

Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 14/09; Petition 406-03
Session: Hundred Thirty-Fourth Regular Session (16 – 27 March 2009)
Title/Style of Cause: Miguel Ignacio Fredes Gonzalez and Ana Andrea Tuzcek Fries v. Chile
Doc. Type: Decision
Decided by: President: Luz Patricia Mejia Guerrero;
First Vice President: Victor Abramovich;
Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Paolo Carozza.
In keeping with Article 17(2) of the Commission’s Rules of Procedure, Commissioner Felipe Gonzalez did not participate in the deliberation and decision on this case.

Dated: 19 March 2009
Citation: Fredes Gonzalez v. Chile, Petition 406-03, Inter-Am. C.H.R., Report No. 14/09, OEA/Ser.L/V/II., doc. 51, corr. 1 (2009)
Represented by: APPLICANTS: the Centro Austral de Derecho Ambiental, the Clinica de Acciones de Interes Publico y Derechos Humanos of the Universidad Diego Portales, and the Organizacion de Consumidores y Usuarios de Chile

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I. SUMMARY

1. On June 3, 2003, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition that the Centro Austral de Derecho Ambiental [Southern Environmental Law Center], the Clínica de Acciones de Interés Público y Derechos Humanos [Human Rights and Public Interest Action Clinic] of the Universidad Diego Portales, and the Organización de Consumidores y Usuarios de Chile [Chilean Users and Consumers Organization] (hereinafter “the petitioners”)[FN2] lodged against the State of Chile (hereinafter “the State”) alleging violation of the rights recognized in articles 13 (freedom of thought and expression), 23(1) (right to participate in government), 25 (judicial protection) and 30 (scope of restrictions) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”), all in keeping with articles 1(1) (obligation to respect rights) and 2 (obligation of adopting domestic legislative measures) thereof and to the detriment of Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries (hereinafter “the alleged victims”).

[FN2] The Commission notes that the only petitioners listed in the September 12, 2006 communication were the Clínica de Acciones de Interés Público y Derechos Humanos de la

Universidad Diego Portales, the Centro de Derechos Humanos y Medio Ambiente, and Miguel Ignacio Fredes González.

2. The petitioners alleged that the State “violated the human rights of the above-named persons (Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries) and of all Chilean citizens by the unlawful restrictions it placed on the right to seek and receive information on biosafety, the release of living modified organisms [...] and genetically modified organisms [...], [and] violated their right to participate in public affairs on those subjects; it also failed to provide judicial protection.”[FN3]

[FN3] The petitioners’ communication of June 3, 2008, p. 2.

3. The State’s contention was that the petitioners have “turned to the Commission representing Chilean citizens as an abstraction, without identifying the person or persons alleged to have been victims of a [violation] of their rights of access to information and to participation in public affairs.”[FN4] The State argued further that the alleged victims failed to exhaust the remedies under domestic law that is a condition required for the Commission to declare a petition admissible. The State also observed that the facts alleged by the petitioners do not establish violations of the American Convention.

[FN4] The State’s communication of August 1, 2005, p. 14.

4. Without prejudging the merits of the matter, the Commission concluded that the petition is admissible with respect to the alleged violations of the rights recognized in articles 13 and 8(1) of the American Convention, in keeping with the general obligations undertaken in articles 1(1) and 2 thereof, to the detriment of the alleged victims. The Commission also concluded that the petition is inadmissible with respect to the alleged violations of articles 23(1) and 25 of the American Convention. The Commission decided to publish this decision and to include it in its Annual Report to the General Assembly of the Organization of American States.

II. PROCESSING WITH THE COMMISSION

5. The petition was received on June 3, 2003[FN5] and sent to the State on July 16, 2004. The State sent its comments on August 1, 2005. On September 12, 2006 the petitioners responded to the State’s observations.[FN6]

[FN5] On October 14, 2003, the petitioners supplied the Commission with additional information related to the petition.

[FN6] In that communication, Felipe González told the Commission that he was withdrawing as representative of the Clínica de Interés Público y Derechos Humanos of the Universidad Diego Portales, as he had been elected a member of the Commission.

6. On April 6, 2006, the organizations Article 19 – Global Campaign for Free Expression, Instituto Prensa y Sociedad [Press and Society Institute], Libertad de Información México [Freedom of Information Mexico], the Asociación Civil [Civil Association], and the Open Society Justice Initiative filed an amicus curiae.

III. POSITION OF THE PARTIES

A. The petitioners

7. The petitioners maintained that on June 28, 2001, Ana Andrea Tucek Fries and Miguel Ignacio Fredes González, among others, filed an information request with the Servicio Agrícola y Ganadero [the Agriculture and Livestock Service] (hereinafter “the SAG”), which is a department of the State’s Ministry of Agriculture. The request was filed to obtain the following information:

A. SAG Resolution 1,927 of 1993, on Rules and Regulations on the Release of Transgenics, whose source in law is Plant Health Decree No. 3557; SAG Resolution 269/99, which created the Advisory Committee on the Release of Transgenic Organisms [Comité Asesor para la Liberación de Organismos Transgénicos] (CALT); and Resolution 2004/00, which created the Advisory Committee on the Deliberate Introduction into the Environment of Living Modified Organisms, and any government action associated with those resolutions.

B. The documents used as the direct and essential basis or support for the SAG’s actions in connection with the aforesaid resolutions.

8. To make it easier to locate the information, the request filed with the SAG purportedly specified precisely which documents that the alleged victims wanted to access:

A. Clearances for release of transgenic crops and trees, with the name of the businesses involved, genetic modification and precise location of the transgenic crops and trees (plot, community, region) for the 1999/2000 season.

B. Clearances for release of transgenic crops and trees with the name of the businesses involved, genetic modification and precise location of the transgenic crops and trees (plot, community, region) for the 2000/2001 season.

C. Precise location of all sites where transgenic crops and trees have been released, from 1992 onward.

D. Biosafety measures for the transgenic crops and trees for the 1999/2000 season.

E. Biosafety measures for the following transgenic plants under the biosafety quarantine for the 2000/2001 season: sunflower, melon, potato, beet, corn and soy.

F. Resolution lifting the biosafety quarantine, from 1994 to the present, for transgenic corn and soy and the reasons why the quarantine was lifted.

G. Minutes of the meetings that the CALT has held since its creation in 1997 and all agreements and resolutions adopted.

H. Information on the SAG's inspection of the biosafety measures used for transgenic crops in the last two seasons (inspected plots, date and personnel involved).

I. Name of the experts that the CALT consulted about the release of transgenics and their reports.[FN7]

[FN7] The petition pointed out that in letters addressed to the SAG and dated October 18, 1999, August 3, 2000 and November 3, 2000, María Isabel Manzur Nasal had requested information on transgenic crops in Chile for the 1999/2000 and 2000/2001 season. The SAG had allegedly partially answered her requests.

9. The petitioners stated that when the information was requested, Ana Andrea Tuzcek Fries was working for the Asociación de Agricultores Orgánicos de Chile "Tierra Viva", while Miguel Ignacio Fredes González was an attorney for the Centro Austral de Derecho Ambiental. According to the petition, the alleged victims requested the information with the interest of "protecting the rights to life and to health when they were endangered, in cases such as threats to life, human and animal health, or agricultural activities, or when the location, zones, areas or plots where genetically modified organisms are produced, elaborated, or exported are unknown." In their request, the alleged victims also expressed that "the release of transgenic crops to the environment and their use as human and animal food involved certain risks for human health and the environment that were not totally studied or quantified." Finally, they mentioned that "the information related to transgenic crops and their location should be accessible to all citizens, as it was crucial for the exercise of the constitutional remedies established in Articles 19 paragraphs 8, 21 and 24 of the Constitution. The lack of knowledge of what was produced and of its direct effect on the environment could diminish the value of the soil (right to property), affect the quality of soil and water (right to live in an environment free of contamination), and disrupt the organic production of the same or other plot (right to develop an economic activity)"[FN8].

[FN8] Annex to petitioner's communication of October 14, 2003. Request of information presented before the SAG of June 28, 2001, p.1

10. The petitioners pointed out that the national director of the SAG did not answer the request within the time period stipulated in Law No. 18,575, as amended by Law No. 19,653.[FN9]

[FN9] Petitioners' communication of June 3, 2003, paragraph 35.

11. The petitioners maintained that on July 27, 2001, the alleged victims filed a civil action of "Amparo seeking protection of the right of access to public information." The action was filed

in Santiago's 26th Civil Court against the SAG, and invoked, inter alia, the right of access to information, upheld in Article 13 of the American Convention.

12. The petitioners indicated that on December 7, 2001, Santiago's 26th Civil Court ruled in favor of the petitioners. The Court cited, inter alia, Article 13 of the American Convention as the grounds for the ruling and ordered the SAG to provide the requested information within ten days. In reasoning the judgment, the Court held that "the factors that the SAG believes exempt it from having to provide the information at issue in this case are expressed in general terms and no supporting evidence was introduced that would enable the court to conclude [...] [that disclosing that information would affect] a public or private interest, [...] or that disclosure would affect the rights of third parties or obstruct or thwart the inspection that the SAG must do of transgenic crops and trees in the country." [FN10]

[FN10] Attachment to the petitioners' communication of October 14, 2003. Santiago's 26th Civil Court. Judgment of December 7, 2001, Consideranda paragraph 4.

13. The petitioners stated that on January 8, 2002, the SAG and the Asociación Nacional de Productores de Semillas A.G. de Chile [Chilean National Seed Producers Association A.G.] filed an appeal challenging the ruling of the court of first instance.

14. The petitioners observed that on December 4, 2002, the Santiago Court of Appeals reversed the ruling of the court of first instance. The appellate court held that "disclosure and the right to request information not permanently available to the public only applies in the case of government records and documents that are used as the direct and essential basis or support for the SAG's administrative actions and not just any background information that the government has on file concerning its measures or activities." [FN11] The Santiago Court of Appeals indicated that disclosure and access to information "only concerns businesses that provide public services; hence a civil action of "Amparo seeking protection of the right of access to public information" is out of order "in any case involving information or documents that a private business that is the purveyor of a public utility service provides to a government body." [FN12] Lastly, the Court pointed out that under Article 14 of SAG Exempt Resolution No. 1523 of 2001 [FN13] -based on Supreme Decree 26 of 2001-, the government itself had classified as confidential any documents that private parties supply to the SAG concerning modified species. Using this argument, the court concluded that the "background information, reports or data that private businesses supply to the [SAG] under Exempt Resolution No 1523 are confidential and not for public consumption." [FN14]

[FN11] Attachment to the petitioners' communication of October 14, 2003. Santiago Court of Appeals. Judgment of December 4, 2002, Consideranda paragraph 2.

[FN12] Attachment to the petitioners' communication of October 14, 2003. Santiago Court of Appeals. Judgment of December 4, 2002, Consideranda paragraph 3.

[FN13] The petitioners observed that Article 14 of Exempt Resolution No 1523 of 2001 (Establishing regulations governing the storage and introduction into the environment of living

modified plant organisms capable of propagation) provides that “the information contained in the request and in the attached documents shall be understood to be confidential and will only be used in the evaluation to authorize storage and the corresponding introduction into the environment of a modified organism that is either imported or developed within the country.” Emphasis added.

[FN14] Attachment to the petitioners’ communication of October 14, 2003. Santiago Court of Appeals. Judgment of December 4, 2002, Consideranda paragraph 5.

1. Apropos the exhaustion of the remedies under domestic law

15. The petitioners alleged that the December 4, 2002 ruling of the Santiago Court of Appeals exhausted the remedies under domestic law available with respect to the alleged violation of articles 13 and 30 of the American Convention. According to the petitioners, on the date the facts that are the subject of this petition occurred, the civil action for “Amparo seeking protection of the right of access to public information” was the remedy specifically prescribed by Article 14 of Law No. 18,575, as amended by Law No 19.653, for purposes of protecting the right of access to information that is in the possession of government agencies. The petitioners also noted that subparagraph (i) of Article 13 of Law No. 18,575, as amended by Law No 19.653, clearly provided that “a remedy of cassation may not be used to challenge a ruling delivered on appeal.”[FN15]

[FN15] The petitioners observed that at the time the events in the present case occurred, the right of access to information in the possession of the government was regulated by the following: (a) Law No. 18,575 (Constitutional Bylaws on General Principles of State Administration), amended by Law No.19,653 (on Integrity in Government Applied to the Organs of State Government), and (b) Supreme Decree No. 26 of 2001 (Regulations on the Secrecy or Confidentiality of the Government Records and Documents). According to the petition, Article 13 of Law No. 18,575, as amended by Law No. 19,653, provides that “within forty-eight hours of the date on which the application is filed, the head of the agency with which the application is filed must answer the request, either by supplying the requested documents or refusing to release them.” They also pointed out that Article 14 of Law No. 18,575, as amended by Law No. 19,653, provides that “once the time period stipulated in the preceding article for delivery of the requested document has expired or if the request is denied [...], the applicant party shall have the right to appeal to the then presiding civil judge in the jurisdiction of the requested government agency, to seek protection of the right recognized in the preceding article.”

16. Responding to the State’s argument set out in paragraph 26 below, the petitioners argued that exhausting the remedies under domestic law did not mean that they had to file a remedy seeking protection against the laws invoked in the ruling that they were challenging (especially in the case of Supreme Decree No. 26 of 2001). Their contention was that the remedy of protection did not enable an “abstract protection of rights” and, therefore, was not a suitable mechanism for challenging the legality or constitutionality of Supreme Decree No. 26 of 2001 or of any other government provision.

17. The petitioners argued that in Chilean legal literature and jurisprudence, the Remedy of Protection was only permissible in cases of government omission or oversight (when it failed to supply the requested information). They maintained, however, that even so, the remedy was still not permissible when a “special” action was available to protect the same right, as happened at the time of the events with the civil action of “Amparo seeking protection of the right of access to public information.” The petitioners pointed that had they filed a Remedy of Protection at the same time as the civil action of “Amparo seeking protection of the right of access to public information,” a *litis pendentia* would have been created; had the Remedy of Protection been filed after the amparo ruling, it would have been declared time barred.

18. As for the alleged violation of articles 23(1) and 25 of the Convention, the petitioners asserted that no “simple and prompt” recourse existed that would enable individuals to seek court protection “against violations of the right to participate in public affairs.”

2. Apropos the characterization of the alleged violations of the American Convention

19. The petitioners observed that the December 4, 2002 ruling of the Santiago Court of Appeals was a violation of Article 13 of the American Convention because “it disregarded the [scope of the] right to seek information, a right recognized in an international treaty on the subject of human rights.”[FN16]

[FN16] The petitioners’ communication of June 3, 2003, paragraph 107.

20. The petitioners alleged further that the ruling of the Santiago Court of Appeals relied on Article 13 of Law No. 18,575, as amended by Law No. 19,653,[FN17] and on Supreme Decree No. 26 of 2001. However, they observed, the judgment in question made no reference at all to the arguments made by the alleged victims and weighed by the court of first instance, regarding the content and scope of Article 13 of the American Convention and Article 19, paragraph 12 of the Chilean Constitution.[FN18]

[FN17] The petition states that Article 13 of Law No. 18,575, amended by Law No. 19,653, provides that:

The only grounds on which access to requested documents or background information can be denied are the confidentiality or secrecy required in laws or regulations; the fact that disclosure will impair or thwart proper performance of the requested agency’s functions; opposition, mounted in due time and proper form by third parties referred to in or affected by the information contained in the requested documents; the fact that circulating or providing documents will affect the rights or interests of third parties, which determination shall be made and duly justified by the head of the requested agency, and the fact that disclosure or circulation will be detrimental to the national security or national interest. One or more regulations shall

specify those cases in which documents and background information that government organs have in their possession are confidential or secret.

[FN18] The petition pointed out that the pertinent part of Article 19, paragraph 12 of the Chilean Constitution provides that “the Constitution shall ensure to all persons: [...] 12. Freedom to express opinions and to inform, without prior censorship and in any manner and by any means, notwithstanding a person’s responsibility to answer for the crimes and excesses committed in the exercise of these freedoms, as prescribed by law enacted by a qualified quorum.”

21. The petition alleges that the provisions on which the Santiago Court of Appeals relied are contrary to Article 13 of the American Convention, as they recognize disproportionate and needless exceptions to the right of access to information. Therefore, by failing to consider the arguments made with respect to the materiality and scope of Article 13 of the American Convention, the petitioners contend, the Chilean court ended up violating the alleged victims’ right of access to information.[FN19]

[FN19] The petitioners’ communication of June 3, 2003, paragraph 118.

22. The petitioners alleged further that Article 13 of Law No. 18,575, as amended by Law No. No. 19,653, and Supreme Decree No. 26 of 2001, violate the guarantee that any restriction of rights shall be by law, as recognized in articles 13(2) and 30 of the American Convention. They contend that whereas the Convention articles stipulate that any limitation on the rights and guarantees recognized in the American Convention shall be established by law, Article 13 of Law No. 18,575, as amended by Law No. 19,653, gives government officials the authority to decide which information is confidential and what information can be given to the public.[FN20] They further alleged that subparagraphs a) and b) of Article 8 of Supreme Decree No. 26 of 2001 (issued by the Ministry Office of the General Secretary of the Office of the President) based on that law, limited the right of access to information in much broader terms than the law itself.[FN21] In this regard, they stated that Supreme Decree No. 26 of 2001 (a) contained grounds for confidentiality over and above those prescribed by law; (b) it authorized heads of government agencies to declare government records confidential, and (c) extended the confidential classification by another 20 years, all in violation of articles 13(2) and 30 of the American Convention.

[FN20] According to the petitioners, the pertinent parts of Article 12 of Law No. 18,575, as amended by Law No. 19,653, read as follows:

Article 13. Civil servants shall observe the principle of government integrity and, in particular, the general and special legal provisions that govern it [...] [...]The only grounds on which access to requested documents or background information can be denied are the confidentiality or secrecy required in laws or regulations; the fact that disclosure will impair or thwart proper performance of the requested agency’s functions; opposition, mounted in due time and proper form, by third parties referred to in or affected by the information contained in the requested documents; the fact that circulating or providing documents will affect the rights or interests of

third parties, which determination shall be made and duly justified by the head of the requested agency, and the fact that disclosure or circulation will be detrimental to the national security or national interest.

One or more regulations shall specify those cases in which documents and background information that government organs have in their possession are confidential or secret. (Emphasis added).

[FN21] The petitioners stated that the pertinent parts of Article 8 of Supreme Decree No. 26 of 2001 provide that:

Article 8. The only records and documents that can be declared secret or confidential are those whose disclosure or circulation might affect some public or private interest of the governed, according to the criteria spelled out below:

a) The following records and documents shall be declared secret or confidential to protect public interests:

1. Those pertaining to national defense and security.
2. Those pertaining to foreign policy or international relations.
3. Those pertaining to monetary policy and foreign exchange.
4. Those whose disclosure could be harmful to the currency and to public credit.
5. Those that pertain to the preservation of public order and prevention and suppression of crime.
6. Those whose disclosure or circulation might be detrimental to the conduct of legal proceedings or the preliminary or preparatory proceedings that the law entrusts to government agencies.
7. Those whose disclosure or circulation might be detrimental to investigations or inquiries that the competent public services are conducting into crimes and violations of administrative, tax or customs law.
8. Those that, if known, could seriously impair or obstruct administrative action by the requested government body.
9. Official correspondence, duly classified by the proper authority pursuant to Interior Ministry Supreme Decree No. 291 of 1974.

b) The following records and documents shall be declared secret or confidential to protect the private interests of the governed:

1. Records by name that contain a value judgment or assessment of a certain person or a person who is clearly identifiable.
 2. Those that, if disclosed or known, could adversely affect the private life of a named or identifiable person.
 3. Files pertaining to punitive or disciplinary proceedings of any kind, only with respect to third parties unrelated to those proceedings.
 4. Medical or health files.
 5. Those that contain or refer to industrial and trade secrets, including manufacturing procedures, economic and financial information and trade strategies.
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23. As for Article 23(1) of the American Convention, the petitioners maintained that the State had violated the right of the victims and of all society to participate in the conduct of public affairs. Their contention was that the State had not “cultivated public policy that is truly

participatory in making decisions on regulations, institutionality and national obligations vis-à-vis biosafety and the release of transgenics.”[FN22] They also claimed that Article 23(1)(a) of the American Convention, in relation to Article 2 thereof, was violated by virtue of the fact that “in the entire Chilean legal system, there is no body of law that guarantees the right to participate in public affairs.” Their contention was that “the State [...] has failed to take the legislative measures or to introduce permanent institutional mechanisms in the country’s regions to guarantee citizens’ right to participate in the design and implementation of the policies, programs and actions that the State conducts to meet public needs.”[FN23]

[FN22] The petitioners’ communication of June 3, 2003, para. 142.

[FN23] The petitioners’ communication of June 3, 2003, para. 155.

24. In a related argument, the petitioners maintained that Article 25 of the American Convention was being violated by the fact that Chile’s juridical system does not offer a simple and prompt recourse to protect citizen’s right to participate in public affairs. The petitioners’ contention was that there was no judicial recourse that enabled citizens to challenge cases in which government agencies (a) failed to periodically circulate or publish information of public interest; (b) failed to provide a well-founded and timely response to civil society’s observations; (c) failed to consult civil society in cases in which state agencies were required to do so; (d) failed to take into account the observations forthcoming from civil society, or (e) failed to enact regulatory provisions that set consultation procedures in motion.

B. The State

1. Apropos the exhaustion of the remedies under domestic law

25. The State alleged that the petition did not satisfy the requirements of prior exhaustion of local remedies, and therefore asked the Commission to declare the petition inadmissible.

26. The State’s contention was that the petitioners had failed to exhaust the remedies under domestic law with respect to the allegation that Supreme Decree No. 26 was incompatible with articles 13(2) and 30 of the American Convention. In the State’s opinion, the alleged victims did not pursue any administrative or judicial avenue to challenge the lawfulness or constitutionality of Supreme Decree No. 26 of 2001. According to the State, the alleged victims did not raise the legality or constitutionality of that decree in either the application filed with the SAG or in the civil action of “Amparo seeking protection of the right of Access to Public Information.” The State argued that the alleged victims had simply requested information. For the State, one cannot make the case that with these measures the petitioners had pursued and exhausted the remedies under domestic law with respect to this particular claim in their petition. The State maintained that to exhaust local remedies with regard to Supreme Decree No. 26 of 2001, the petitioners should have filed a Remedy of Protection.

27. The State also asserted that the petitioners failed to exhaust local remedies with respect to the alleged violations of Article 23(1), in relation to articles 25 and 2 of the American

Convention. The State's contention was that the "petitioners did not take advantage of the effective and suitable remedies available, even though the Chilean domestic legal system affords such remedies to resolve, through the courts, the violations alleged by the petitioners." [FN24]

[FN24] The State's communication of August 1, 2005, p. 17.

2. Apropos the characterization of the alleged violations of the American Convention

28. The State's argument was that the petitioners' complaint was neither "concrete" nor "coherent". It asserted that the regulations then in force to govern access to information were consistent with international standards, as they spelled out, in detail, a procedure whereby private parties could gain access to information, and precisely what information was classified as confidential.

29. As for the alleged violation of Article 13 of the American Convention, the State observed that the petitioners turned to the IACHR simply to use an international venue to challenge a court ruling that had not gone in their favor. In the State's view, "this is not a case involving an alleged violation of a right protected by the American Convention; instead, it is a dispute over the conflicting interpretations rendered by the lower and higher courts." [FN25]

[FN25] The State's communication of August 1, 2005, p. 25.

30. The State further alleged that it did not violate Article 2 of the American Convention because, at the time of the events in this case, it had a sizeable body of rules and regulations governing access to information and participation in crafting public policy and that those regulations that conformed to the standards set by the inter-American system. The State also argued that issues related to transgenic policy or specific information that can be kept confidential or secret were regulated by the State and therefore beyond the Commission's purview.

V. ADMISSIBILITY

A. The Commission's competence *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

31. Under Article 44 of the American Convention and Article 23 of the Commission's Rules of Procedure, the petitioners, legally recognized nongovernmental entities, are legitimate parties to lodge petitions with the Commission with respect to possible violations of rights recognized in the American Convention. Further, Chile has been a party to the Convention since August 21, 1990, the date on which it deposited the respective instrument of ratification.

32. The petitioners asserted that the petition was lodged on behalf of Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries. Subsequently, however, the petitioners argued that “the Chilean State has systematically denied the right of access to information on these subjects to [the alleged victims] and, thus, to the entire Chilean citizenry”[FN26].

[FN26] The petitioners’ communication of June 3, 2008, p. 2. Emphasis added.

33. The State argued that “the generic reference to all Chileans as alleged victims of a violation of the rights protected under articles 13, 30 and 23(1) of the American Convention simply reinforces the position that, strictly speaking, there is no specific victim of human rights violations in this case, as the petitioners contend.”[FN27] The State maintained, therefore, that the requirement of jurisdiction *ratione personae* had not been satisfied, since from the facts in the case, one cannot identify specific individuals whose human rights were violated.

[FN27] The State’s communication of August 1, 2005, p. 14.

34. As reported in paragraphs 7 to 13 above, the petitioners contend that that Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries filed an application with the SAG requesting information and that no reply was forthcoming. The petitioners argue that Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries therefore turned to the Chilean courts. In first instance, the presiding judge granted the writ of “Amparo seeking protection of the right of access to public information” that Fredes and Tuzcek filed. The Court of Appeals, however, reversed the lower court’s decision and held that Fredes and Tuzcek did not have a right to access the information in question.

35. The IACHR observes that in the complaint, the petitioners clearly named Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries as the purported victims of the violations alleged in the petition. Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries are the persons who requested the information, and filed the judicial remedies to challenge the failure to provide that information. Therefore, in the instant case, the IACHR regards Miguel Ignacio Fredes González and Ana Andrea Tuzcek Fries as the alleged victims; hence, the Commission understands that the petition concerns their rights and is not, therefore, an abstract case.

36. Inasmuch as violations of rights protected by the American Convention are being alleged, said to have occurred within the territory of a State party thereto, the Commission has competence *rationi loci* to take up the petition. Furthermore, the obligation to respect and ensure the rights protected in the Convention was incumbent upon the State on the date on which the violations alleged in the petition were said to have occurred. Therefore, the Commission has competence *ratione temporis* to examine the case. Finally, the IACHR has competence *ratione materiae* because the petition alleges violations of human rights recognized in the American Convention.

B. Requirements for the petition's admissibility

1. Exhaustion of the remedies under domestic law

37. Article 46(1) of the American Convention provides that in order for a case to be admitted, "the remedies under domestic law [must] have been pursued and exhausted in accordance with generally recognized principles of international law." Paragraph 2 of that article provides that those provisions shall not apply when the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated, or the party alleging violation of his rights has been denied access to the remedies, or there has been unwarranted delay in rendering a final judgment under the aforementioned remedies. The Commission emphasizes that the State that invokes the objection asserting a failure to exhaust domestic remedies must show that there are adequate and effective domestic remedies that have not been properly exhausted.[FN28] Adequate domestic remedies "are those which are suitable to address an infringement of a legal right." [FN29] An effective remedy is one that is "capable of producing the result for which it was designed." [FN30]

[FN28] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, paragraphs 59 and 63.

[FN29] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 64.

[FN30] I/A Court H.R., Velásquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 66.

38. The State maintained that the alleged victims in the instant case failed to exhaust the remedies under domestic law vis-à-vis the alleged infringement of articles 13 and 30 of the American Convention allegedly embodied in Supreme Decree No. 26 of 2001. The State observed that in the instant case, not all the remedies available in the domestic legal system were exhausted to challenge the legality or constitutionality of Supreme Decree No. 26 of 2001. The State's contention was that the alleged victims failed to exhaust the Remedy of Protection, recognized in Article 20 of the Chilean Constitution. It maintained that the Remedy of Protection would have given a judge an opportunity to determine whether the decree conformed to the law or the Constitution.

39. In response, the petitioners maintained that in the instant case, the Remedy of Protection was not appropriate. They first point out that the remedy would not have been the appropriate course to challenge the legality or constitutionality of Supreme Decree No. 26 of 2001 in the abstract. Secondly, they point out that a special remedy created by Law No. 18,575, as amended by Law No. 19,653, could be used to challenge administrative omissions that resulted in a violation of the right of access to information. According to the petitioners, "although the State asserts that a local remedy exists that has yet to be exhausted, it fails to point out that with respect to information, the Remedy of Protection and the remedy of amparo both protect the same right of access to information; hence, it would be pointless (if not out of order) to file both remedies simultaneously." The petitioners contend that "when a remedy seeking access to public

information is filed, the Remedy of Protection need not be filed, since the special remedy embodies the protection that the general remedy is intended to afford. This has been the jurisprudence of the Santiago Court of Appeals time and time again, as it has declared inadmissible remedies of protection claiming violations of rights for which the law provides a specific review procedure or other appropriate procedure.”[FN31]

[FN31] The petitioners’ communication of September 12, 2006, pp. 29-30.

40. Based on these arguments the Commission asks whether, in the instant case, the Remedy of Protection to challenge Supreme Decree No. 26 of 2001 was necessary in order to exhaust the remedies under domestic law.

41. First, in order to invoke the Remedy of Protection, there must be some arbitrary or unlawful action that violates or threatens to violate one of the rights mentioned in Article 20 of the Chilean Constitution.[FN32] Consequently, the Remedy of Protection cannot be brought to challenge, in the abstract, Supreme Decree No. 26 of 2001.

[FN32] The petitioners stated that Article 20 of the Constitution of Chile provides that: An individual whose rights and guarantees under Article 19, paragraphs 1, 2, 3 (subparagraph 4), 4, 5, 6, 9 (final subparagraph), 11, 12, 13, 15, 16 with respect to the right to work, the right to a job of one’s choosing and the right to enter into contract, and the right provided under subparagraph four, and paragraphs 19, 21, 22, 23, 24 and 25 are denied, curtailed or threatened in any way by virtue of abusive or unlawful acts and omissions may -on his own or through another party acting in his behalf- turn to the respective court of appeals, which shall immediately order the measures it deems necessary to restore the rule of law and ensure that the affected party is duly protected, without prejudice to the other rights that he may assert with the corresponding authority or court.

The remedy of amparo may also be invoked in the case of paragraph 8 of Article 19, when the right to live in a pollution-free environment is violated by an unlawful act or omission imputable to some authority or individual.

42. Nevertheless, the Remedy of Protection was a proper recourse to challenge the administrative omission whereby the SAG failed to supply the alleged victims with the information they had requested. In effect, as the State asserts, the alleged victims could have pursued this avenue to have a court review Supreme Decree No. 26 of 2001. However, for reasons that will be explained below, in the instant case this remedy did not have to be pursued in order for internal remedies to be exhausted.

43. When the events at issue in this petition occurred, two alternative actions were available to question the government’s conduct with respect to the right of access to information: (a) the Remedy of Protection, which is a generic constitutional remedy, and (b) the civil action of

“Amparo seeking protection of the Right of Access to Public Information,” which is a special remedy.

44. As a judicial remedy exists that is specifically intended to guarantee the rights recognized in Article 20 of the Chilean Constitution, it was reasonable, based on the literature and domestic case law, for the alleged victims to have opted to file the special remedy and not the Remedy of Protection.[FN33] Filing both remedies simultaneously would have been improper procedure, as the two are mutually exclusive. Nor could the alleged victims have filed a Remedy of Protection once the civil action of amparo seeking protection of the right of access to information was decided since the Remedy of Protection must be filed within 15 days of the violation being alleged; therefore, had the alleged victims attempted to file the Remedy of Protection at that point, it would have been time barred. Finally, a Remedy of Protection is inadmissible against appellate court rulings. As previously explained, the law clearly states that no remedy is admissible to challenge appellate court ruling; furthermore, this particular remedy –the Remedy of Protection- cannot be used to challenge court rulings.[FN34]

[FN33] The petitioners’ communication of September 12, 2006, pp. 30-31. According to the petitioners, time and time again the Santiago Court of Appeals “has declared inadmissible remedies of protection claiming violations of rights for which the law provides a specific review procedure or other appropriate procedure.” They also maintained that “on other occasions, the mere existence of another legal avenue was deemed an impediment to filing the Remedy [of Protection].”

The petitioners cite various court rulings to make their point:

[I]n a 2002 ruling involving the case of someone who filed a Remedy of Protection when another person assaulted the alleged victim with a knife, the court held that a proper criminal proceeding was available for a complaint of this kind, but it was not the Remedy of Protection. The remedy was therefore declared inadmissible as manifestly groundless [Remedy of Protection, Court of Appeals, Case No.991-2002, Vilches Pérez Luís v. Ávila Víctor Manuel].

In other similar cases -cases involving domestic violence, for example- the Court has remanded the files to the proper Criminal Court, without taking judicial measures and without ruling on the matter [Remedy of Protection, Case No. 593-2002, Gallardo Velásquez Alida Ernestina v. Díaz Iglesias Raymond, Remedy of Protection, Court of Appeals, Case No. 1040-2002, Campos Pizarro Mercedes Luisa v. Catalán Vidal Patricio Enrique. Remedy of Protection, Court of Appeals, Case No. 1157-2002, Vilches Pérez Luís Alberto v. Ávila P. Víctor Manuel. Remedy of Protection, Court of Appeals, Case No. 702-2002, Aguayo Quezada Agapito v. Caja de Compensación de Asignación Familiar Los Héroes, Remedy of Protection, Court of Appeals, Case No. 994-2002, Sepúlveda Contreras María Inés v. Pica Riquelme Osvaldo].

In a case involving contract law, the Court reviewed the issues of admissibility and then threw out the remedy on the grounds that the facts alleged therein were issues relating to the validity or nonperformance of contracts, which it deemed should be heard by the court with jurisdiction over such matters [Remedy of Protection, Court of Appeals, Case No. 723-2002, Soto Fernández Silvio Virginio, Adolfo Luís, Julia Edith and Cecilia del Carmen v. Aranda Fernández Elba del Carmen].

In another case, a family filed a remedy of protection against a woman who intentionally arranged liquidation of an estate, declaring herself sole heir. The Court declared the case

inadmissible. In the Appellate Court's opinion, "the facts described [in the petition] do not fall within the boundaries of the Remedy of Protection, as they concern inheritance law and should be heard before the ordinary civil courts with jurisdiction over such matters.

[...]

By way of example, the author cites the following jurisprudence: "Because a specific procedure is in place for this case, namely the procedure provided for in transitory article 5 of Decree Law No. 1289, the Organic Law on Municipalities, this Court cannot agree to hear this Remedy of Protection [4.XI.86, Revista Gaceta Jurídica N° 80, p. 30 in Verdugo Johnston, Pamela. "El recurso de Protección en la Jurisprudencia" p. 43].

[FN34] The petitioners' communication of September 12, 2006, pp. 32-33. The petitioners observed that the "most legal writings and judges consider that the Remedy of Protection cannot be used to challenge court rulings [...]. [T]he argument is that allowing a challenge via that avenue would seriously upset the procedural system, as it would be tantamount to recognizing the existence of a suppletory remedy in addition to the set of remedies that the law provides; this could even cause litigation in the courts to collapse. Furthermore, to admit remedies against court rulings is a violation of the principle of res judicata, the principle of juridical certainty and stability and, ultimately, the constitutional structure of the judicial branch of government [Gómez Bernales, Gastón. Derechos fundamentales y recurso de protección. Ediciones Diego Portales. Escuela de Derecho. Santiago 2005, pp. 159-160]". They added that on the subject of whether the Remedy of Protection should be a proper means to challenge court rulings, Verdugo Johnston observes that "the trend in jurisprudence has been decidedly against allowing this remedy in such cases" [Verdugo Johnston, Pamela. "El recurso de Protección en la Jurisprudencia" p. 40. Editorial Jurídica, Santiago, 1988]". By way of example, an excerpt from a Supreme Court ruling is cited: "Whatever errors the judge hearing the case may have committed, whether they be procedural or material, those errors must be corrected by the remedies that the relevant statute provides or, absent any such statute, by the remedies that the general law applicable to the case affords [Cons. 3°, 5.VI.86. Revista Gaceta Jurídica No. 72, p. 31 in Verdugo Johnston, Pamela. "El recurso de Protección en la Jurisprudencia", p. 43]".

45. Based on the foregoing reasoning, the Commission concludes that the Remedy of Protection to challenge Supreme Decree No. 26 of 2001 did not have to be filed in order to exhaust the remedies under domestic law in the instant case. The Commission also considers that at the time of the events in this case, the civil action of "Amparo seeking protection of the Right of Access to Public Information" was the proper remedy to pursue to secure protection of the right of access to information in the sense of Article 13 of the American Convention.

46. The Commission therefore concludes that the petitioners exhausted the specific remedy that offered the possibility of court protection in those cases in which the authorities refused to disclose public information. It is the Commission's understanding, then, that the petitioners duly exhausted the available domestic remedies.

2. Time period for lodging a petition

47. Under Article 46(1)(b) of the American Convention, a petition must be lodged within six months from the date on which the party alleging violation of his rights was notified of the final

judgment that exhausted domestic remedies. In the instant case, the final judgment was delivered by the Santiago Court of Appeals on December 4, 2002. The petitioners lodged their complaint on June 3, 2003. The Commission therefore concludes that the petition was lodged within the period established in Article 46(1)(b) of the Convention.

3. Duplication of international proceedings and international res judicata

48. Nothing in the case file suggests that the subject of the petition is pending in another international proceeding for settlement or is substantially the same as one previously studied by the Commission or by another international organization. Thus, the requirements established in articles 46(1)(c) and 47(d) of the American Convention are deemed satisfied.

4. Characterization of the facts alleged

49. At this stage in the proceeding, the Commission does not determine whether or not the alleged violations of the rights recognized in the American Convention, to the detriment of the alleged victims, did in fact occur.

50. Under Article 47(b) and (c) of the American Convention, in the admissibility stage the IACHR must only determine whether the petition states facts that, if proven, could tend to establish violations of the rights recognized in the American Convention, or whether the petition is “manifestly groundless” or “obviously out of order.”

51. The standard for assessing admissibility is different from that for assessing the merits of a complaint. In the admissibility phase, the IACHR must conduct a prima facie evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of a right guaranteed under the American Convention. Such an evaluation is a summary evaluation and does not imply prejudgment or advance an opinion on the merits. By establishing two distinct phases –one on admissibility and the other on the merits-, the Commission’s Rules of Procedure reflect this distinction between the evaluation to be carried out by the Commission for the purpose of declaring a petition admissible and that required to establish whether a violation has taken place.

52. In the instant case, the State argues that the petitioners are trying to use the Commission as a court of fourth instance in order to change a court ruling that did not come out in their favor. The State’s position is that the present case does not raise any issue that is material to the American Convention; instead it is a question of conflicting interpretations rendered by two courts as to the scope of a domestic law.[FN35] The State also contends that the enactment of domestic legislation concerning the reserved or secret character of public information is a matter from its “exclusive competence.”[FN36]

[FN35] The State’s communication of August 1, 2005, p. 25.

[FN36] The State’s communication of August 1, 2005, p. 59.

53. The petitioners contend that the purpose of the complaint sub examine is to establish the State's international responsibility for violation of the American Convention. In their view, the ruling being challenged never weighed the arguments relating to Article 13 of the American Convention, which the alleged victims had asserted and which the judge of first instance had used when granting the writ of amparo. The petitioners contend that had the provisions of the American Convention been applied, the ruling delivered by the Santiago Court of Appeals would have been the reverse of what it was. Finally, the petitioners observe that the decision not to supply the requested information violates the principle of the legal right recognized in articles 13(2) and 30 of the American Convention, and the right to freedom of information recognized in Article 13 of the Convention, since the restriction has no justification and is unnecessary and disproportionate.

54. For the Commission, the issue in the present case is whether the State's conduct, especially the December 4, 2002 ruling of the Santiago Court of Appeals, compromised the alleged victims' rights under the American Convention, particularly the right protected under Article 13. In other words, this is not simply a matter of differing interpretations by two judges, or a discussion of established facts or an assessment by a court. The issue here is to determine whether Article 13 of the American Convention was observed in the court ruling that denied the alleged victims access to information that the government had in its possession in connection with genetically modified organisms.

55. In the Commission's opinion, the arguments made by the petitioners and the State regarding the alleged violation of the right of access to information pose a legal question that could tend to establish a violation of the rights protected by Article 13 of the American Convention, in relation to articles 1(1) and 2 thereof. Therefore, in its analysis of the merits, the Commission will decide whether the failure to respond to the request for information that the alleged victims filed, the December 4, 2002 ruling of the Santiago Court of Appeals and the laws used as the grounds for that decision, are compatible with the obligations established in Article 13 of the American Convention and the duty to ensure the Convention-protected rights and to adopt domestic legislative measures, undertaken in articles 1(1) and 2 of that instrument. In addition, the IACHR will analyze if the restrictions imposed to the right to access to information in the present case observed the obligations under Article 13(2) in relation to Article 30 of the American Convention.

56. Further, in application of the principle of *jura novit curia*, in the merits phase the Commission will determine whether the absence of a duly justified written response from the government authorities to the request for information constitutes a violation of the State's obligations under Article 8(1) of the American Convention in relation to Article 1(1) thereof.[FN37]

[FN37] I/A Court H.R., Case of Claude Reyes et al. Judgment of September 19, 2006. Series C No. 151, paragraphs 114-123.

57. Finally, the Commission finds that the petitioners have failed to properly substantiate the claims of alleged violations of the rights recognized in Article 23 in relation to Article 25. It therefore finds that the arguments made in the petition that concerned these articles are inadmissible.[FN38]

[FN38] See in this regard, IACHR. Report No. 60/03. Petition 12,108. Admissibility. Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero (Chile). October 10, 2003, paragraphs 61-62.

V. CONCLUSION

58. The Commission concludes that it is competent to take up this petition, which fulfills the admissibility requirements set forth in articles 46 and 47 of the American Convention, and articles 30, 37 et seq of the Commission's Rules of Procedure.

59. Based on the preceding arguments of fact and of law and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

DECIDES:

1. To declare the present case admissible with respect to the alleged violations of Article 13, all in keeping with articles 1(1) and 2 of the American Convention.
2. In application of the principle of *jura novit curia*, to declare this petition admissible with respect to Article 8(1) of the American Convention in keeping with Article 1(1) of the American Convention.
3. To declare the petition inadmissible with respect to the alleged violations of Articles 23(1) and 25, all in keeping with Article 1(1) of the American Convention.
4. To forward this report to the State and to the petitioners.
5. To publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Done and signed in the city of Washington, D.C., on March 19, 2009. (Firmado): Luz Patricia Mejía Guerrero, President; Víctor E. Abramovich, First Vice-president; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Paolo Carozza, members of the Commission.