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REPORT No. 234/24
PETITION 749-15
INADMISSIBILITY REPORT

FUNTIERRA REHABILITACIÓN S.A.S.
COLOMBIA

Approved electronically by the Commission on December 10, 2024.

Cite as: IACHR, Report No. 234/24. Petition 749-15. Inadmissibility. Funtierra Rehabilitation S.A.S.. Colombia. December 10, 2024.

I. PETITION DETAILS

Petitioner:	Funtierra Rehabilitation IPS S.A.S.
Alleged victim :	Funtierra Rehabilitation IPS S.A.S. ¹
Reported status:	Colombia ²
Rights invoked:	Articles 4 (life), 5 (humane treatment), 17 (protection of the family), 19 (rights of the child), and 26 (economic, social, and cultural rights) of the American Convention on Human Rights ³ ; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities; and Inter-American Convention against All Forms of Discrimination and Intolerance

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	June 10, 2015
Additional information received during the study stage:	October 25, 2016, January 18, 2017, July 13, 2020, July 14, 2022, and December 28, 2022
Notification of the petition to the State:	May 4, 2022
The State's Response:	October 3, 2022
Additional Observations of the Petitioner:	November 2, 2022

III. COMPETENCE

Competence <i>Ratione personae</i>:	No, in the conditions set forth in Section VI
Competence <i>Ratione loci</i>:	Yes
<i>Ratione Temporis</i> Competence:	Yes
Competence <i>Ratione materiae</i>:	Yes, the American Convention (deposit of the instrument of ratification made on July 31, 1973)

IV. DUPLICATION OF PROCEEDINGS AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIME LIMIT FOR SUBMISSION

Duplication of proceedings and international res judicata:	No
Rights declared admissible:	None
Exhaustion of domestic remedies or admissibility of an exception:	N/A
Submission within the deadline:	N/A

¹ The initial petition identifies as alleged victims more than 500 children and adolescents with disabilities, users of the Health Provider Institution Funtierra Rehabilitation S.A.S.; however, after reviewing the case, the Commission has determined that the object of the petition is the continuation of the provision of health technology services by that institution, therefore, it has established that the alleged victim in this case is Funtierra Rehabilitación S.A.S.

² In accordance with the provisions of Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Carlos Bernal Pulido, a Colombian national, did not participate in the debate or decision in this case.

³ Hereinafter "the American Convention" or "the Convention."

⁴ The observations of each party were duly forwarded to the opposing party. Along with the initial petition, the petitioner asked the IACHR to grant precautionary measures in favor of the alleged victims, a request that was registered under number MC-953-16, but that on January 31, 2019, was deactivated due to lack of updated information on the reported situation.

V. POSITION OF THE PARTIES

The petitioner

1. The Health Provider Institution (hereinafter "IPS") Funtierra Rehabilitación S.A.S. denounces that the government of the department of Córdoba made the decision to stop paying for and authorizing rehabilitation treatments and therapies in favor of children with disabilities under the State subsidized regime of public healthcare and has failed to comply with several tutela judgments that ordered it to restore such services.

2. The petitioner explains that Funtierra Rehabilitation IPS is the entity in charge of providing health rehabilitation services for persons with disabilities in the department of Córdoba, linked to different Health Promoting Entities (hereinafter "EPS") of the subsidized regime.⁵ It relates that Funtierra has carried out the treatments of therapies not included in the Mandatory Health Plan (hereinafter "POS") of neurodevelopment and neurorehabilitation since 2012 in favor of the population of the subsidized health regime of the department.

3. It narrates that since November 6, 2014, the Ministry of Health of the department of Córdoba, illegally, stopped receiving requests for authorization of 'health technology' procedures, such as physical therapy based on neurodevelopment, occupational therapy based on neurodevelopment, speech therapy based on neurodevelopment, myofunctional therapy, and sensory-motor integration; provided by the IPS to more than 500 children with disabilities.

4. As a result, the petitioner states that the legal representatives of the children filed several tutela actions for violation of the rights to life, health, and special protection measures in favor of the children, which were heard by the following judicial authorities: Second Criminal Court of the Montería Circuit, Sixth Oral Administrative Court of the Judicial Circuit of Montería, First Criminal Court of the Circuit for Adolescents with Function of Knowledge of Montería, Second Civil Court of the Circuit of Montería, First Criminal Court of the Circuit of Montería, First Administrative Court of the Judicial Circuit of Montería, First Civil Court of the Circuit of Montería, Civil Court of the Circuit of Loricá, and the Promiscuous Family Court of Planeta Rico.

5. The petitioner states that the petitions for protection were granted in favor of the patients, whereupon the judges ordered the department's Secretary of Health to authorize and pay for the comprehensive treatment required by the children within 48 hours of notification of the judgments. They also authorized the collection of expenses by the IPS to the Solidarity and Guarantee Fund of the General Health Security System of Colombia (hereinafter "FOSYGA") to avoid the economic deterioration of the provider institutions.

6. However, the petitioner asserts that the government of Córdoba has not complied with the orders issued, because it makes an arbitrary and erroneous interpretation of Statutory Health Law No. 1751 of 2015, according to which it is not the responsibility of the departmental entity to authorize and pay for subsidized treatments outside the POS. In addition, the petitioner alleges that even when the department authorizes rehabilitation services, it takes approximately seven months to pay the IPS in charge, which

⁵ In Colombia, there are two regimes of healthcare. One is the contributory regime, where people who pay to the General Health System receive their healthcare services. These can be provided by either a public or private Health Promoting Entity ("EPS") to which each person is subscribed and pays to each month for their health care. Secondly, there is a regime subsidized by the State, for those people in a situation of economic vulnerability who are unable to pay to the General System of Health Services. In the subsidized regime, users are subscribed to EPS contracted and paid for by territorial entities (departments and municipalities) to serve the non-contributing population, and the EPS, in turn, contract the services of different IPS (which can be public or private) for the provision of outsourced health services, with prior authorization from the municipalities and departments.

The EPS are in charge of covering health services included in the Mandatory Health Plan ("POS"), which they must provide and pay for; but, when the treatments or medicines are outside the POS and their provision becomes necessary to guarantee the health of the people in the subsidized regime, they can be ordered by means of a tutela ruling (a constitutional writ), so that the EPS provide such services, the payment of which is borne by the territorial entities in halves with the Solidarity and Guarantee Fund of the General Health Security System of Colombia ("FOSYGA"). If this happens in the contributory regime, the contributor must pay for the expense of the 'non-POS' services.

generates serious economic damage in the provision of the therapies because the professionals who perform them do not obtain payment of their monthly salary and the IPS are in a deficient financial situation. because of the omissions of the governorate.

7. In subsequent communications, it reports that as of July 1, 2016, Funtierra Rehabilitation IPS temporarily closed its services, despite the tutela rulings and incidents of contempt exercised by both the parents of the children, and by IPS Funtierra itself.

8. In response to the State's observations, the petitioner argues that although the Constitutional Court revoked and rejected the tutela action filed by Funtierra because it was not the mechanism for raising pecuniary claims for debts owed by the government; the IPS subsequently resorted to the route provided for by domestic legislation, that is, the lawsuit before the Superintendence of Companies, which was accepted by that entity, ordering the government of Córdoba to pay debts for the health services rendered by Funtierra. This decision was confirmed in a nullity process before the contentious-administrative jurisdiction and in a subsequent popular action, both promoted by the governor's office, the latter of which was declared inadmissible by the Council of State on November 23, 2022.

9. In addition, the petitioner maintains that although the Constitutional Court certified copies so that Funtierra could be investigated for possible acts of corruption and fraud, that court had no jurisdiction to conduct such investigations and trials with respect to the facts. It emphasizes that the Comptroller's Office opened a financial investigation against the IPS, but archived it by order of November 1, 2019, so it became *res judicata*. It also points out that there are proceedings against Funtierra before the Attorney General's Office, and reports that the government of Córdoba ordered an audit of the IPS by the University of Cartagena aimed at certifying the validity of the enforceable debts that had already been recognized as valid by the jurisdictional ruling of the Superintendence of Corporations. However, on June 2, 2021, through a ruling, it was the Superintendence of Companies that recognized the legality of the enforceable debts and in this sense ordered compliance with the obligations arising from them.

10. Finally, the petitioner asks the IACHR "to review the violation of the fundamental rights to health of the children of Córdoba, who, with the excuse of the alleged acts of corruption already reviewed and ruled on by different authorities, have been deprived of treatments that improve their living conditions."

The Colombian State

11. The State, for its part, replies that this petition is inadmissible, since the true claim of IPS Funtierra Rehabilitation is the payment of irregular debts by the government of Córdoba, using as a pretext the violation of the right to health of children with disabilities, for which reason, the alleged victim in this case is a legal person; consequently, the IACHR lacks competence *ratione personae* to hear this matter. On the other hand, it raises the failure to exhaust domestic remedies and the inadmissibility of the petition due to the configuration of the so-called 'formula of the fourth international instance'.

12. With respect to the facts, Colombia clarifies that these were known by the Constitutional Court in the review of several tutela actions instituted both by the parents of children who use the IPS, and the one submitted by Funtierra. Thus, through Judgment T-563/19 of November 20, 2019, the Constitutional Court determined that the children involved were treated by private doctors, outside the general health system (EPS of the subsidized regime), who diagnosed them with some type of physical, sensory or cognitive alteration and prescribed specialized therapies that are not within the offer of the state health system, but in private IPS such as Funtierra Rehabilitación, which has no ties to the EPS to which the children were affiliated.

13. The State notes that some IPSs, as indicated by the Constitutional Court, established direct contact with the patients' caregivers and participated very actively in the judicialization of the controversy so that the judges would order the specialized therapies to be carried out by these IPS, without being subject to the controls and restrictions of the EPS, not even in regulatory fee matters. This led more than 500 children to request different courts through tutela actions to declare the violation of their right to health and to order the performance of specialized therapies at the expense of the Secretary of Health of the Government of Córdoba.

Thus, several judges from the municipalities of Lorica, Planeta Rico, San Carlos, Cereté and Montería recognized the right of children to receive specialized treatments provided by Funtierra Rehabilitation IPS SAS, since 2012, paid for with resources from the Government of Córdoba because they are benefits excluded from the POS of people belonging to the subsidized regime. With this, the IPS became *de facto* and without any contract, the supplier of health technologies and services of the department.

14. For this reason, the State narrates that, when the Government stopped authorizing therapy services, IPS Funtierra Rehabilitation filed a tutela action in February 2016, arguing the violation of the rights of nearly 500 children who use its services. However, the State notes that, in the tutela proceeding, it was established that the government had assumed the full cost of specialized therapies which were included in the POS that had to be paid by the EPS. In this way, it considered that the IPS intended to "*extract health resources without being subject to the system of controls and verifications carried out by the EPS, through the prescription of treatments classified as outside the POS*". In the case of IPS Funtierra, the State remarks that the Office of the Comptroller General concluded that the services provided to hundreds of children under the subsidized regime were covered by tutela rulings that ordered the provision of services classified as "NOT POS" because they included therapies based on neurodevelopment or neurorehabilitation, despite the fact that they were physical therapies provided for in the POS, as well as speech therapy or psychology sessions that only had a special methodological component, all with the purpose of excluding the mediation of the EPS, and to 'negotiate' freely and directly with the territorial entities, and extract public resources from them.

15. Colombia reports that on August 3, 2016, the Superior Court of the Judicial District of Montería heard the tutela action filed by Funtierra, and denied the constitutional protection requested in the first instance on the grounds that it was inadmissible, because it found that there were two active proceedings in the ordinary jurisdiction with the same claims, so it considered that the tutela was not a parallel mechanism to decide the same matter. The State adds that the petitioner filed an appeal challenging that decision, but it was denied in the second instance by the Criminal Cassation Chamber of the Supreme Court of Justice on September 15, 2016. On this occasion, the Chamber determined the lack of standing of the IPS to represent the child patients in the judicial process, especially since constitutional actions filed by the parents of each patient were already known.

16. Finally, the State reports that the tutela action reached the Constitutional Court, and the latter joined the Funtierra case with several files of actions brought by the relatives of the children who requested the order of specialized therapies by the Secretary of Health of the Government of Córdoba. Thus, on November 20, 2019, it issued Judgment T-563/19. Colombia cites that the Constitutional Court found that:

[A]ccording to some of the relatives of the children who were treated at the IPS Funtierra, this entity not only provided them with the therapies requested in the tutela actions, but also, prior to that, contacted the patients through home visits, informative talks in educational centers, telephone calls or contacts through different intermediaries. informing them of the possibility of free access to the services of the health center through the filing of a tutela action that the same entity would promote in the judicial courts, and, once they accepted, it filed the constitutional actions. Some parents say that their only intervention in the judicial process consisted of "signing some papers" and presenting a copy of their citizenship card and the patient's identity card or civil registry to the IPS, which would have directly managed the tutela actions. Some parents even stated that they were unaware that constitutional injunctions had been filed on their behalf." [Emphasis added]

17. Thus, the Constitutional Court warned that this action by the IPS Funtierra Rehabilitation had been an inappropriate conduct, because it did not allow the EPS to which the children were affiliated to evaluate their condition and establish the required treatment, and whether it was included or not in the POS; in addition to the fact that there were inconsistencies between the true medical diagnoses and those alleged in the tutela action. In view of the above, the Constitutional Court established that the real purpose of Funtierra's tutela action was to maintain its status as a provider of specialized treatments for children with disabilities under the subsidized regime in some municipalities, which were also available in the subsidized EPS, invoking the rights of its patients. For this reason, the Constitutional Court denied the action, considering that the IPS lacked legitimacy to represent the children who used their treatments, and certified copies to the control entities so that they could investigate possible criminal acts or breaches of medical ethics committed by said entity.

18. In view of the foregoing, the State argues that the true purpose of this petition lies in the intention of Funtierra Rehabilitación IPS SAS that the State pay the monies allegedly owed to it and order the Government of Córdoba to continue authorizing the specialized therapies that were ordered in tutela judgments that, as the Constitutional Court was able to determine, were obtained irregularly. Consequently, it contends that the Commission lacks personal jurisdiction to hear this matter, since it is a petition where the alleged victim is a legal person, as Funtierra Rehabilitación IPS SAS intends, once again, to instrumentalize the children to claim economic obligations that favor only the entity. The State emphasizes that this follows from the fact that the contact details of the alleged victims and their representatives are those of the IPS, and that several annexes were signed by the legal representative of the legal entity.

19. On the other hand, Colombia maintains that the petitioner IPS has not exhausted domestic remedies, in accordance with the admissibility requirement set forth in Article 46(1)(a) of the American Convention. It emphasizes that this requirement is consistent with the principle of subsidiarity of the Inter-American Human Rights System so that States are given the opportunity to repair and remedy the situation before resorting to international bodies. In this regard, it argues that the mechanism that the petitioner should have exhausted was the executive process for the collection of the debt against the government of Córdoba; however, he has not proven that he has resorted to that route, so the petition becomes inadmissible.

20. Finally, the State asserts that in this case the so-called 'fourth instance formula' is configured, since the petitioner seeks to have the judgment handed down by the Constitutional Court reviewed and revoked, despite the fact that the process respected the right to a fair trial. It recalls that the Inter-American Commission does not have the faculty to review the rulings issued by the national courts acting within its sphere of competence, and in application of the guarantees of the Convention. It understands that, under inter-American jurisprudence, the petition is only admissible when it concerns the violation of a right contained in the American Convention, and, in the instant case, the petitioner does not demonstrate that there is a violation of rights, but bases its complaint on a mere disagreement with the judicial decision. Therefore, it considers that the petition is inadmissible under the terms of Article 47(b) of the American Convention.

VI. ANALYSIS OF THE COMPETENCE OF THE IACHR

21. The Commission observes that the State contends the lack of competence by reason of the person. In this regard, it argues that the present petition covers a matter whose alleged victim would be a legal person. The petitioner does not comment on this argument and limits itself to pointing out that Funtierra exhausted domestic remedies for the payment of the debts.

22. The Commission recalls that, as a general rule, Article 1(2) of the American Convention establishes that only human beings are entitled to the rights protected therein. On this understanding, the Commission has followed the criterion of interpretation of Article 44 of the American Convention, requiring that in order for a petition to be admissible, there must be specific, individualized, and determined victims, or they must refer to a specific and defined group of victims composed of determinable individuals.⁶ This excludes complaints alleging violation of the rights of legal persons.⁷

23. The receipt of petitions alleging acts to the detriment of legal persons is a significant trend in the Inter-American System, which must be assessed on a case-by-case basis. However, the organs of the Inter-American System have established some important parameters in this regard, for example, that the person who has to suffer the violation of rights must ultimately be a human person; that domestic judicial remedies, in principle, must be exhausted in order to seek the protection of human persons as victims; and that in some cases, certain legal persons, such as the media, trade unions or political parties, are indispensable platforms for the exercise of the rights of natural persons, which should be a fundamental consideration in the analysis of the respective case.

⁶ IACHR, Report No. 57/08, Petition 283-06. Inadmissibility. Mario Roberto Chang Bravo. Guatemala. July 24, 2008, para. 38.

⁷ IACHR, Report No. 83/05, Petition 644-00. Inadmissibility. Carlos Alberto López Urquía. Honduras. October 24, 2005, para. 42.

24. Thus, the Inter-American Court, in its Advisory Opinion 22 of February 26, 2016, referred extensively to this issue, and reiterated as a fundamental principle that, in many situations, the rights and obligations attributed to legal entities are resolved in rights and obligations of the natural persons who constitute them or who act on their behalf or representation.⁸ It also established that the exercise of the right through a legal person must involve an essential and direct relationship between the natural person that requires protection by the Inter-American System and the legal person through which the violation occurred, since a simple link between the two persons is not sufficient to conclude that the rights of natural persons and not of legal persons are effectively being protected. Indeed, it must be proven beyond the simple participation of the natural person in the activities of the legal person, so that such participation is substantially related to the rights alleged to have been violated.⁹

25. In the instant case, the Commission takes note of the petitioner's allegations regarding the direct impact on the right to health of more than 500 children with disabilities who were users of the rehabilitation therapies provided by IPS Funtierra. However, the petitioner has not provided updated information on the situation of children with disabilities since the closure of Funtierra in 2016, and whether they are receiving therapy in other institutions.

26. On the contrary, the State has affirmed that the rehabilitation therapies required by children and children who were users of the IPS are available in the EPS of the subsidized regime because they are part of the POS; in particular, it reports that the Constitutional Court found that several EPS in the judicial process, indicated that these special therapies within "have been attributed to the public health system", and if their provision is not adequate, patients can file a claim before the National Health Superintendence.

27. Consequently, and in view of the lack of information about the current requirements and treatments that are being received by the children who were previously patients of the IPS, the Commission concludes that the alleged victim in this case is, in fact, the legal entity Funtierra Rehabilitación S.A.S. And in view of the fact that the petitioner has not demonstrated that the failure of the Government of Córdoba to pay for the services provided by the Government of Córdoba to this legal person affects the rights to health of the children who currently receive their rehabilitation treatments by other means; the Commission considers that it lacks competence *ratione personae* to hear the present case, under the terms of Article 1(2) of the American Convention.

VII. DECISION

1. To declare the petition inadmissible.
2. To notify the parties of this decision; and 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 10th day of the month of December, 2024. (Signed:) Roberta Clarke, President; Edgar Stuardo Ralón Orellana, Arif Bulkan, and Gloria Monique de Mees, Commissioners.

⁸ Inter-American Court of Human Rights. Ownership of rights of legal persons in the Inter-American Human Rights System. Advisory Opinion OC-22/16 of 26 February 2016. Series A No. 22, paragraph 111.

⁹ Inter-American Court of Human Rights. Ownership of rights of legal persons in the Inter-American Human Rights System. Advisory Opinion OC-22/16 of 26 February 2016. Series A No. 22, para. 119.