list by Resolution No. 246/07 of the Judicial Appointments Commission on Judicial Discipline of the Council of the Judiciary in view of a complaint filed against him before the Commission on Judicial Discipline of said council. The petitioner claims that this formal request to exclude him was filed by a member of the Argentine Congress, who at the same time was a member of the same Commission on Judicial Discipline, and that she took this measure in reprisal for the investigations that, as a judge, he undertook against the then minister of defense in a case involving arms trafficking.

3. In this context, the complaint filed against the petitioner before the Commission on Judicial Discipline was based on a criminal investigation that had not yet led to any criminal charges; hence, this was not a cause for his exclusion from the selection procedure, under article 16 of the Rules of Procedure for the Competitive Selection Process for Judicial Appointments of the National Judiciary. The complaint had been submitted on March 2, 2006 by the CODERE business group, which was investigated by Judge Tiscornia on trafficking charges, and it alleged that the petitioner had asked them for money in exchange for dismissing the case against them. The petitioner emphasizes that at the moment of the selection procedure and after the trial for his removal, the legal action brought against him for bribery was still a mere complaint. He indicates that he was found innocent in all the instances of said proceedings and was definitely acquitted by the Supreme Court of Justice (“CSJN”) in December 2015.

4. Thus, on May 21, 2007 the petitioner filed an appeal for legal protection before the Council of the Judiciary against the Judicial Appointments Commission’s measure to exclude him from the order of merit so that it would be annulled and he would be reinstated to the corresponding order of merit. However, said remedy was not considered by the Council of the Judiciary because when the Council was going to analyze it, the matter was forwarded to a discipline hearing, after which he was removed from office.

5. Mr. Tiscornia was removed from office on December 19, 2007 by a resolution of the discipline tribunal of the Judicial Council. The Council had changed its membership in light of Law No. 26080 of February 24, 2006, which restructured the Council’s membership and the majorities needed to adopt decisions, to allegedly favor the ruling party’s interests. Moreover, he indicates that in the discipline hearing his right to a fair trial was violated because he was not allowed to be represented by the attorney that he trusts; his request to postpone the hearing in view of his arrangements previously set for the date scheduled was declined; the appointment of a public defender for him was done with little anticipation to the hearing—apparently precluding an adequate preparation of his defense—; and the request that he and his official defender had filed to present exculpatory evidence was declined.

6. Given the resolution to remove him, on February 7, 2008 Mr. Tiscornia filed a special federal remedy before the same Discipline Tribunal claiming that this body had decided his removal in single instance of jurisdiction and that the CSJN establishes that removals of judges by single instance of jurisdiction will be justiciable where violations of due process of law occur, such as in his case. He also claimed that his removal was an arbitrary judgment because his requests to produce evidence for his defense were systematically and groundlessly rejected, thus, infringing his right of defense in trial and due process. On February 27, 2008, the Discipline Tribunal overturned the special remedy filed by the petitioner on grounds of insufficient evidence of a direct relationship between the matter of the trial and the federal issue presented.

7. On March 6, 2008, the petitioner challenged the above decision by submitting a special complaint before the Supreme Court of Justice, insisting on the competence of the highest court to review violations of due process in removal proceedings against judges. Finally, on June 30, 2009 the CSJN dismissed the remedy, considering that, under article 115 of the Argentine Constitution, resolutions issued by the Discipline Tribunal are unappealable, without detriment to the fact that sometimes certain violations of due process may be reviewed by this Court. It concluded that Mr. Tiscornia did not prove any violation of due process subject to federal review.

8. Furthermore, the petitioner alleges that after he was removed from office, the judiciary's benefit society ("the OSPJN") ruled to terminate his and his family's (wife and three under-aged children) membership in it. Therefore, he submitted two applications to the administrative department of the benefit society, on February 12 and March 17, 2008. Since there was no answer, on March 31, 2008 he filed an appeal for legal protection before the Seventh National Civil Economic Court of the Federal Capital to claim, *inter alia*, that he and his family could not be excluded from the benefit society's health insurance plan while remedies were pending resolution in the removal proceedings against him, and to request the issue of a precautionary measure so that said insurance plan would be maintained until proceedings on that appeal were settled. However, by a resolution of April 18, 2008 the OSPJN ruled the termination of their membership, and the Seventh Court denied the issue of a restraining order as it believed that the petitioner's exclusion from the benefit society did not constitute a violation of fundamental rights and that the evidence filed was insufficient to prove the violation of a right or any risk in the delay.

9. On April 24, 2008, Mr. Tiscornia impugned the Seventh Court's denial together with the OSPJN's decision to exclude him and his family from its health insurance plan, claiming that the Discipline Tribunal decision to remove him from the judiciary was not final yet, because a complaint still pending settlement. Thus, again he requested a precautionary measure. Nevertheless, on July 17, 2008 the Third Chamber of the National Civil Economic Court upheld the denial to issue a precautionary measure, based on the fact that the alleged victim had failed to prove in the case that the motive of his exclusion from the OSPJN was manifestly arbitrary or illegal. To challenge this ruling, the petitioner filed a special federal remedy on August 11, 2008. On September 18, 2008, the Third Chamber admitted it for processing, specifically regarding his claims of federal relevance (the purported violation of international treaties on human rights).

10. In this context, the petitioner comes before the IACHR to claim that he has been a victim of political persecution and, as a result, he has been removed from his job as a federal judge and defamed in the media, and that this has even affected his family, as they were deprived of the health insurance plan that he used to hold at the OSPJN. He complains that these acts of retaliation are a direct consequence of his work as a judge in the investigation into serious acts of corruption that involved high government officials.

11. Lastly, he alleges that by virtue of article 60 of the Argentine Constitution, removed judges are automatically disqualified from holding any public office in the future; thus, he believes that the punishment established in this article is comparable to the one set forth in the Criminal Code of Procedure for offenses against public administration in such a way that it appears a criminal punishment instead of a mere administrative penalty. He submits that this comparison of penalties equates impeachment with criminal proceedings. Likewise, he calls into question the nature of the Discipline Tribunal established by the new Law 26080 of 2006, considering that the change in the representation of the different groups has led to a political rather than an academic predominance, hence proceedings are now a type of impeachment proceedings

instead of a trial by jury, as the 1994 constitutional reform had originally established; and that, therefore, Law 26080 has distorted the balance or diversity of the represented groups required by article 114 of the Argentine Constitution for the constitution of the Judicial Council.

12. In turn, the State of Argentina claims that Mr. Tiscornia had the opportunity to challenge the Discipline Tribunal's decision before the Supreme Court of Justice by filing a claim for the alleged violation of his right to a fair trial, which the State believes was thoroughly studied by the Supreme Court. Consequently, the alleged lack of remedies to challenge the jury's decision is groundless because the petitioner's complaint was settled by the National Supreme Court.

13. As regards that petitioner's allegation about the purpose of disqualification from holding any public office, the State stresses that said provision is nothing other than a logical consequence of the removal of a judge in view of the seriousness of the charges leading to such measure; that, otherwise, it would be possible to reinstate judges who committed serious offenses. Moreover, in regard to impeachment in Argentina, it asserts that this is a procedure aimed at removing from office certain public officials and judges on grounds of failure to perform their duties or the commission of certain offenses; and that in the case of judges of the lower courts, like the petitioner, the established trial differs from impeachment because the law sets forth that judges of the lower courts will hold their offices during their good behavior and will be removed on the grounds specified in article 53 of the National Constitution, by a Discipline Tribunal in order to remove judges who fail to perform their duty to serve and thus not harm the public interest.

14. The State also claims that trials and removal proceedings against judges were initially seen as political affairs not liable to trial in a court of justice. It explains that this has changed over time because the Supreme Court's case law has established the precedent of "Nicosia" case, under which decisions made by the Senate in the framework of an impeachment are liable to federal review by the CSJN when the official's right of defense or the basic constitutional rights of due process of law are manifestly infringed.

15. Additionally, the State indicates that in November 2015 the Second Chamber of the National Administrative Court of Appeals ruled that Law 26080 was unconstitutional in view of a lawsuit filed by the Buenos Aires Bar Association. Therefore, the State affirms that Mr. Tiscornia had the opportunity to report it in the special federal remedy he filed and in the subsequent special complaint finally settled by the CSJN, which in principle would have led to the annulment of the removal proceedings against him; but as he failed to do so, he cannot seek to bring to the international venue a new act that the State did not hear in the substantiation in the domestic proceedings.

16. Lastly, the State invokes the doctrine of a fourth-instance body, according to which the IACHR is not entitled to review judgments issued by domestic courts that work within their jurisdiction and implement the right to a fair trial unless a violation is found in regard to a right enshrined in the Convention, which in the State's view does not apply to the instant case. To conclude, it disputes the admissibility of this petition based on the fact that the IACHR notified the State seven years after the petition was filed by the petitioner.

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

17. In regard to the exhaustion of the domestic legal remedies presented by the petitioner concerning his removal from office as a national judge of the Seventh National Criminal Economic Trial Court of the Federal Capital after a Discipline Tribunal Hearing, the Inter-American Commission believes that he exhausted all the legal remedies available in the domestic framework, including special remedies, which were settled by the Supreme Court's final resolution of June 30, 2009. The State, for its part, does not allege lack of exhaustion of domestic remedies but it does question the fact that the petitioner did not report the unconstitutional nature of Law 26080 in the special remedies he filed. In this regard, the Commission notes that the Supreme Court of Justice rejected the petitioner's special complaint based on the unappealable nature of the Discipline Tribunal's decisions, in accordance with the National Constitution. Therefore, the Commission believes that regardless of the hypothetical possibility presented by the State, Mr. Tiscornia did

exhaust the domestically available legal remedies under the terms of Article 46.1.a of the American Convention.⁶

18. As to the petitioner's allegation about the membership termination of the health insurance plan he held at the judicial benefit society, which included his immediate family, Mr. Tiscornia proves that he exhausted a series of remedies, from requests to that institution to a judicial complaint settled by the Third Chamber of the National Federal Civil Economic Court on July 17, 2008 through an unfavorable ruling for Mr. Tiscornia. In this regard, the Inter-American Commission takes into account such procedural activity of the petitioner; however, it notes that the termination of his membership in the health insurance plan is a direct and logical consequence of his removal, which is the principal complaint he brings before the IACHR. Thus, since the domestic remedies were exhausted by the Supreme Court's final resolution of June 30, 2009, this requirement is declared met regarding the instant complaint about the health insurance.

19. As to the timeliness requirement, the Commission notes that the petition was submitted on August 9, 2007 and that the domestic remedies were definitely exhausted on June 30, 2009; therefore, the instant petition meets the requirement established in Article 46.1.b of the American Convention. The State did not submit allegations regarding the time of presentation.

20. The Inter-American Commission also takes note of the State's claim about the failure to refer the petition within the stipulated period. In this regard, the IACHR indicates that after receipt there is no deadline for the referral of petitions to the State, under the American Convention and the Commission's Rules of Procedure, and that deadlines established by the Rules and the Convention for other stages in the processing do not apply by analogy.

VII. ANALYSIS OF COLORABLE CLAIM

21. The Inter-American Commission notes that, based on the information submitted by the parties, the acts reported by the petitioner, consisting in his arbitrary removal from office as a federal judge and disqualification from holding public office in the future as a result of a trial in single instance of jurisdiction, in which, *inter alia*, he was deprived of the due exercise of his right of defense and he and his family were excluded from the OSPJ, all could *prima facie*⁷ establish violations of the rights enshrined in Articles 8 (Fair Trial), 23 (Participation in Government) and 25 (Judicial Protection) of the American Convention, in relation to its Articles 1.1 (Obligation to Respect Rights) and 2 (Domestic Legal Effects), to the detriment of Mr. Guillermo Juan Tiscornia. As well as Article 26 (Economic, Social and Cultural Rights) of the American Convention, in relation to its article 1.1, to the detriment of Mr. Tiscornia and his family.

22. As regards the allegations of violations of Article XIV ((Work and Fair Remuneration)) of the American Declaration, the IACHR has previously established that once the American Convention enters into force with respect to a State, it is that instrument, and not the Declaration, that becomes the specific source of law to be applied by the Inter-American Commission, provided that the petition alleges violations of rights of identical substance upheld by both instruments. Thus, considering that Article 26 of the American Convention refers broadly to the economic, social and cultural rights, and that these rights should be analyzed in relation to the OAS Chart and other relevant legal instruments. Therefore, the IACHR deems that alleged violations of the American Declaration in relation to the Article 26 of the Convention, the analysis of its interplay and common scope should be made at the merits stage.

23. In this petition, the Commission has analyzed the American Declaration rights invoked by the petitioners in light of the American Convention.

⁶ This analysis is consistent with that drafted by the Commission in regard to other precedents of judicial officials removed in Argentina, such as in: IACHR, Report No. 104/17, Petition 1281-07, Admissibility, Mirta Carmen Torres, September 7, 2017, par. 9; and IACHR, Report No. 56/16, Petition 666-03, Admissibility, Luis Alberto Leiva, December 6, 2016, paras. 31 and 32.

⁷ This analysis is consistent with that drafted by the Commission in regard to other precedents of judicial officials removed in Argentina, such as in: IACHR, Report No. 104/17, Petition 1281-07, Admissibility, Mirta Carmen Torres, September 7, 2017, par. 9; and IACHR, Report No. 10/16, Petition 387-03, Admissibility, Carlos Andrés Fraticelli, April 14, 2016, paras. 53 and 54.

24. In regard to the complaint about the purported infringement of Article 11 (Privacy) of the American Convention, the Commission notes that the petitioner has not presented allegations or enough evidence to *prima facie* consider its possible violation.

25. Then, as to the International Covenant on Civil and Political Rights, the Commission is not competent to determine violations of the rules of said instrument. However, the IACHR may consider it for interpretation purposes of the American Convention at the merits stage of this case, pursuant to Article 29 of the American Convention.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 8, 23, 25 and 26 of the American Convention, in connection to its Articles 1.1 and 2, and Article XIV of the American Declaration;

2. To find the instant petition inadmissible in relation to Article 11 of the American Convention;
and

3. To notify the parties of this decision; to continue with the analysis on the merits; 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 in the city of Santo Domingo, Dominican Republic, on the 5th day of the month of May, 2018. (Signed): Margarette May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Luis Ernesto Vargas Silva, Second Vice President; Antonia Urrejola and Flávia Piovesan, Commissioners.