Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Marcel Claude Reyes, Arturo Longton Guerrero and Sebastian Cox Urrejola v. Chile
Doc. Type:	Order (Merits, Reparations and Costs)
Decided by:	President: Sergio Garcia Ramirez; Vice President: Alirio Abreu Burelli; Judges: Antonio A. Cancado Trindade; Cecilia Medina Quiroga; Manuel E. Ventura Robles; Diego Garcia-Sayan Judge Oliver Jackman did not take part in the deliberation and signature of this judgment, because he advised that, due to circumstances beyond his control, he would be unable to participate in the seventy-second regular session of the Court.
Dated:	19 September 2006
Citation:	Claude Reyes v. Chile, Order (IACtHR, 19 Sep. 2006)
Represented by:	APPLICANT: Juan Pablo Olmedo Bustos

In the Case of Claude Reyes et al.,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 29, 31, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment.

I. INTRODUCTION OF THE CASE

1. On July 8, 2005, in accordance with the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") lodged before the Court an application against the State of Chile (hereinafter "the State" or "Chile"). This application originated from petition No. 12,108, received by the Secretariat of the Commission on December 17, 1998.

2. The Commission submitted the application for the Court to declare that the State was responsible for the violation of the rights embodied in Articles 13 (Freedom of Thought and Expression) and 25 (Right to Judicial Protection) of the American Convention, in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero.

3. The facts described by the Commission in the application supposedly occurred between May and August 1998 and refer to the State's alleged refusal to provide Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero with all the information they requested from the Foreign Investment Committee on the forestry company Trillium and the Río Condor Project, a deforestation project to be executed in Chile's Region XII that "c[ould] be prejudicial to the environment and to the sustainable development of Chile." The Commission stated that this refusal occurred without the State "providing any valid justification under Chilean law" and, supposedly, they "were not granted an effective judicial remedy to contest a violation of the right of access to information"; in addition, they "were not ensured the rights of access to information and to judicial protection, and there were no mechanisms guaranteeing the right of access to public information."

4. The Commission requested that, pursuant to Article 63(1) of the Convention, the Court order the State to adopt specific measures of reparation indicated in the application. Lastly, it requested the Court to order the State to pay the costs and expenses arising from processing the case in the domestic jurisdiction and before the body of the inter-American system.

II. JURISDICTION

5. The Court is competent to hear this case, in the terms of Articles 62 and 63(1) of the Convention, because Chile has been a State Party to the American Convention since August 21, 1990, and accepted the compulsory jurisdiction of the Court on the same date.

III. PROCEEDINGS BEFORE THE COMMISSION

6. On December 17, 1998, a group composed of the "Clínica Jurídica de Interés Público" of the Universidad Diego Portales; the Chilean organizations "FORJA," the "Terram Foundation" and "Corporación la Morada"; the Instituto de Defensa Legal of Peru; the "Fundación Poder Ciudadano" and the Asociación para los Derechos Civiles (Argentine organizations); and Baldo Prokurica Prokurica, Oswaldo Palma Flores, Guido Girardo Lavín and Leopoldo Sánchez Grunert, submitted a petition to the Commission.

7. On October 10, 2003, the Commission adopted Report No. 60/03 declaring the case admissible. On November 11, 2003, the Commission made itself available to the parties in order to reach a friendly settlement.

8. On March 7, 2005, pursuant to Article 50 of the Convention, the Commission adopted Report No. 31/05, in which it concluded that Chile had "violated the rights of Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero of access to public information and to judicial protection established in Articles 13 and 25 of the American Convention, respectively, in relation to Articles 1(1) and 2 of the Convention, by denying them access to information held by the Chilean Foreign Investment Committee and by not granting them access to Chilean justice to contest this refusal." The Commission recommended to the State that it should "disclose the information requested by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero"; "[g]rant adequate reparation to Marcel Claude Reyes, Sebastián Cox Urrejola and

Arturo Longton Guerrero for the violation of their rights, including providing them with the requested information"; and "[a]dapt its domestic laws to Article 13 of the American Convention regarding access to information and adopt the necessary measures to establish practices and mechanisms that guarantee effective access to public information and information of public interest to the people of Chile."

9. On April 8, 2005, the Commission forwarded this report to the State and granted it two months from the date of transmittal to provide information on the measures adopted to comply with the recommendations made therein.

10. On April 8, 2005, the Commission informed the petitioners that it had adopted the report under Article 50 of the Convention and granted them one month to advise it of their position as regards submitting the case to the Court.

11. On June 8, 2005, the State requested an extension to inform the Commission about compliance with the recommendations contained in Report No. 31/05. The Commission granted it an extension until June 23, 2005.

12. On June 15, 2005, the petitioners presented a communication to the Commission expressing their interest in the Commission submitting the case to the Court's consideration.

13. On June 30, 2005, the State sent a report to the Commission in response to the recommendations made in Report on Merits No. 31/05 (supra para. 8). Chile also forwarded a copy of the foreign investment contracts and assignment contracts relating to the "Río Condor" Project.

14. On July 1, 2005, "in the understanding that the State had not adopted its recommendations satisfactorily," the Commission decided to submit the case to the Court's consideration.

IV. PROCEEDINGS BEFORE THE COURT

15. On July 8, 2005, the Inter-American Commission submitted the application to the Court, attaching documentary evidence and offering testimonial and expert evidence. The Commission appointed Evelio Fernández Arévalo, Santiago A. Canton and Eduardo Bertoni as delegates and Ariel Dulitzky, Victor H. Madrigal-Borloz, Christina M. Cerna and Lisa Yagel as legal advisers (infra para. 22).

16. On August 4, 2005, after the President of the Court (hereinafter "the President") had made a preliminary review of the application, pursuant to the provisions of Article 35(1)(b) of the Rules of Procedure, the Secretariat of the Court (hereinafter "the Secretariat") notified it, together with the appendixes, to the State informing the latter of the time limits for answering the application and appointing its representatives in the proceedings.

17. On August 4, 2005, the Secretariat, pursuant to the provisions of Article 35(1)(e) of the Rules of Procedure, notified the application and its appendixes to Juan Pablo Olmedo Bustos,

representative of the alleged victims (hereinafter "the representative"), informing him of the time limit for presenting his brief with requests, arguments and evidence (hereinafter "requests and arguments brief").

18. On August 5, 2005, the State submitted a brief in which it requested the Court "to consider the information provided opportunely to the Inter-American Commission[, in communications of June 30, 2005 (supra para. 13) and July 8, 2005 [FN1], when making the preliminary examination of the merits of the application for the effects of admissibility."

[FN1] On July 8, 2005, Chile, through its Embassy in Costa Rica, presented to the Secretariat of the Court copy of a communication dated July 8, 2005, from the State to the Inter-American Commission in which, inter alia, it "reiterate[d] its willingness to comply with the recommendations contained in Report No. 31/05 of March 7, 2005, […] and to adopt the necessary measures to this end, coordinating the actions of the respective bodies of the State Administration."

---

19. On August 23, 2005, the State appointed Amira Esquivel Utreras as Agent and Miguel Ángel González Morales as Deputy Agent.

20. On September 28, 2005, the representative forwarded his requests and arguments brief accompanied by documentary evidence, and offered expert evidence. On October 3, 2005, he presented the appendixes to this brief.

21. On December 2, 2005, the State submitted the brief answering the application and with observations on the requests and arguments brief, together with documentary evidence, and offered testimonial and expert evidence. On December 23, 2005, it presented the appendixes to this brief.

22. On January 17, 2006, the Commission submitted a communication accrediting Lilly Ching as legal adviser in this case, in substitution of Lisa Yagel (supra para. 15).

23. On February 7, 2006, the Court issued an order in which it called upon Sebastián Cox Urrejola and Arturo Longton, proposed as witnesses by the Commission, and Andrés Emilio Culagovski Rubio and Liliana Guiditta Macchiavelo Martini, proposed by the State, to provide their testimony by means of statements made before notary public (affidavits). It also called upon Claudio Francisco Castillo Castillo, proposed as an expert witness by the State, and Tomás Vial del Solar, Miguel Ángel Fernández and Davor Harasic Yaksic, proposed as expert witnesses by the representative, to provide their expert opinions by way of statements made before notary public (affidavits). In the same order, the Court convened the parties to a public hearing to be held in Buenos Aires, Argentina, on April 3, 2006, in the courtroom of the Supreme Court, to hear their final oral arguments on merits and possible reparations and costs, as well as the testimonial statements of Marcel Claude Reyes, proposed by the Commission, and Eduardo Jorge Moyano Berríos, proposed by the State, as well as the expert opinions of Ernesto Villanueva, proposed by the Commission, Roberto Mayorga Lorca, proposed by the alleged

victims' representative, and Carlos Carmona Santander, proposed by the State. In this order, the Court also informed the parties that they had until May 18, 2006, to submit their final written arguments on merits and possible reparations and costs. The Court also admitted the offer of evidence made by the representative in his requests and arguments brief and called upon him to present this evidence directly to the Court.

24. On February 17, 2006, the alleged victims' representative and the State requested an extension to present the testimonies and expert evidence provided by statements before notary public, in response to the request made in the Court's order of February 7, 2006. The President of the Court granted the representative, the State and the Commission the requested extension until March 10, 2006.

25. On February 17, 2006, the Asociación por los Derechos Civiles (ADC) submitted a brief in which, "in its capacity as one of the original petitioners before the Commission," it requested authorization to intervene in the public hearing on April 3, 2006. On the instructions of the President, the Secretariat admitted the brief submitted by ADC as an amicus curiae. Regarding the request to take part in the public hearing, it did not allow the Association to participate directly, informing it that only those persons accredited by the parties to the case could present their arguments.

26. On March 10, 2006, the Inter-American Commission forwarded the written statements of the witnesses, Luis Sebastián Cox Urrejola and Arturo Longton Guerrero. The same day, Chile forwarded the written statements of the witnesses, Andrés Emilio Culagovski Rubio and Liliana Guiditta Macchiavelo Martini, and the expert witness, Claudio Francisco Castillo Castillo (supra paras. 23 and 24).

27. On March 13, 2006, the alleged victims' representative forwarded the written statements of the expert witnesses, Tomás Vial Solar, Miguel Ángel Fernández González and Davor Harasic Yaksic (supra paras. 23 and 24). The representative also forwarded four documents "issued after the requests brief had been presented," "[p]ursuant to Article 44(3) of the Rules of Procedure" of the Court. In addition, in relation to the evidence admitted by the Court in its order of February 7, 2006 (supra para. 23), the representative sent a report issued on February 15, 2006, by the Chairman of the Presidential Advisory Committee for the Protection of Human Rights, together with a communication from the Executive Director of the Open Society Justice Initiative dated February 20, 2006, enclosing a report entitled: "Transparency and Silence. A Survey of Access to Information Laws and Practices in Fourteen Countries." Lastly, the representative forwarded two amici curiae briefs submitted by the Center for Legal and Social Studies (CELS) and Damián M. Loreti and Analía Elíades (professors, the UNESCO Freedom of Expression Chair of the School of Journalism, Universidad Nacional de La Plata), and by Gastón Gómez Bernales (professor of the Law School of the Universidad Diego Portales). The representative's brief and appendixes were first received by e-mail on March 10, 2006.

28. On March 27, 2006, the Commission submitted a brief in which it stated that "it had no comments to make" on the evidence presented by the alleged victims' representative (supra para. 27), and that "it had no comments on the sworn statements submitted to the Court" by the State and the representative (supra paras. 26 and 27).

29. On March 28, 2006, Chile remitted its comments on the written testimonies and expert opinions submitted by the Commission and the alleged victims' representative (supra paras. 26 and 27), and also on the evidence forwarded by the representative (supra para. 27).

30. On March 28, 2006, the Open Society Justice Initiative, ARTICLE 19, the Instituto Prensa y Sociedad, Access Info Europe and Libertad de Información México presented an amici curiae brief.

31. On March 31, 2006, the Impact Litigation Project of the American University Washington College of Law forwarded an amicus curiae brief.

32. On April 3, 2006, a public hearing was held on merits, and possible reparations and costs. There appeared before the Court: (a) for the Inter-American Commission: Evelio Fernández and Santiago A. Canton, delegates; Víctor H. Madrigal Borloz, Lilly Ching, Juan Pablo Albán, Carlos Zelada and Ignacio Álvarez, legal advisers; (b) for the alleged victims: Juan Pablo Olmedo, representative, and Ciro Colombana López, adviser; and (c) for the State of Chile: Amira Esquivel Utreras, Agent; Patricio Aguirre Vacchieri and Virginia Barahona Lara. Also, the witnesses and expert witnesses proposed by the parties (supra para. 23 and infra para. 49). In addition, the Court heard the final arguments of the Commission, the representative, and the State. At the end of the public hearing, the representative submitted a copy of the book entitled "Derechos fundamentales y recursos de protección" by Gastón Gómez Bernales (infra para. 40).

33. On May 18, 2006, the Commission presented its final written arguments on merits reparations, and costs. On May 23, 2006, the Commission presented an appendix to these final arguments.

34. On May 18, 2006, the alleged victims' representative forwarded his final written arguments; the appendixes were sent the following day. The representative presented "a summary of the results of the access to information survey conducted [by the Open Society Justice Initiative] in 14 countries, including Chile, in 2004," in relation to the evidence admitted by the Court in its order of February 7, 2006 (supra para. 23).

35. On May 19, 2006, the State presented its final written arguments.

36. On May 23, 2006, the Executive Director of the Open Society Justice Initiative submitted the same document that the alleged victims' representative had forwarded on May 18, 2006 (supra para. 34).

37. On May 24, 2006, the representative forwarded the Spanish version of the report of the Open Society Justice Initiative, the English version of which had been submitted on March 13, 2006 (supra para. 27).

38. On June 5, 2006, the Center for Justice and International Law (CEJIL) presented an amicus curiae brief.

39. On July 5, 2006, on the instructions of the President, the Secretariat requested the Inter-American Commission and the representative to present certain documentation as helpful evidence by July 14, 2006, at the latest.

40. On June 7, 2006, in response to the Secretariat's request, the representative forwarded two copies of the book entitled "Derechos fundamentales y recursos de protección," which he had submitted at the end of the public hearing (supra para. 32); these copies were forwarded to the other parties.

41. On July 11, 2006, the Commission remitted the evidence requested in the note of July 5, 2006 (supra para. 39).

42. On July 14, 2006, the State submitted a communication with "comments and observations" on the amicus curiae brief presented by CEJIL on June 5, 2006 (supra para. 38).

43. On July 18, 2006, the alleged victims' representative responded to the request for helpful evidence in the Secretariat's note of July 5, 2006 (supra para. 39).

44. On July 25, 2006, the Secretariat informed the parties that, on the instructions of the President, they were granted seven days to forward any observations they deemed pertinent on the helpful evidence presented on July 11 and 18, 2006 (supra paras. 41 and 43).

45. On July 28, 2006, Chile presented its observations on the helpful evidence submitted by the Inter-American Commission and the alleged victims' representative in briefs of July 11 and 18, 2006, respectively (supra paras. 39, 41, 43 and 44).

46. On July 31, 2006, the Commission submitted a brief indicating that "it had no observations to make" on the helpful evidence presented by the alleged victims' representative (supra para. 43).

47. On August 7, 2006, the alleged victims' representative forwarded the electronic version of the "[nineteenth] report of the Presidential Advisory Committee for the Protection of Human Rights, corresponding to the second quarter of 2006" and requested "its incorporation as part of the evidence provided in the instant case."

V. EVIDENCE

A) DOCUMENTARY EVIDENCE

48. The documentary evidence submitted by the parties included the written testimonial statements and expert opinions requested by Court in its order of February 7, 2006 (supra para. 23). These statements and opinions are summarized below:

TESTIMONIES

a) Proposed by the Inter-American Commission on Human Rights

1. Luis Sebastián Cox Urrejola, alleged victim

He is a lawyer and representative of the non-governmental organization "FORJA", whose purpose is to improve the capacity of individuals and groups to exercise their rights.
In May 1998, "together with Marcel Claude and Arturo Longton, he submitted the application for information to the Foreign Investment Committee" (hereinafter "FIC" or "the Committee") requesting information on Forestal Trillium Ltda. and the Río Cóndor Project, in order, as members of civil society, to contribute to and ensure enhanced community involvement and information "so as to ensure the maximum social responsibility of private companies in the context of the major public investments promoted and authorized by the State and its institutional framework." "Owing to the refusal of the Committee and its authorities," they filed several judicial recourses.
The Committee's failure to respond to the said application or to provide an official refusal resulted in a harm to "public interest and to the interests of the community" he has been defending, a well as the State entity's non-compliance with its obligations and related national and international norms and recommendations. This non-compliance "concern[ed] the suitability of the investor, the execution of the authorized investment, and compliance with Decree Law No. 600."

2. Arturo Longton Guerrero, alleged victim

He has been a Member of Congress of the Republic of Chile for more than 16 years, and "during this time [has] been involved in various initiatives designed to safeguard fundamental human rights." "In 1997 [(sic)], as a concerned citizen, as well as in exercise of [his] functions as a Deputy of the Republic of Chile, and worried about the possible indiscriminate felling of indigenous forests in the extreme south of Chile by a foreign company[, …] together with […] Marcel Claude [Reyes, he] met with the Director of Foreign Investment in Chile to obtain information regarding the veracity of the affirmations of [the] company that was cutting down indigenous forests, requesting diverse elements of information about the foreign investor concerned […] and[,] in particular, about the background data that demonstrated his suitability and soundness." "This refusal of public information signified a violation of [his] human rights; it also affected and impaired [his] authority as a Deputy of the Republic and hindered [his] oversight responsibilities."
He referred to several cases that, in his opinion, involved refusal to disclose public information and in which he has intervened directly, and stated that such cases "are repeated constantly throughout [Chile's] Ministries and Public Administration."

b) Proposed by the State

3. Andrés Emilio Culagovski Rubio, lawyer and Oversight Officer (Fiscal) of the Foreign Investment Committee

The Foreign Investment Committee "is a functionally-decentralized, public-law juridical person, with its own assets, domiciled in Santiago, linked to the President of the Republic through the Ministry of Economy, Development and Reconstruction." "Under Decree Law [No. 600], it is

the only agency authorized, in representation of Chile, to accept the entry of foreign capital and to establish the terms and conditions of the respective contracts." The other functions of FIC include the following: to receive, examine and take a decision on foreign investment applications; to administer the respective foreign investment contracts; to prepare studies and background material on interpretation; to keep a statistical record of foreign investment in the country under Legislative Decree No. 600; to take part in international negotiations on foreign investment; to participate in activities to promote Chile as a country for foreign investment; to centralize information and data concerning the control that public bodies should exercise on the commitments made by foreign investors or the companies in which they invest, and to denounce before the competent public entities and authorities any offense or infraction that comes to its attention; to take and expedite the necessary measures before the public agencies that must provide information or give their authorization prior to the approval of the different applications on which FIC must decide; to investigate in Chile or abroad the suitability and soundness of the applicants or interested parties; as well as any other function entrusted to it by the laws in force or the competent authorities.

He referred to the structure of FIC and indicated that the Committee had an Executive Vice Presidency to carry out its functions and obligations.

He mentioned the type of authorization that FIC can grant a foreign investment application and the background material it must have in order to grant it.

In the case of the foreign investment project represented by Forestal Trillium Ltda., the FIC Executive Vice Presidency merely received, studied and decided on the foreign investment application, verifying that it complied with the legal requirements. When the FIC Executive Vice Presidency had taken a decision on the application it was presented to the Foreign Investment Committee for approval.

The witness had no information on the Forestal Trillium Ltda. project, since he was not supposed "to monitor or intervene in the implementation stages of economic projects whose capital flows had been authorized."

4. Liliana Guiditta Macchiavello Martini, lawyer of the Foreign Investment Committee

She has been one of the Foreign Investment Committee's lawyers since 1997 and has exercised diverse functions within its oversight unit (fiscalía).

She referred to the way in which FIC is structured. She indicated that the functions of the Executive Vice Presidency, defined in Articles 15 and 15 bis of Legislative Decree No. 600, "demonstrate that the role of [this Committee and its] Vice Presidency is merely to authorize the flow of foreign capital into Chile under any of the investment models described in Article 2 of this decree."

"The limited role of FIC in authorizing the entry of foreign capital into Chile is not altered by the obligation that Article 15(e) of this Decree imposes on the Vice Presidency [of this Committee …], that it should interact with the public bodies that must give their authorization before FIC approves the foreign investment application." This obligation only refers to cases in which the respective sectoral laws require a public entity's authorization of investments in some specific industrial and commercial sectors. Health, environmental and other permits must be requested from the competent authorities complying with the respective requirements.

The role of FIC to investigate the suitability and soundness of applicants involves requiring foreign investors to provide all public or private background material in Chile or abroad that

proves they have access to the capital they wish to import into the country. “Regarding the foreign investors involved in the Trillium Project, they were requested to provide all the background information required from juridical persons [… .] Based on the background material provided […], the Foreign Investment Committee considered they complied with the [required] conditions of soundness and suitability”

At the time the petitioners in this case requested information from FIC, its Vice Presidency “considered that all information regarding third parties was of a confidential nature, if its disclosure could constitute a violation of the privacy of the owners of the information, irresponsibly endangering the results of the investors’ activities in [Chile].” The witness alluded to some of the information considered of a confidential nature, such as commercial information, copyrights and trademarks, use of technology and, in general, the specific characteristics of the investment projects that investors wished to develop with the capital they were requesting the authorization of FIC to transfer to Chile. When submitting investment applications, investors were not obliged to present “totally defined or structured” projects; consequently, the FIC Vice Presidency and FIC had to manage the information provided by investors with extreme prudence, to provide them with an adequate assurance that the details of their commercial activities would not be divulged. Administrative Decision Exenta [Note: exempt from the control of the Comptroller General’s Office] No. 113 of 2002 contains the abovementioned criteria and establishes the records, documents and background data of the FIC Vice Presidency that should be considered secret or confidential. The 2005 Chilean Constitution imposes the obligation to review all existing information policies to ensure they are in keeping with Article 8 of the Constitution. To this end, in official communication No. 072 of 2006, the Ministry-General Secretariat of the Presidency provided the public services with guidelines on transparency and disclosure of the Administration’s acts.

Regarding the attitude of FIC to the Terram Foundation’s request: during the meeting held between the petitioners and the FIC Executive Vice President, the latter “provided them with the information they requested on the project, in keeping with the criteria on disclosure and confidentiality in force at the time. The same day, the information was complemented by a fax addressed to Marcel Claude Reyes. Disregarding the information provided by the FIC Vice Presidency, the Terram Foundation repeated its request on two occasions (June 3 and July 2, 1998) and, subsequently, initiated a series of complaints and claims before the courts of justice and the media, a situation that gave rise to the corresponding clarifications by the FIC Vice Presidency. The information provided by the FIC Vice Presidency to the Terram Foundation was “the information that FIC possessed”; namely, information on “the foreign investment contracts signed under Legislative Decree No. 600, the identity of the investors, the authorized amount of the investment, the capital inflow schedule, [… and the] capital that had effectively been imported.”

The FIC Vice Presidency’s “communications policy” has always been applied in the same way to all those requesting any information or background material “that it might have.” The witness considered that the same procedure was followed in this case as in any other request for this type of information.

EXPERT OPINIONS

a) Proposed by the alleged victims’ representative

1. Tomás Vial Solar, lawyer

He was legal adviser to the Ministry-General Secretariat of the Presidency from 2002 to 2004.
According to the reports of the respective Senate and Chamber committees, the reform of Article 8 of the Constitution "was understood […] merely as elevating to constitutional rank the contents of Articles 13 and 15 of the 1999 Constitutional Organic Law on General Principles of [State] Administration." During the Parliamentary discussion, "there was never any mention of the existence of a right of access to information for the population"; "nor was there any record of their having discussed the effects of the reform on the different body of the State and on the legislation in force"; nor "was the need to modify the legislation in force or to make an effort to provide increased access to information mentioned."
The new Article 8 of the Constitution introduced a constitutional principle of disclosure that applies to all State entities; consequently, its scope is greater than the General Principles Law which refers only to the State Administration.
The constitutional provision indicates that acts, together with the decisions and procedures on which they are based, shall be public. The words "acts" and "procedures" should be understood in the broadest sense. Regarding the grounds for acts and decisions, all documents relating to any specific act of the State are public.
The constitutional provision establishes that restrictions of access to information shall be imposed only by a law adopted by a special quorum (the absolute majority of the elected senators and deputies). The new grounds established in Article 8 of the Constitution stipulate that secrecy or confidentiality can only be established when disclosure would affect due compliance with the functions of State entities, individual rights, national security and public interest. This provision also reduced the reasons for which information may be declared secret or confidential.
"The adoption of the constitutional reform […] rendered unconstitutional both the provisions of Article 13 of the General Principles Law, which allowed this confidentiality to be established using rules of a regulatory nature, and also the Secrecy and Confidentiality Regulations and all corresponding decisions." The constitutional provision is more restrictive regarding the grounds for refusing information than the legal provision (Article 13 of the General Principles Law), because it establishes "that, in order to refuse information, an individual's rights must be affected." Nevertheless, it is less demanding, since the legal provision established that disclosure should affect the rights of the third party "noticeably," while the constitutional reform does not mention this specifically. The legal provisions to establish the secrecy or confidentiality of some issues, which were enacted prior to the constitutional reform, retain their validity, to the "extent that they do not substantially conflict with the Constitution."
He indicated that although the constitutional reform represented progress from the section of view of ensuring access to information, it did not include a positive obligation by the State and, thus, did not constitute a right. Since access to information is not a constitutional right, a conflict arises when it is weighed with other rights that have a constitutional rank and that would have priority. Also, since it is not a constitutional right, the State does not have the constitutional obligation "to promote it or to create the conditions for its due protection."
Regarding the Administration's mechanisms for protecting access to information, he referred to the provisions on access to information that relate to the Administration, particularly Articles 13 and 14 of the Constitutional Organic Law on General Principles of [State] Administration. This law establishes that administrative acts, the documents that complement them or directly support them, and company reports or background material are public.

In relation to the grounds for refusing information, paragraph 11 of Article 13 of the General Principles Law establishes five reasons. It should be understood that the first was derogated by the constitutional reform, because it established that confidentiality or secrecy could be established by legal or regulatory provisions; the second is that the disclosure would impede or prevent due compliance with the functions of the entity from which information is requested; the third is the opposition of third parties; the fourth is that the rights or interests of third parties are substantially affected, and the fifth is that disclosure would affect national security or interests. The scope of the second reason could lead to an "arbitrary interpretation" by the authorities.
With regard to recourses when access to information is refused, the applicant may file administrative remedies and also a recourse to justice called "amparo [protection] of information" included in Article 14 of the General Principles Law. Regarding administrative remedies, the law "does not include a specific recourse"; the applicant must therefore use general remedies such as an appeal for reconsideration of judgment and an appeal to a higher instance. "The effectiveness of these remedies is limited in cases of requests for information."

2. Miguel Ángel Fernández González, lawyer

The evolution of legislation on the protection of the right of access to information includes the proposals made by the National Public Ethics Commission, which were implemented by: promulgation of Act No. 19,653; incorporation of the principle of disclosure of the acts of the body of State Administration; inclusion of a special judicial proceeding if the entity from which information is requested does not provide access to this information; publication of Act No. 19,880 on administrative procedures, and constitutional recognition of the principle of disclosure in Article 8 of the Constitution.
Regarding the current legislation on access to public information, he indicated the importance of the fact that the principle of disclosure had been elevated to constitutional rank, also establishing a legal reservation regarding the grounds on which secrecy or confidentiality may be declared. He indicated the problems faced by the right of access to public information, owing to the existence of grounds for confidentiality with such a wide and vague content such as national interest and national security.

3. Davor Harasic Yaksic, lawyer, President of the Chilean Chapter of Transparency International, and Adviser to the State's Defense Council from 1972 to 1996

He referred to the content of Chilean laws on access to State-held information. Act No. 19,653 of 1999 on Administrative Probity of the Body of the Administration, and the 2003 Administrative Procedure Act established the principles of transparency and disclosure as central elements of the proper exercise of public service. The 2005 constitutional reform elevated the principles of transparency and disclosure to constitutional rank and extended them to all the body of the State.
He mentioned what he considered are the obstacles and restrictions to access to public information in Chile. The law that formally incorporated the principle of disclosure into the Chilean legal system (the Administrative Probity Act) allowed the right of access to information to be restricted by providing that the grounds for refusing access could be established by legal or regulatory provisions. From 2001 to 2005, administrative practices were implemented that favored the confidentiality and secrecy of administrative acts, documents and background material. These practices were based on the Secrecy or Confidentiality Regulations created by

Supreme Decree No. 26 of the Ministry-General Secretariat of the Presidency. The Regulations transcended the framework of normative jurisdiction, increased the grounds for refusing information, and gave rise to the announcement of some one hundred decisions by body of the Administration that transformed secrecy and confidentiality into "the general rule, impairing the principles of transparency and disclosure." Another obstacle was the limited and insufficient judicial protection arising from the special amparo (protection) remedy established in the Administrative Probity Act which, far from strengthening the principle of disclosure and access to information, has resulted in departmental heads choosing to "wait for a judicial decision," which also provides little protection to applicants.

b) Proposed by the State

4. Claudio Francisco Castillo Castillo, lawyer

He referred to the nature and functions of the Foreign Investment Committee under the provisions of Legislative Decree No. 600. He underscored the work of promoting investments carried out by the FIC Vice Presidency from 1994 to 2000.

Regarding the processing of foreign investment applications, investors who "wish to make investments in Chile […] must complete a Foreign Investment Application on a printed form prepared by the FIC Vice Presidency." On the form, the investor must provide, inter alia, information on "[n]ame or company name; principal associates or shareholders; nationality; financial information; line of business; brief description of the project to be [executed] in Chile; amount of the proposed investment to execute the project; background information on the Chilean company that will receive the investment; [and whether the investors] have decided to take advantage of the invariable tax regime."

This investment application must be presented to the FIC Vice Presidency accompanied by the investor's legal registration data. The FIC Vice Presidency must assess the formal aspects and, lastly, applications involving less than US$5 million must be authorized by the Executive Vice President following the agreement of the President of the Foreign Investment Committee; applications involving more than US$5 million must be authorized by the members of the Committee. The authorization granted to the investors to make their capital contributions is "without detriment to the authorizations that must be obtained from the local authorities, according to the type of project planned."

With regard to the level of confidentiality of the actions, documents and operations related to foreign investment projects in Chile, all the data held by the FIC Vice Presidency in relation to each project is provided by the investors. During the 1990s, a distinction was made between the levels of confidentiality of the information presented by the investors. Some information was not of a public nature because it referred "to a specific business undertaking owned by the foreign investors." Regarding the latter, the FIC Vice Presidency "was very careful not to provide this information to third parties." "The significant expansion of many of the country's productive sectors would not have been possible if FIC had not been prudent about how it managed the technical, financial and economic information relating to foreign investment projects."

B) TESTIMONIAL AND EXPERT EVIDENCE

49. On April 3, 2006, the Court received the statements of the witnesses proposed by the Inter-American Commission on Human Rights and by the State, and of the expert witnesses proposed by the Commission, by the alleged victims' representative, and by the State during a public hearing (supra para. 32). The Court summarizes the principal parts of these testimonies and expert opinions below.

TESTIMONIES

a) Proposed by the Inter-American Commission

1. Marcel Claude Reyes, alleged victim

He is an economist, and was a founder of the Terram Foundation as well as its Executive Director from 1997 to 2003. The basic aims of this organization were "to participate actively in public debates and in the production of sound, scientific information to support the social and civic efforts of the people of Chile in favor of sustainable development." In 1983, he was an official of the Central Bank and was appointed as an adviser to the Foreign Investment Committee and to the Environmental Accounts Unit.

Regarding his request for information from the Foreign Investment Committee in relation to the Río Cóndor project and the Trillium company, his intention had been to "play an active part […] in the debate and discussion on the Río Cóndor project […] from an economic perspective, in order to make a technical, financial and social evaluation of the project, and [to assess] the potential […] development of the region [and] of the country [as a result] of the project." The project had a "significant environmental impact" and gave rise to public debate.

Playing an active part, "required a series of elements of information [from the Foreign Investment Committee], because the information held by the public entities involved in environmental matters and by the public itself was insufficient." A formal written request was made, asking, among other matters, for information on the suitability of the investor, his international experience and his compliance with the environmental, legal and fiscal laws and regulations. "As a result of [this] request, [they] received a note from the Executive Vice President of the Committee at that time […], who invited [Arturo Longton and himself] to a meeting," during which he handed them "a sheet with the name of the investor, the name of his company [and] the amount of capital that he had asked to import into the country." Following the meeting, he received "a fax on the afternoon of that same day […] stating that […] the information on associated capital amounts had been omitted; however, this was not included in the fax." He stated that he had obtained partial information and had not receive either an oral or written response concerning the missing information, or the reasons why he had not been given or would not be given this information, even after insisting on two further occasions. Subsequently, after a "reasonable time" had elapsed and without knowing why the information had been refused, they resorted to the courts of law, filing a remedy of protection, which was rejected "because it was not pertinent"; an appeal for reconsideration of the judgment concerning the remedy for protection, which was rejected, and a complaint before the Supreme Court, which was also rejected.

"The forestry project [in question] was never executed, because, after about five years of negotiation, public debate and public obstruction […], it was not implemented owing to financial problems."

He referred to information they requested from the National Forestry Commission in 2000 concerning an investigation carried out by that agency. The information was not provided and they resorted to the courts; on this occasion they won the action for access to information.
Based on his experience in relation to environmental issues, he considers that "it is extremely difficult to have access to information" and, consequently, asks that "this information [which he was refused] should be made public […] and that the State of Chile should end the practice of secrecy, which prevents its citizens from exercising their rights and is an obstacle to freedom of expression."

b) Proposed by the State

2. Eduardo Moyano Berríos, Executive Vice President of the Foreign Investment Committee from 1994 to 2000

With regard to the management of foreign investment projects, "each project has a file, containing all the information provided [by the investor] to FIC." "The complete information file" is not sent to the Ministers, but rather "a report on this information [and] any documents considered to be of major importance." He is "certain there is [a file] on the Trillium project," and also that "the Ministers duly approved the project in 1991, if my memory does not fail me." "There was a public debate on the project" during the time he was Executive Vice President of FIC.
The Terram Foundation's request for information on the Trillium project in May 1998 resulted in a meeting on May 19, 1998, during which "a significant part of the information it held [was handed over], additional information was sent to the Terram Foundation by fax the same day." The information provided concerned "when the project had been approved, the names of the companies involved, the investment flows to date, the type of project, its location, etc."
Regarding the information that gave rise to the dispute, as Vice President he did not provide the information requested in section 3 of the request for information, because "the Foreign Investment Committee […] did not disclose the company's financial data, since providing this information would be contrary to public interest," which was "the country's development." "It was not reasonable that foreign companies applying to the Foreign Investment Committee should have to disclose their financial information in this way, information that could be very important to them in relation to their competitors; hence, this could have been an obstacle to the foreign investment process." He did not provide the information requested in section 6, because the background information that the Committee could request from other institutions "did not exist," and the Committee did not having policing functions; and he did not provide the information requested in section 7, because "the Foreign Investment Committee had neither the responsibility nor the capacity to evaluate each project on its merits; it had a staff of just over 20 persons. Furthermore, this was not necessary, since the role of the Foreign Investment Committee is to authorize the entry of capital and the corresponding terms and conditions, and the country had an institutional framework for each sector." Trillium was not consulted prior to the refusal of this information; rather the refusal was based on "a policy" and the practice of the Foreign Investment Committee and its Executive Vice Presidency.
Regarding the mechanism for responding to requests for information received by the Committee, the practice was to answer the request in writing. In this case, the request "was answered by a meeting and a fax." Subsequently, "there were letters […] that were answered orally"; in other

words, “there was personal contact” and, hence, it was not considered “necessary to formalize this exchange.” He stated that “written questions should be answered in writing and, if this was not always done, [he was] guilty of an administrative error.”

EXPERT OPINIONS

a) Proposed by the Commission

1. Ernesto Villanueva, lawyer

“Article 13 of the Convention has been interpreted systematically as a source of one aspect of the right of access to public information.” “On the one hand, human development […] is engendering increased demand [as regards] the spirit of the norm [and,] on the other hand[,…] the right of access to public information implies that [society] is the owner of the right […] and that […] the State authorities are depositaries of information that does not belong to them.”
An appropriate law on access to public information should include an extensive number of entities that are obliged to provide information, and applicants for information should not have to justify their request, since it refers to public information and, thus, to a fundamental human right.
Another important factor is that, when classifying information as confidential, limited use should be made of the exceptions. It must be demonstrated that there is probable and possible harm that would affect the general interest and the exception invoked; consequently, it would be necessary to explain the reasons why this information has not been provided. In addition, it must be shown that this harm would be greater than the public’s right to know the information for “reasons of public interest.” Only in this way, could a distinction be made between confidentiality based on political criteria, and confidentiality because matters of public interest that should be retained as an exception to access to information could be jeopardized. The law should provide for institutions to ensure compliance.
The more advanced countries have introduced legal measures such as the obligation to keep a complete record of all activities; they also give the regulatory agency powers to investigate and crosscheck, allowing it to verify whether the information truly does not exist or whether this is merely a mechanism for refusing to provide it to the applicant.
In this specific case, the Foreign Investment Committee did not conform to international standards. The modifications that Chile has made to its laws do not meet these standards, because, owing to legal vacuums, the State is able to cite a series of discretional factors by interpreting the exceptions in order not to provide the requested information.
The problem of discretionality has gradually been reduced by legal mechanisms. In the different legislatures, it is becoming more frequent to observe the State’s extensive capacity to invoke a series of factors when faced by gaps in the law. In some countries, measures have been implemented that emphasize this possibility of discretionality. Exceptions to the disclosure of public information should be minimal, established by law and regulated insofar as possible, to avoid information of public interest being incorporated into some of these exceptions. “The crucial section is to ensure that the laws on access to public information produce concrete results with reports and information that allow society to exercise an oversight function, [...] to combat corruption, [...] to satisfy personal interests, [...] to exercise rights and [...] to comply with obligations.”

b) Proposed by the alleged victims' representative

2. Roberto Mayorga Lorca, lawyer, and FIC Oversight Officer (fiscal) and Vice President from 1990 to 1994

According to Article 15 of Decree Law No. 600 (Investment Act), the mandate and the obligations of the Foreign Investment Committee are to study and to provide information on investment applications, which means investigating in Chile and abroad the suitability and soundness of those who present applications. Also, FIC must "report any offense or infraction it learns about to the competent public authorities and entities." According to Decree law No. 600, the Committee is obliged not only to examine the transfer of capitals but also the suitability of the investor, based on the information assembled when the request is presented and on its own criteria. Even though it does not have an "external investigation network," FIC had a permanent connection with the international police, which verified whether the investment applicants had a criminal record.

Once the application had been submitted, all the documentation collected by the Committee formed part of a file examined by the legal department, which prepared a report on whether the investment was admissible. If the report was positive, a decision was taken on whether the project should be approved or rejected at a meeting between the Foreign Investment Committee, the Ministers, the Oversight Officer and the Vice President.

c) Proposed by the State

3. Carlos Carmona Santander, lawyer

In 2005, the Constitution of the Republic was reformed and "for the first time, provisions applicable to all State entities were introduced into [the Chilean] system, establishing the obligation to provide [the petitioner] with the requested information." Until then, the right of access to information was regulated by law; however, with the reform, it became regulated directly by the Constitution, as a principle applicable to all State entities. This provision is established in the first title of the Constitution, which provides the basis for interpreting all the other titles that regulate the different powers and rights of the individual.

This constitutional regulation establishes that it is possible to refuse a request for information based on secrecy or confidentiality, which may be established for a series of reasons, including the following: when disclosure would affect due compliance with the functions of the [State] entities; when disclosure would affect individual rights; and when disclosure would affect national security or national interest. There is a radical change in this regard, because the reasons are set out in the Constitution itself and are regulated by a law enacted by special quorum (the majority of elected deputies and senators).

He referred to the legal recourses available to protect the right of access to public information. Currently, there are specific legal recourses in relation to access to administrative information, which do not extinguish and which allow the Administration's classification of information to be discussed to determine whether it conforms to the legal reasons for refusing to provide information. He also referred to the disciplinary sanctions contained in the 1999 Probity Act, applicable to officials who refuse to provide requested information without a specific reason.

Regarding the protection of the right of access to information, the citizenry has the following guarantees: the right to request access to information without cost, except for the respective photocopy; the right to contest refusal by regular administrative remedies; and the legislative requirement of a special quorum in Congress to establish restrictions to the right.

C) ASSESSMENT OF THE EVIDENCE

Assessment of the documentary evidence

50. In this case as in others, [FN2] the Court accepts the probative value of the documents presented by the parties at the proper procedural opportunity or as helpful evidence, which were not contested or opposed, and whose authenticity was not questioned. Also, in accordance with Article 44(3) of the Rules of Procedure, the Court accepts the documents forwarded by the alleged victims' representative on March 13, 2006 (supra para. 27), subsequent to the submission of the requests and arguments brief, as well as the Spanish version of one of these documents, presented on May 24, 2006 (supra para. 37), taking into account the State's observations (supra para. 29) and assessing them together with the body of evidence.

[FN2] Cf. Case of Ximenes Lopes. Judgment of July 4, 2006. Series C No. 149, para. 48; Case of the Ituango Massacres. Judgment of July 1, 2006. Series C No. 148, para. 112; and Case of Baldeón García. Judgment of April 6, 2006. Series C No. 147, para. 65.

---

51. Regarding the written statements made by the witnesses, Luis Sebastián Cox Urrejola, Arturo Longton Guerrero, Andrés Emilio Culagovski Rubio and Liliana Guiditta Macchiavelo Martini, and also by the expert witnesses, Claudio Francisco Castillo Castillo, Tomás Vial Solar, Miguel Ángel Fernández González and Davor Harasic Yaksic (supra paras. 26 and 27), the Court considers them pertinent, to the extent that they are in keeping with the purpose defined in the Court's order requesting them (supra para. 23), taking into account the State's observations (supra para. 29). On other occasions, the Court has admitted sworn statements that were not made before notary public, when this does not affect legal certainty or the procedural equality of the parties. [FN3]

[FN3] Cf. Case of Ximenes Lopes, supra note 2, para. 52; Case of the Ituango Massacres, supra note 2, para. 114; and Case of Baldeón García, supra note 2, para. 66.

---

52. The Court incorporates into the body of evidence, in accordance with the provisions of Article 44(1) of the Rules of Procedure, the documents forwarded by the representative on March 13, 2006 (supra para. 27), which were offered by the representative in his requests and arguments brief, and accepted by the Court in an order of February 7, 2006 (supra para. 23).

53. In application of the provisions of Article 45(2) of the Rules of Procedure, the Court incorporates into the body of evidence, the documents presented by the Commission and by the

representative (supra paras. 41 and 43) in response to the President's request for helpful evidence (supra para. 39), taking into account the State's observations (supra paras. 44 and 45).

54. In accordance with Article 45(1) of the Rules of Procedure, and considering them useful for deciding this case, the Court adds to the body of evidence the document presented by the representative at the end of the public hearing held on April 3, 2006 (supra para. 32), the documents submitted as appendixes to his final written arguments (supra para. 34), and the document forwarded on August 7, 2006 (supra para. 47), taking into account the State's observations, and assesses them with the body of evidence applying the rules of sound criticism.

55. In addition, pursuant to the provisions of Article 45(1) of the Rules of Procedure, the Court incorporates into the body of evidence in this case the Constitution of Chile, Act No. 19,980 of May 29, 2003, Supreme Decree No. 423 of April 5, 1994, and draft Act No. 3773 available on the Senate's web page, because they are useful in the instant case.

Assessment of testimonial and expert evidence

56. With regards to the statements made by the witnesses and expert witnesses proposed by the parties (supra paras. 32 and 49), which were not opposed or contested, the Court accepts them and grants them the corresponding probative value. The Court considers that the testimonial statements of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola (supra paras. 32 and 49), which are useful in this case, must be assessed together with all the evidence in the case and not in isolation, since they are alleged victims and have a direct interest in the case. [FN4]

[FN4] Cf. Case of Ximenes Lopes, supra note 2, para. 56; Case of the Ituango Massacres, supra note 2, para. 124; and Case of Baldeón García, supra note 2, para. 66.

VI. PROVEN FACTS

57. Based on the evidence provided and bearing in mind the statements made by the parties, the Court considers that the following facts have been proved:

The Foreign Investment Committee and the foreign investment mechanism regulated by Legislative Decree No. 600

57(1) Legislative Decree No. 600 of 1974, the text of which was consolidated, coordinated and systematized by Decree No. 523 of the Ministry of Economy, Development and Reconstruction of September 3, 1993, contains the Chilean Foreign Investment Statute, which is one of the legal mechanisms for implementing this type of investment, and grants certain benefits to the investor. This Legislative Decree includes provisions regulating "foreign natural and juridical persons and Chileans resident abroad who transfer foreign capital to Chile and who sign a foreign investment contract." [FN5] The Decree regulates foreign investment contracts, the rights and obligations of

foreign investors, and the rules and regulations applicable to them, as well as the role of the Foreign Investment Committee and the Executive Vice Presidency. [FN6]

[FN5] Cf. Article 1 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, appendix 6, folios 1199 to 1212).
[FN6] Cf. Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, appendix 6, folios 1199 to 1212).

57(2) The Foreign Investment Committee "is a functionally-decentralized, public-law juridical person, with its own assets […] linked to the President of the Republic through the Ministry of Economy, Development and Reconstruction." The Committee is composed of: (1) the Minister of Economy, Development and Reconstruction, who chairs it; (2) the Finance Minister; (3) the Minister for Foreign Affairs; (4) the Minister of the respective sector, in the case of investment applications in areas that involve ministries that are not represented on the Committee; (5) the Minister of Planning and Cooperation, and (6) the President of the Central Bank of Chile. [FN7]

[FN7] Cf. Article 13 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, volume I, appendix 6, folio 1208).

57(3) This Committee is "the only body authorized, in representation of the State of Chile, to authorize the entry of foreign capital under Decree Law [No. 600] and to establish the terms and conditions of the respective contracts" and is linked to the President of the Republic through the Ministry of Economy, Development and Reconstruction. To fulfill its role and obligations, "the [Foreign Investment] Committee shall be represented by its President in the case of […] investments that require the agreement of the Committee, as established in Article 16 [of this decree]; otherwise, it will be represented by its Executive Vice President." [FN8]

[FN8] Cf. Article 12 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, volume I, appendix 6, folio 1207).

57(4) To fulfill its role and obligations, the Executive Vice Presidency of the Foreign Investment Committee, has the following responsibilities: (a) to receive, examine and report on foreign and other investment applications submitted to the Committee's consideration; (b) to act as the Committee's administrative body, preparing the required background material and studies; (c) to carry out information, registration, statistical and coordination functions relating to foreign investment; (d) to centralize information and the reports on the control of the obligations undertaken by foreign investors or the companies in which they are involved exercised by public

entities, and to denounce any offense or infraction that comes to its attention before the competent public entities or authorities; (e) to carry out and to facilitate the necessary procedures before the different entities that must provide information or grant authorization before the Committee can take a decision on the different applications, and for due execution of the corresponding contracts and decisions, and (f) to investigate in Chile or abroad the suitability and soundness of the applicants or interested parties. [FN9]

[FN9] Cf. Article 15 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, volume I, appendix 6, folio 1208); and written statement made by the witness, Andrés Emilio Culagovski Rubio, on March 10, 2006 (file on merits, volume III, folio 815).

57(5) The Foreign Investment Committee receives applications to make foreign investments in Chile through its Vice President; they are accompanied by background information on the applicants. When the applicants are juridical persons, this information consists of: name of the company; type of company; names of the principal shareholders, their nationality, civil status and residence; company domicile; economic activity; financial information for the previous year; registered capital; assets; profits; countries in which the company has investments; legal representative in Chile; economic analysis of the project; sector of the economy; region where the investment will be made; new jobs the project will generate; intended market; amount, purpose and composition of the investment; and information on the company receiving the investment. [FN10]

[FN10] Cf. Foreign investment request form (file on merits, volume III, appendix to the written statement made by the expert witness, Claudio Francisco Castillo Castillo, on March 13, 2006 folios 897 to 901).

Concerning the investment contract for the “Río Cóndor Project”

57(6) On March 21 and September 24, 1991, the Foreign Investment Committee issued two agreements approving the foreign investment applications submitted by Cetec Engineering Company Inc. and Sentarn Enterprises Ltd., to invest a capital of US$180,000,000 (one hundred and eighty million United States dollars). [FN11]

[FN11] Cf. Foreign investment contract of December 24, 1991 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folio 2045).

57(7) On December 24, 1991, the State of Chile signed a foreign investment contract with Cetec Engineering Company Inc. and Sentarn Enterprises Ltd. (foreign investors) and with

Inversiones Cetec-Sel Chile Limitada (company receiving the capital). This contract was signed under Decree Law No. 600 (the Foreign Investment Statute) in order to invest in Chile a capital of US$180,000,000 (one hundred and eighty million United States dollars). The contract established that this capital would be "surrendered and paid, on one or more occasions" to the company receiving the capital, Inversiones Cetec Cel [sic] Chile Ltda., so that the latter could use it in "the work of the design, construction and operation of a forestry exploitation project in the twelfth region," known as the "Río Cóndor Project." This project "involve[d] the development of a comprehensive forestry complex, composed of a mechanized sawmill, a timber-processing plant, manufacture of boards and planks, a lumber chip recovery plant [and] an energy plant […]." [FN12] The project had a "significant environmental impact" and gave rise to public debate. [FN13]

[FN12] Cf. Foreign investment contract of December 24, 1991 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folio 2046).
[FN13] Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; and testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006.

57(8) The Foreign Investment Committee approved the foreign investment application based on the examination of the background information provided by the investors. [FN14] An investment of approximately US$33,729,540 (thirty-three million seven hundred and twenty-nine thousand five hundred and forty United States dollars) was made under this investment contract. [FN15]

[FN14] Cf. Testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006; written statement made by the witness, Andrés Emilio Culagovski Rubio, on March 10, 2006 (file on merits, reparations, and costs, volume III, folio 817); written statement made by the witness, Liliana Guiditta Macchiavello Martini, on March 10, 2006 (file on merits, reparations, and costs, volume III, folio 826); and expert opinion given by Roberto Mayorga Lorca before the Inter-American Court during the public hearing held on April 3, 2006.
[FN15] Cf. Report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2041).

57(9) On December 15, 1993, after the rights arising from this contract had been ceded several times to other companies that would act as foreign investors, [FN16] the company receiving the investment, Inversiones Cetec-Sel Chile Ltda. changed its name to Forestal Trillium Ltda. (hereinafter "Forestal Trillium") and, on March 15, 1999, changed its name again to Forestal Savia Limitada. [FN17]

[FN16] Cf. Contract transferring foreign investment rights from Cetec Engineering Company Inc. and Sentarn Enterprises Ltd. to Zuñirse Holding Ltd., dated April 12, 1993 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folios 2099 to 2105).
[FN17] Cf. Report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2041); and registration No. 787/99 concerning change in company (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folio 2109).

57(10) On August 28, 2002, and October 10, 2003, the foreign investor, Bayside Ltd., and the State of Chile signed two foreign investment contracts authorizing a capital investment of US$10,000,000 (ten million United States dollars) and US$5,000,000 (five million United States dollars), "to be surrendered and paid to increase the capital of the company FORESTAL SAVIA LIMITADA, formerly FORESTAL TRILLIUM LIMITADA, which is developing the Río Cóndor forestry exploitation project in the twelfth region." The contract indicated that the investment authorization was "without prejudice to any other [authorizations] that […] might be required from the competent authorities." [FN18]

[FN18] Cf. Foreign investment contracts of August 28, 2002, and October 10, 2003 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folios 2115 and 2120).

57(11) The Río Cóndor Project was not executed; hence, Forestal Savia Limitada (formerly Forestal Trillium), which was the "receiver of the capital flows of the accredited foreign investor companies," did not implement the project. [FN19]

[FN19] Cf. Newspaper article entitled "Victoria Parcial Contra el Secretismo" published in "El Mercurio" on July 10, 2005 (file of appendixes to the requests and arguments brief, appendix 10, folios 1637 and 1638); brief answering the application and with observations on the requests and arguments brief, and requests and arguments brief (file on merits and possible reparations and costs, volume I, folios 130, 197 and 198); and testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.

Concerning Marcel Claude Reyes and Arturo Longton Guerrero's request for information from the Foreign Investment Committee and the latter's response

57(12) Marcel Claude Reyes is an economist. In 1983, he worked in the Central Bank as an adviser to the Foreign Investment Committee and in the Environmental Accounts Unit; also, he was Executive Director of the Terram Foundation from 1997 to 2003. One of the purposes of this non-governmental organization was to promote the capacity of civil society to respond to public

decisions on investments related to the use of natural resources, and also "to play an active role in public debate and in the production of solid, scientific information […] on the sustainable development of [Chile]." [FN20]

[FN20] Cf. Letter dated May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the application, appendix 1(1), folios 40 and 41); testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; and print-out of some links on the Terram Foundation web page of August 9, 2000 (file before the Commission, volume II, folio 429).

57(13) On May 7, 1998, Marcel Claude Reyes, as Executive Director of the Terram Foundation, sent a letter to the Executive Vice President of the Foreign Investment Committee, indicating that the foundation proposed "to evaluate the commercial, economic and social aspects of the [Rio Condor] project, assess its impact on the environment […] and exercise social control regarding the actions of the State entities that are or were involved in the development of the Río Cóndor exploitation project." [FN21] In this letter, the Executive Director of the Terram Foundation requested the Foreign Investment Committee to provide the following information "of public interest": [FN22]

"1. Contracts signed by the State of Chile and the foreign investor concerning the Río Cóndor project, with the date and name of the notary's office where they were signed and with a copy of such contracts.
2. Identity of the foreign and/or national investors in this project.
3. Background information from Chile and abroad that the Foreign Investment Committee had before it, which ensured the soundness and suitability of the investor(s), and the agreements of the Committee recording that this information was sufficient.
4. Total amount of the investment authorized for the Río Cóndor project, method and timetable for the entry of the capital, and existence of credits associated with the latter.
5. Capital effectively imported into the country to date, as the investors' own capital, capital contributions and associated credits.
6. Information held by the Committee and/or that it has requested from other public or private entities regarding control of the obligations undertaken by the foreign investors or the companies in which they are involved and whether the Committee is aware of any infraction or offense.
7. Information on whether the Executive Vice President of the Committee has exercised the power conferred on him by Article 15 bis of D[ecree Law No.] 600, by requesting from all private and public sector entities and companies, the reports and information he required to comply with the Committee's purposes and, if so, make this information available to the Foundation." [FN23]

[FN21] Cf. Letter dated May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the

application, appendix 1(1), folios 40 and 41); and testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.
[FN22] Cf. Letter dated May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the application, appendix 1(1), folios 40 and 41).
[FN23] Cf. Request for information of May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the application, appendix 1(1), folios 40 and 41).

57(14) On May 19, 1998, the Executive Vice President of the Foreign Investment Committee met with Marcel Claude Reyes and Deputy Arturo Longton Guerrero. [FN24] The Vice President handed them "a sheet with the name of the investor, the company name, and the amount of capital he had asked to import into the country" [FN25] when the project was approved, the companies involved, the investments made to date, the type of project and its location. [FN26]

[FN24] Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006; and written statement made by the witness, Arturo Longton Guerrero of March 2006 (file on merits reparations, and costs,, volume III, folio 915).
[FN25] Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.
[FN26] Cf. Written statement made by the witness, Liliana Guiditta Macchiavello Martini on March 10, 2006 (file on merits, volume III, folio 828); and testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006.

57(15) On May 19, 1998, the Executive Vice President of the Foreign Investment Committee sent Marcel Claude Reyes a one-page letter, via facsimile, in which he stated that "with regard to our conversation, the figures provided correspond only to capital, which [was] the only item executed. The Project [was] authorized to import 'associated credits' of US$102,000,000, but ha[d] not availed itself of this authorization[, and the authorized capital] amount[ed] to US$78,500,000." [FN27]

[FN27] Cf. Copy of the facsimile letter of May 19, 1998, from the Executive Vice President of the Foreign Investment Committee to Marcel Claude Reyes (file of appendixes to the application, appendix 2, folio 48); and testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.

57(16) On June 3 and July 2, 1998, Marcel Claude Reyes sent two letters to the Executive Vice President of the Foreign Investment Committee, in which he reiterated his request for

information, based on "the obligation of transparency to which State agents are subject and the right of access to public information established in the State's Constitution and in the international treaties signed and ratified by Chile." In addition, Mr. Claude Reyes indicated in these letters that he had "not received an answer from the Foreign Investment Committee to his request," and made no comment on the information that had been provided (supra para. 57(14) and 57(15)). [FN28]

[FN28] Cf. Letters of June 3 and July 2, 1998, from Marcel Claude Reyes to the Executive Vice President of the Foreign Investment Committee (appendixes to the application, appendixes 1(2) and 1(3), folios 43 and 46); testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; and testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006.

57(17) The Vice President of the Foreign Investment Committee did not adopt a written decision justifying the refusal to provide the information requested in sections 3, 6 and 7 of the original request for information (supra para. 57(13)). [FN29]

[FN29] Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006; and brief of August 13, 1999, presented by the State of Chile during the proceedings before the Inter-American Commission on Human Rights (file before the Inter-American Commission on Human Rights, volume II, folios 908 to 910).

57(18) On June 30, 2005, during the proceedings before the Inter-American Commission (supra para. 13), the State forwarded the Commission a copy of the foreign investment contracts and the assignment contracts relating to the "Río Condor" project. [FN30]

[FN30] Cf. Report presented by the State to the Inter-American Commission on June 30, 2005 (file before the Commission, volume I, folio 221); and final arguments brief submitted to the Court by the State on May 18, 2006 (file on merits, reparations, and costs, volume IV, folio 1264).

57(19) The State provided Mr. Claude Reyes and Mr. Longton Guerrero with the information corresponding to sections 1, 2, 4 and 5 of the original request for information orally and in writing (supra para. 57(13)). [FN31]

[FN31] Cf. Facsimile letter of May 19, 1998, from the Executive Vice President of the Foreign Investment Committee to Marcel Claude Reyes (file of appendixes to the application, appendix

2, folio 48); testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006; and application brief presented by the Inter-American Commission (file on merits, reparations, and costs, volume I, folio 54).

57(20) On April 3, 2006, the Executive Vice President of the Foreign Investment Committee at the time when Mr. Claude Reyes submitted his request for information, stated during the public hearing held before the Inter-American Court, inter alia, that he had not provided the requested information:

(a) On section 3 (supra para. 57(13)), because "the Foreign Investment Committee […] did not disclose the company's financial data, since providing this information was contrary to the public interest," which was "the country's development." "It was not reasonable that foreign companies applying to the Foreign Investment Committee should have to disclose their financial information in this way; information that could be very important to them in relation to their competitors; hence, this could have been an obstacle to the foreign investment process." It was the Foreign Investment Committee's practice not to provide a company's financial data that could affect its competitiveness to third parties. The Committee and the Vice President defined what was in the public interest;
(b) On section 6 (supra para. 57(13)), because information on the background material that the Committee could request from other institutions "did not exist" and the Committee "does not having policing functions"; and
c) On section 7 (supra para. 57(13)), because "the Foreign Investment Committee had neither the responsibility nor the capacity to evaluate each project on its merits; it had a staff of just over 20 persons. Furthermore, this was not necessary, since the role of the Foreign Investment Committee is to authorize the entry of capitals and the corresponding terms and conditions, and the country had an institutional framework for each sector." [FN32]

[FN32] Cf. Testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006.

Concerning the practice of the Vice Presidency of the Foreign Investment Committee with regard to providing information

57(21) Up until 2002, the Executive Vice Presidency of the Foreign Investment Committee "followed the criteria of providing only its own information." Its practice was not to provide information on the financial statements of an investment company or the names of the shareholders, [FN33] and it considered that "information regarding third parties, such as commercial information, copyrights and trademarks, use of technology and, in general, the specific characteristics of the investment projects that foreign investors wished to develop were confidential, […] since this was data of a private nature, belonging to the investor, that could

harm his legitimate business expectations if it were made public, and there was no legal source that permitted disclosure." [FN34]

[FN33] Cf. Testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006; and report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2041).

[FN34] Cf. Report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2042).

57(22) On November 13, 2002, the Ministry of Economy, Development and Reconstruction issued Decision Exenta No. 113, published in the official gazette on March 24, 2003. Article 1 of the Decision established that "acts, documents and background information whose disclosure and dissemination could affect the public interest shall be considered of a secret or confidential nature" and, in five subparagraphs, listed the situations envisaged by this Decision. Additionally, Article 2 establishes the circumstances in which acts, documents and background information would be of a secret or confidential nature considering that their disclosure and dissemination could affect the private interests of those concerned. [FN35]

[FN35] Cf. Decision Exenta [Note: exempt from the control of the Comptroller General's Office] No. 113 of the Ministry of Economy, Development and Reconstruction, published in the official gazette on March 24, 2003, (file of appendixes to the requests and arguments brief, appendix 6, folio 1270).

Concerning the judicial proceedings

57(23) On July 27, 1998, "Marcel Claude Reyes, personally and in representation of the Terram Foundation, Sebastián Cox Urrejola, personally and in representation of the NGO FORJA, and Arturo Longton Guerrero, personally and as a Deputy of the Republic," filed an application for protection [of constitutional rights] before the Santiago Court of Appeal. [FN36] This recourse was based on the alleged violation by Chile of the right of the appellants to freedom of expression and access to State-held information, guaranteed by Article 19(12) of the Chilean Constitution, in relation to Article 5(2) thereof; Article 13(1) of the American Convention, and Article 19(2) of the International Covenant on Civil and Political Rights. They requested the Court of Appeal to order the Foreign Investment Committee to respond to the request for information and make the information available to the alleged victims within a reasonable time. In the text of this application for protection, the appellants did not refer to the meeting held with the Executive Vice President of the Foreign Investment Committee, or to the information that the latter had given them (supra para. 57(14) and 57(15)).

[FN36] Cf. Application for protection filed by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero before the Santiago Court of Appeal on July 27, 1998 (file of appendixes to the application, appendix 3, folios 51 and 52).

57(24) Article 20 of the Constitution of the Republic of Chile regulates the application for protection, which can be filed by an individual "on his own behalf, or by another person on his behalf" before the respective court of appeal when, "owing to arbitrary or illegal acts or omissions, he suffers denial of, interference with or threat to the legitimate exercise of the rights and guarantees established in specific subparagraphs of Article 19, explicitly described in Article 20. The application for protection shall be admissible also in the case of Article 19(8), when the right to live in an uncontaminated environment shall be affected by an arbitrary or illegal act that can be attributed to a specific authority or individual." In addition, this Article 20 also establishes that the said court "shall adopt forthwith the measures it deems necessary to re-establish the rule of law and ensure the due protection of the person affected, without prejudice to other rights that may be claimed before the corresponding courts or authority." [FN37]

[FN37] Cf. Constitution of the Republic of Chile of August 8, 1980 (helpful evidence incorporated by the Inter-American Court, available at http:/www.bcn.cl/pags/legislación/leyes/constitución_politica.htm).

57(25) On July 29, 1998, the Santiago Court of Appeal delivered a ruling in which it declared the application for protection that had been filed inadmissible, because "from the facts described […] and from the background information attached to the application, it is clearly without grounds." In addition, the Court of Appeal stated that it had taken into consideration that "the purpose of the application for protection is to re-establish the rule of law when this has been disrupted by arbitrary or illegal acts or omissions that threaten, interfere with or deny the legitimate exercise of some of the guarantees specifically listed in Article 20 of the Constitution of the Republic, without prejudice to any other legal proceedings." This ruling does not contain any justification other than the one indicated above, and mentions that it is adopted "under the provisions of No. 2 of the Supreme Court's Unanimous Judicial Decision [published on] June 9, [1998]." [FN38]

[FN38] Cf. Ruling of the Santiago Court of Appeal of July 29, 1998 (file of appendixes to the application, appendix 4, folio 73).

57(26) The Unanimous Judicial Decision of the Supreme Court of Chile "concerning the processing of the application for protection of constitutional guarantees" issued on June 24, 1992, was modified by "Unanimous Judicial Decision concerning the processing of and ruling on the application for protection" of May 4, 1998, published on June 9, 1998. In section No. 2 of the latter, the Supreme Court agreed that "the Court shall examine whether it has been filed

opportunely and whether it has sufficient merit to admit it for processing. If, in the unanimous opinion of its members, the presentation is time-barred or suffers from a clear lack of justification, it shall declare it inadmissible by a summary decision, which shall not be susceptible to any type of appeal, except that of an appeal for reconsideration of judgment before the same court." [FN39]

[FN39] Cf. Decision of the Supreme Court of Chile "concerning the processing of the application for protection of constitutional guarantees" issued on June 24, 1992; and decision of the Supreme Court of Chile "concerning the processing of and ruling on the application for protection" issued on May 4, 1998 (file before the Commission, Volume II, folios 1039 to 1050).

57(27) On July 31, 1998, the alleged victims' lawyer filed an appeal for reconsideration of judgment before the Santiago Court of Appeal, in which he requested the Court "to reconsider the ruling of […] July 29, [1998 …] annulling it, and declaring the [application for protection] admissible." [FN40] In this appeal, in addition to presenting the legal arguments concerning the alleged violation of the right of access to the requested information, he stated that the ruling did not contain a detailed justification of the declaration of inadmissibility and "was not consistent with the provisions of section No. 2 of the Unanimous Judicial Decision concerning the processing of and ruling on the application for protection, which established that "the declaration of inadmissibility must be 'summarily justified.'" In the appeal, the said lawyer indicated that the declaration of inadmissibility "introduced a violation of the provisions of Article 5(2) of the Constitution, in relation to Article 25 of the American Convention."

[FN40] Cf. Appeal for reconsideration of judgment filed by the alleged victims' lawyer before the Santiago Court of Appeal on July 31, 1998 (file of appendixes to the application, appendix 5, folio 76).

57(28) On July 31, 1998, the alleged victims' lawyer filed a remedy of complaint before the Supreme Court of Chile against the Justices of the Santiago Court of Appeal who signed the ruling of July 29, 1998 (supra para. 57(25)) and asked the Supreme Court to order "the parties against whom the appeal was made to reconsider the ruling as soon as possible and, in brief, admit [the application for protection], immediately repairing the harm that gave rise to it, modifying the wrongfully adopted ruling in accordance with the law, and adopting any other relevant measures pursuant to the law." [FN41]

[FN41] Cf. Remedy of complaint filed by the alleged victims' lawyer before the Supreme Court of Chile on July 31, 1998 (file of appendixes to the application, appendix 7, folio 94).

57(29) Article 545 of the Basic Court Code establishes that the purpose of the remedy of complaint is "to correct serious shortcomings or abuses committed when issuing rulings of a

jurisdictional nature." It shall only be admissible when the abuse or shortcoming is committed in an interlocutory judgment that ends the proceedings or makes it impossible to continue and that is not eligible for any regular or special recourse." [FN42]

[FN42] Cf. Article 545 of the Basic Court Code (file before the Commission, volume II, folio 1054).

57(30) On August 6, 1998, the Santiago Court of Appeal declared that "the requested reconsideration is inadmissible" [FN43] (supra para. 57(27)).

[FN43] Cf. Decision of the Santiago Court of Appeal of August 6, 1998 (file of appendixes to the application, appendix 6, folio 89).

57(31) On August 18, 1998, the Supreme Court declared inadmissible the remedy of complaint filed by the alleged victims' lawyer (supra para. 57(28)), on the basis that "the grounds for admissibility are not present in the case," because the ruling that declared the application for protection inadmissible (supra para. 57(25)), pursuant to the unanimous judicial decision on the processing of and ruling on this application, could be appealed by an appeal for reconsideration of judgment. [FN44]

[FN44] Cf. Judgment delivered by the Supreme Court of Chile on August 18, 1998 (file of appendixes to the application, appendix 8, folio 109).

Concerning the legal framework of the right of access to State-held information and the confidentiality or secrecy of acts and documents in Chile

57(32) Article 19(12) of the Chilean Constitution ensures to all persons "the freedom to issue an opinion and to provide information, without any prior censorship of any kind and by any means, without prejudice to responding to any offenses or abuses committed in the exercise of these freedoms pursuant to laws enacted by a special quorum." [FN45] This Article also establishes "the right to file petitions before the authorities on any matter of public or private interest, with the sole restriction that this should be done in respectful and appropriate language." [FN46]

[FN45] Cf. Article 19(12) of the Chilean Constitution, supra note 36.
[FN46] Cf. Article 19(14) of the Chilean Constitution, supra note 36.

57(33) Constitutional Organic Law on General Principles of State Administration No. 18,575 of 1986, in force at the time of the facts, did not contain provisions concerning the right of access to

State-held information and the principles of transparency and disclosure of the Administration. In addition, this law did not establish a procedure for acceding to information held by the administrative entities. [FN47]

[FN47] Cf. Constitutional Organic Law on General Principles of State Administration No. 18,575 published in the official gazette on December 5, 1986 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 3, folio 2025 to 2134).

57(34) On April 18, 1994, Supreme Decree No. 423 was published in the official gazette. It created the National Public Ethics Commission, inter alia, in order to promote an informed reflection on the issue of public ethics, actively involving the different powers of the State and civil sectors. The decree emphasized the need "to modernize public administration, and to direct the performance of its functions towards fulfillment of its goals, improving the efficiency, productivity and quality of the public services provided." [FN48]

[FN48] Cf. Decree No. 423 issued by the Ministry of the Interior on April 5, 1994 (helpful evidence incorporated by the Inter-American Court, available at http://www.chiletransparente.cl/home/doc/DS423_ 1994.pdf).

57(35) On December 14, 1999, Act No. 19,653 concerning "Administrative probity applicable to the body of State Administration" was published in the official gazette of the Republic of Chile. Act No. 19,653 incorporated the principles of probity, transparency and disclosure and established the "right to have recourse to a professionally qualified judge of a civil court," requesting protection of the right to request certain information in writing. [FN49] On November 17, 2001, Decree Law 1/19,653 was published, establishing "the consolidated, coordinated and systematized text of Act No. 18,575" (supra para. 57(33)). This Act established, inter alia, that: [FN50]

(a) "The administrative acts of the body of State Administration and the documents that directly and essentially substantiate or complement them are public." Disclosure "extends to the reports and background information that private companies offering services to the public, and the companies referred to in the third and fifth subparagraph [...] of the Limited Companies Act provide to State entities responsible for overseeing them, to the extent that this is of public interest, that its dissemination does not affect the proper functioning of the company, and that the owner of the information does not avail himself of his right to refuse access to it";
(b) If the information "is not available to the public permanently, the interested party shall have the right to request it in writing from the head of the respective service";
(c) The head of the service may refuse access to the information for the reasons established in the law, but if he refuses access for a reason other than national security or national interest, the interested party has the right to resort to a professionally qualified judge of a civil court, and an appeal against the judgment delivered by that judge can be made before the respective court

of appeal. Should the reason invoked be national security or national interest, the appellant's complaint must be filed before the Supreme Court;

(d) If the information requested could affect the rights or interests of third parties, they may oppose the disclosure of the requested documents, by submitting a brief that does not need to state the reason, when they are given the opportunity to do so. Even in the absence of the opposition of third parties, the head of the requested entity may consider that "disclosure of the requested information would substantially affect the rights or interests of the third parties owners of this information";

(e) The head of the requested entity must provide the documentation requested, unless one of the reasons that authorizes him to refuse it is involved. The refusal must be communicated in writing and include the reasons for the decision. The only reasons why the State may refuse to provide documents or background information requested from the Administration are:

1) Confidentiality or secrecy established by legal or regulatory provisions;

2) That disclosure would impede or hinder due compliance with the functions of the requested entity;

3) Timely and appropriately-presented opposition by the third parties to which the information contained in the requested documents refers or who are affected by it;

4) That disclosure or delivery of the requested documents or background information affects the rights or interests of third parties substantially, based on a justified opinion of the head of the requested entity; and

5) That disclosure would affect national security or interest.

(f) One or more regulations shall establish the cases of secrecy or confidentiality of the documentation and background information that are held by the body of State Administration.

[FN49] Cf. Act No. 19,653 "Administrative Probity Applicable to the Body of State Administration" (file of appendixes to the application, appendix 9, folio 113).

[FN50] Cf. Decree law No. 1/19,653 establishing the consolidated and systematized text of Act No. 18,575, Constitutional Organic Law on General Principles of State Administration (file of appendixes to the requests and arguments brief, appendix 2, folios 1128 to 1157).

57(36) On January 28, 2001, the Minister-Secretary General of the Presidency promulgated Supreme Decree No. 26, with the Regulations on the secrecy or confidentiality of acts and documents of the State Administration; it was published on May 7, 2001. These Regulations establish that, for an administrative entity to provide the requested information, this should refer to administrative acts or to documents that directly and essentially substantiate them or complement them. [FN51] It also defines what should be understood by administrative act, document, supporting document, directly substantiating or complementary document, essentially substantiating or complementary document, and acts or documents that are permanently available to the public. [FN52] In addition, this regulation establishes that:

(a) The reports are public of private companies that provide services, or State-owned companies, or limited companies in which the State appoints two or more directors, to the extent that the requested documentation corresponds to reports and background information that these companies provide to the State entities responsible for overseeing them; that the background

material and reports are of public interest; that their divulgation does not affect the proper functioning of the company; and that the holder of the information does not avail himself of his right to refuse access to it; [FN53]

(b) Acts and documents that have been published integrally in the official gazette and that are included in the register that each service must keep are permanently available to the public; [FN54]

(c) The declaration of secrecy or confidentially is made by the head of the service in a reasoned decision; [FN55]

(d) "Secret" acts and documents shall only be disclosed to the authorities or persons to whom they are addressed and to those who must intervene in their examination and related decisions. "Confidential" acts and documents shall be disclosed only within the unit of the entity to which they are sent; [FN56]

(e) "Only acts and documents whose disclosure and dissemination could affect the public or private interest of the owner of the information may be declared secret or confidential," pursuant to the provisions of Article 8 of the regulations, which incorporate into public interest, reasons for confidentiality such as defense, national security, foreign policy, international relations, monetary policy, and into private interest, reasons for confidentiality such as files on punitive or disciplinary procedures of any nature, and medical or health files; [FN57]

(f) The body of the State Administration shall classify acts and documents using explicit criteria, according to the required level of protection; [FN58] and

(g) The acts and documents of a "confidential" or "secret" nature shall retain this characteristic for 20 years, unless the head of the respective service excludes them from these categories by a reasoned decision. [FN59]

[FN51] Cf. Article 2 of the Regulations on the secrecy or confidentiality of acts and documents of the State Administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1159).

[FN52] Cf. Article 3(d) and (e) of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folios 1159 to 1163).

[FN53] Cf. Article 2 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folios 1159 to 1163).

[FN54] Cf. Article 3(f) of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folios 1159 to 1163).

[FN55] Cf. Article 9 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1962).

[FN56] Cf. Article 7 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1961).

[FN57] Cf. Article 8 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1961).

[FN58] Cf. Article 9 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1962).
[FN59] Cf. Article 10(e) of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1963).

57(37) Following the entry into force of Supreme Decree No. 26 establishing the regulations on the secrecy or confidentiality of acts and documents of the State Administration (supra para. 57(36)), approximately 90 decisions were issued granting secrecy or confidentiality to a series of administrative acts, documents and background information held by State entities. [FN60]

[FN60] Cf. Administrative decisions of various State bodies that classify information as secret or confidential (file of appendixes to the requests and arguments brief, volume I, appendix 4, folios 1164 to 1184); Open Society Institute and PARTICIPA, Chilean Report "Monitoring the Access to Public Information," November 2004 (file of appendixes to the requests and arguments brief, appendix 9, folios 1615 to 1634); and expert opinion given by Carlos Carmona Santander before the Inter-American Court during the public hearing held on April 3, 2006.

57(38) On May 29, 2003, Act No. 19,880 [FN61] on administrative procedures was published, incorporating the principle of disclosure in its Articles 16, 17(a) and (d), and 39. Article 16 stipulates that "with the exceptions established by law or the regulations, the administrative acts of the body of the State Administration and the documents that directly or essential substantiate or complement them, are public."

[FN61] Cf. Act No. 19,980 published in the official gazette of May 29, 2003 (helpful evidence incorporated by the Inter-American Court, available at http://www.conicyt.cl/directorio/legislacion/ley19980.html).

57(39) On October 4, 2004, the Comptroller General's Office issued Opinion No. 49,883, [FN62] in response to a request filed by several individuals and organizations who contested the legality of 49 decisions concerning declarations of secrecy or confidentiality. This opinion stated that "numerous decisions exceed the laws and regulations by declaring the secrecy and confidentiality of other types of issues," and that "several decisions establish matters subject to secrecy or confidentiality in such broad terms that it cannot be understood that they are protected by the legal and regulatory provisions on which they should be based." In this opinion, the Comptroller General's Office stated that "it should be observed that some decisions do not include the precise justification for declaring certain documents secret or confidential." Based on the above, the Comptroller General's Office ordered peremptorily all Government departments to "re-examine [such decisions] as soon as possible [...] and, when applicable, modify them to adapt them to the legal provisions on which they are based."

[FN62] Cf. Opinion No. 49,883 of October 4, 2004 (file of appendixes to the requests and arguments brief, volume I, appendix 5, folios 1186 to 1196).

57(40) On January 4, 2005, two senators presented a draft law on access to public information. [FN63] In the preambular paragraphs, it stated that "[d]espite legislative efforts [in the 1999 Probity Act and Act No. 19,880 of May 29, 2003], in practice, the principles of transparency and access to public information are severely limited, converting these laws into dead letter […,] owing to the fact that the Probity Act itself stipulates that one or more regulations shall establish the cases of secrecy or confidentiality of the documentation and background information held by the State Administration, and this constitutes a significant barrier to the right of access to public information established by law."

[FN63] Cf. Draft Act No. 3773-06 on Access to Public Information (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 7, folios 2261 to 2270); and draft Act No. 3773-06 on Access to Public Information (helpful evidence incorporated by the Inter-American Court, available at http://sil.senado.cl/pags/index.html).

57(41) On August 26, 2005, Act No. 20,050 reforming the Chilean Constitution entered into force. Among other substantial reforms, it incorporated a new Article 8, which established that:

The exercise of public functions obliges officials to comply strictly with the principle of probity in all their actions. The acts and decisions of the body of the State are public, and also their justification and the procedures used. Only a law with a special quorum can establish their secrecy or confidentiality when disclosure would affect due compliance with the functions of these entities, the rights of the individual, or national security or interest. [FN64]

The fifth transitory provision of the Chilean Constitution establishes that "[i]t shall be understood that the laws in force on issues relating to this Constitution shall be the object of constitutional organic laws or laws adopted by a special quorum, shall comply with these requirements, and shall continue to be applied, provided they are not contrary to the Constitution, until the corresponding laws have been issued." [FN65]

[FN64] Cf. Act No. 20,050 published in the official gazette on August 26, 2005 (file of appendixes to the requests and arguments brief, appendix I, folios 1088 to 1107).
[FN65] Cf. Ffth Transitory Provision of the Chilean Constitution, supra note 36.

57(42) On October 7, 2005, the Senate of the Republic of Chile adopted the draft law on access to public information modifying Decree Law No. 1 which had established the consolidated,

coordinated and systematized text of the Organic Law on General Principles of State Administration, in order to "achieve a high level of transparency in the exercise of public functions [and encourage] increased and more effective civic participation in public matters." [FN66] This draft law is currently at its second constitutional stage.

[FN66] Cf. Draft Act No. 3773-06 on Access to Public Information (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 7, folios 2261 to 2270); and draft Act No. 3773-06 on Access to Public Information (helpful evidence incorporated by the Inter-American Court, available at http://sil.senado.cl/pags/index.html).

57(43) On December 12, 2005, the Ministry-General Secretariat of the Presidency issued Decree No. 134, derogating Supreme Decree No. 26 of 2001 (supra para. 57(36)), on the basis that, following the reform introduced by the new Article 8 of the Constitution (supra para. 57(40)) the content of the said Decree "was now contrary to the Constitution and, hence, could not continue to be law." [FN67]

[FN67] Cf. Decree No. 134 issued on December 12, 2005, by the Ministry-General Secretariat of the Presidency (file on merits, reparations, and costs, volume II, folio 539).

57(44) On January 30, 2006, the Minister-Secretary General of the Presidency sent an official communication to several State authorities with "guidelines describing the applicable criteria and rules on disclosure and access to administrative information," because, as a "result of the derogation of Decree No. 26,] all the decisions issued under this regulation establishing cases for the secrecy and confidentiality of acts and documents of the Administration had also been tacitly derogated." [FN68]

[FN68] Cf. Undated letter signed by the Minister-Secretary General of the Presidency (file on merits, reparations, and costs, volume II, folio 541).

57(45) On February 15, 2006, the Presidential Advisory Committee for the Protection of Human Rights [FN69] informed the Court that "it had taken the initiative to unofficially urge some entities of the State Administration to respond to requests for information made by individuals and, particularly, non-profit organizations." However, the Committee advised that, in general, the initiative had been "unsuccessful, because the laws in force on this issue assign decisions on conflicts between those requesting information and the requested public service to special administrative-law proceedings. […] Since the decision on whether it is admissible to disclose the public information requested by the individual is reserved to a court, the logical inclination of the heads of service faced with this type of request is to wait until the competent court orders it,"

since, this will ensure that "they are exempted from responsibility in case of possible claims by third parties." [FN70]

[FN69] Cf. Supreme Decree No. 65 of May 11, 2001 (file of appendixes to the requests and arguments brief, appendix I, folios 1088 to 1107); and report issued on February 15, 2006, by the Chairman of the Presidential Advisory Committee for the Protection of Human Rights (file on merits, reparations, and costs, volume II, folios 554 and 556).
[FN70] Cf. Report issued on February 15, 2006, by the Chairman of the Presidential Advisory Committee for the Protection of Human Rights (file on merits, reparations, and costs, volume II, folios 554 and 556); and written statement made by the expert witness Davor Harasic on March 7, 2006 (file on merits, reparations, and costs, volume II, folios 509 to 518).

REGARDING COSTS AND EXPENSES

57(46) The alleged victims and their representative incurred expenses while processing the case before the domestic courts, and also during the international proceedings (infra para. 167).

VII. VIOLATION OF ARTICLE 13 OF THE AMERICAN CONVENTION REGARDING TO ARTICLES 1(1) AND 2 THEREOF (FREEDOM OF THOUGHT AND EXPRESSION)

The Commission's arguments

58. Regarding the alleged violation of Article 13 of the Convention, regarding Articles 1(1) and 2 thereof, the Commission indicated that:

(a) The disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the Government to which it has entrusted the protection of its interests. "Article 13 of the Convention should be understood as a positive obligation on the part of the State to provide access to the information it holds"; this is necessary to avoid abuses by government officials, to promote accountability and transparency within the State, and to allow a substantial and informed public debate that ensures there are effective recourses against such abuses;
(b) There is a growing consensus that States have the positive obligation to provide the information they hold to their citizens. "The Commission has interpreted Article 13 to include a right of access to State-held information";
(c) "According to the broad terms of Article 13, the right of access to information should be governed by the 'principle of maximum disclosure.'" "The burden of proof corresponds to the State, which must demonstrate that restrictions to access to information are compatible with the inter-American provisions on freedom of expression." "This means that the restriction must not only be related to one of the [legitimate] objectives [that justify it], but it must also be shown that disclosure could cause substantial prejudice to this objective and that the prejudice to the objective is greater than the public interest in having the information" (evidence of proportionality);

(d) Most States of the Americas have regulations concerning access to information. The respective Chilean laws were not applied in this case because they were promulgated after the facts that gave rise to the petition. "The State of Chile has made a series of legislative modifications; however[, …] these do not guarantee effective and broad access to public information." "The exceptions established by law […] grant an excessive degree of discretionality to the official who determines whether or not the information is disclosed";
(e) In the instant case, the Commission focused its attention on the information concerning the FIC assessment of the pertinence of the foreign investors, which was not provided to the alleged victims, and which was not officially refused;
(f) Regarding the State's argument that, if the type of information requested had been revealed to the alleged victims, it would have violated the right to confidentiality of the companies concerned, it should be recalled that restrictions to the right to seek, receive and impart information must be expressly established by law. "The State has not cited any provision of Chilean legislation or any legal precedent which expressly establishes that information on the decision-making procedure of the Foreign Investment Committee is confidential." The decision to retain information appears to be "totally at the discretion of the Vice President of the Foreign Investment Committee." Additionally, in its answer to the application, the State departs from the line of argument on confidentiality, alleging that the Foreign Investment Committee did not have the time, capacity or legal powers to investigate the circumstances of the investors;
(g) The Foreign Investment Committee never provided a written response with regard to the missing information and has not shown how retaining the information in question was "necessary" to achieve one of the legitimate objectives established in Article 13 of the Convention. Moreover, it never presented any argument to prove that the disclosure of the information would have resulted in substantial prejudice to these objectives, and that this prejudice was greater than the public interest of disclosing the information as required by the said Article 13. In addition, the State's assertion that the role of controlling Government entities is the exclusive competence of Congress is "unsustainable"; and
(h) "The Chilean State did not guarantee the right of the [alleged] victims of access to information because a State entity refused access to information without proving that it was included in one of the legitimate exceptions to the general rule of disclosure established in Article 13. Also, when the facts that gave rise to this application occurred, the State did not have mechanisms to ensure the right of access to information effectively."

The arguments of the alleged victims' representative:

59. Regarding the alleged violation of Article 13 of the Convention, in relation to Articles 1(1) and 2 thereof, the representative stated that:

(a) The State refused to provide the alleged victims with information it held without giving any reason. The State justified this refusal before the Court by the fact that there was a legal vacuum as regards the confidentiality of the information companies provided to the Foreign Investment Committee. This reason violates the presumption of the maximum disclosure of information and the principles of proportionality and need imposed on restrictions to the right to freedom of expression. The failure to provide the information was decided without prior consultation with the company eventually affected by the disclosure of the information, and the

State did not demonstrate to the Court the extent to which the requested information might have affected the rights of Forestal Trillium Ltda. or the State's foreign investment promotion policy;
(b) It has been shown that the Foreign Investment Committee is supposed to investigate foreign investors. By reserving to itself the assessment of investors, the State failed to guarantee to society the corporate credibility of the investors and their investment;
(c) The implicit recognition of the failure to investigate and the refusal of information by the Committee violate the right of access to information included in the right to freedom of expression, because, in sensitive areas that affect the country's natural resources, public interest requires the State to adopt additional and complementary protection measures designed to ensure the suitability and soundness of those who invest in the country. The State has the positive obligation to generate and disclose public information so as to encourage democratic debate and control by civil society; and
(d) The legislative measures taken by the State do not exempt it from international responsibility, because the failure to provide a response and to disclose the information on the suitability of the foreign investor, and also the denial of justice by the national courts, are consummated facts that violate rights embodied in the Convention. Also, even though the constitutional reform that tacitly annulled the 2001 regulations on secrecy and confidentiality was a step forward, it was incomplete; it hinders, restricts and limits the exercise of the right of access to public information and includes grounds for restrictions that are incompatible with Article 13 of the Convention. This reform and also the one that is currently being discussed in Congress do not recognize the right of access to information as an element of the right to freedom of expression as established in Article 13 of the American Convention, but rather as "an element expressing the general interest of the principles of disclosure and probity."

The State's arguments

60. Regarding the alleged violation of Article 13 of the Convention, in relation to Articles 1(1) and 2 thereof, the State indicated that:

(a) In relation to the alleged refusal of information by the Foreign Investment Committee with regard to sections 6 and 7 of the request, it is evident from the testimony of Mr. Moyano Berríos and Mr. Mayorca that the Committee did not have that information;
(b) In relation to the information regarding section 3 of the request, at the time of the facts of this case and actually, the Foreign Investment Committee does not have the physical capacity or the legal powers to investigate the circumstances of the investors. "The role of the Foreign Investment Committee is merely to facilitate and approve flows of foreign capital into Chile." It is not the Committee's role "to conduct a prior study to guarantee the technical, legal, financial or economic viability of the economic [investment] projects; this is the task of the investors." All the background information that the Committee has is provided by the investors themselves. "The petitioners asked the Foreign Investment Committee to provide them with information designed to reveal the possible environmental impact of the forestry project" and the Committee did not have this information since it fell within the jurisdiction of the National Environmental Commission;
(c) "When the petitioners submitted their petition (December 1998) and up until 2002, there was no law that regulated the disclosure or confidentiality of the administrative acts of the Foreign Investment Committee or the documents on which such acts were based." The

Committee considered that information relating to third parties and, in general, the specific characteristics of the project were confidential because they constituted private background information that, if made public, "could harm legitimate business interests, and in the absence of a legal source that allowed their disclosure";

(d) It has complied with the recommendations made by the Commission in its Report on Merits; namely, to disclose the information requested by the petitioners, to grant adequate reparation to the petitioners, and to adapt its domestic laws to the terms of Article 13 of the Convention;

(e) Regarding the recommendation to disclose the requested information, the Commission refers to providing information in general and, "in its recommendation, omits the information that was handed directly by the Foreign Investment Committee to the alleged victims and which answered four of the seven sections in the request made to this Committee." "The fact that the project in question was never implemented or executed" signifies that the reasons for requesting the information have disappeared and that compliance with the recommendations "is completely out of context." Despite the foregoing, on June 30, 2005, the State "forwarded […] to the Commission the foreign investment contracts and the contracts assigning them, in relation to the Río Cóndor project of the Trillium forestry company";

(f) With regard to the Commission's second recommendation to grant adequate reparation to the petitioners, the State had informed the Commission that it was "considering [..] a reparation of a symbolic nature that would encompass the situation of rights violations of which they were victims, and also publicize the progress made in the area of access to public information [in Chile], in order to adapt its domestic legislation to the terms of Article 13 of the Convention. The nature and characteristics of this symbolic reparation would have been proposed to the Commission and then advised to the petitioners. This did not occur owing to the Commission's decision to submit the case to the Court's consideration […].";

(g) Regarding the Commission's third recommendation, the State has adapted its domestic legislation so that it conforms to the provisions of Article 13 of the Convention. As an example, it mentioned the recent reform of the Constitution, which incorporates the principle of probity and the right of access to public information in its Article 8, and also that "it has recently prepared a draft law designed to improve the legal norms that currently govern the right of access to information, its exercise and limits, and the recourses in cases of abusive, illegal or arbitrary restrictions to its exercise." Likewise, the reasons for refusing to provide the requested documents have been established by Probity Act No. 19,653 and, as a direct consequence of the constitutional reform, "Decree Law No. 26 of the Ministry-General Secretariat of the Presidency establishing the cases in which the body of the Administration could order the secrecy or confidentiality of certain documents or acts in the exercise of their functions, was annulled" to avoid any actions that contradicted the new constitutional provision; and

(h) Examination of the new laws adopted as a result of the Inter-American Commission's recommendations exceeds the purpose and jurisdiction of the Court, because the new norms are not at issue in the instant case.

The Court's findings

61. Article 13 (Freedom of Thought and Expression) of the American Convention establishes, inter alia, that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    a. respect for the rights or reputations of others; or
    b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
[…]

62. Regarding the obligation to respect rights, Article 1(1) of the Convention stipulates that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

63. Regarding domestic legal effects, Article 2 of the Convention establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

64. The Court has established that the general obligation contained in Article 2 of the Convention entails the elimination of any type of norm or practice that results in a violation of the guarantees established in the Convention, as well as the issue of norms and the implementation of practices leading to the effective observance of these guarantees. [FN71]

[FN71] Cf. Case of Ximenes Lopes, supra note 2, para. 83; . Case of Gómez Palomino. Judgment of November 22, 2005. Series C No. 136, para. 91; . Case of the “Mapiripán Massacre”. Judgment of September 15, 2005. Series C No. 134, para. 109; and Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 78.

---

65. In light of the proven facts in this case, the Court must determine whether the failure to hand over part of the information requested from the Foreign Investment Committee in 1998 constituted a violation of the right to freedom of thought and expression of Marcel Claude Reyes,

Sebastián Cox Urrejola and Arturo Longton Guerrero and, consequently, a violation of Article 13 of the American Convention.

66. With regard to the specific issues in this case, it has been proved that a request was made for information held by the Foreign Investment Committee, and that this Committee is a public-law juridical person (supra para. 57(2) and 57(13) to 57(16)). Also, that the requested information related to a foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact (supra para. 57(7)).

67. Before examining whether the restriction of access to information in this case led to the alleged violation of Article 13 of the American Convention, the Court will determine who should be considered alleged victims, and also define the subject of the dispute concerning the failure to disclose information.

68. In relation to determining who requested the information that, in the instant case, it is alleged was not provided, both the Commission and the representative stated that the alleged victims were Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola. They also indicated that the State violated their right of access to public information because it refused to provide them with the requested information and failed to offer a valid justification. In this respect, Mr. Cox Urrejola affirmed in his written statement "that together with Marcel Claude and Arturo Longton, [he] presented the request for information to the Foreign Investment Committee [in] May 1998" (supra para. 48). While, Arturo Longton, in his written statement, indicated that, during the meeting held on May 19, 1998, he requested "several elements of information regarding the foreign investor involved […] and, in particular, the background information that demonstrated his suitability and soundness" (supra para. 48).

69. In the instant case, in which violation of the right to accede to State-held information is alleged, in order to determine the alleged victims, the Court must examine their requests for information and those that were refused

70. From examining the evidence, it is clear that Marcel Claude Reyes, as Executive Director of the Terram Foundation, requested information from the Foreign Investment Committee (supra para. 57(13), 57(14) and 57(16)), and also that Arturo Longton Guerrero participated in the meeting held with the Vice President of this Committee (supra para. 57(14)) when information was requested, part of which has not been provided to them. The State did not present any argument to contest that Mr. Longton Guerrero requested information from the Committee which he has not received. As regards, Sebastián Cox Urrejola, the Court considers that the Commission and the representatives have not established what the information was that he requested from the Foreign Investment Committee which was not given to him; merely that he recently took part in filing an application for protection before the Santiago Court of Appeal (supra para. 57(23)).

71. In view of the above, the Court will examine the violation of Article 13 of the American Convention in relation to Marcel Claude Reyes and Arturo Longton Guerrero, since it has been proved that they requested information from the Foreign Investment Committee.

*

Information that was not provided (subject of the dispute)

72. The Court emphasizes that, as has been proved – and acknowledged by the Commission, the representative, and the State – the latter provided information corresponding to four of the seven sections included in the letter of May 7, 1998 (supra para. 57(13), 57(14), 57(15) and 57(19)).

73. The Court considers it evident that the information the State failed to provide was of public interest, because it related to the foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact (supra para. 57(7)). In addition, this request for information concerned verification that a State body - the Foreign Investment Committee – was acting appropriately and complying with its mandate.

74. This case is not about an absolute refusal to release information, because the State complied partially with its obligation to provide the information it held. The dispute arises in relation to the failure to provide part of the information requested in sections 3, 6 and 7 of the said letter of May 7, 1998 (supra para. 57(13) and 57(17)).

***

A) Right to freedom of thought and expression

75. The Court's case law has dealt extensively with the right to freedom of thought and expression embodied in Article 13 of the Convention, by describing its individual and social dimensions, from which it has deduced a series of rights that are protected by this Article. [FN72]

[FN72] Cf. . Case of López Álvarez. Judgment of February 1, 2006. Series C No. 141, para. 163; Case of Palamara Iribarne. Judgment of November 22, 2005. Series C No. 135, para. 69; . Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, paras. 77-80; . Case of Herrera Ulloa. Judgment of July 2, 2004. Series C No. 107, paras. 108-111; . Case of Ivcher Bronstein. Judgment of February 6, 2001. Series C No. 74, paras. 146–149; . Case of "The Last Temptation of Christ" (Olmedo Bustos et al.). Judgment of February 5, 2001. Series C No. 73, paras. 64-67; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 30-33 and 43.

---

76. In this regard, the Court has established that, according to the protection granted by the American Convention, the right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds." [FN73] In the same way as the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information.

[FN73] Cf. Case of López Álvarez, supra note 72, para. 163; . Case of Ricardo Canese, supra note 72, para. 77; and . Case of Herrera Ulloa, supra note 72, para. 108.

---

77. In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State. [FN74]

[FN74] Cf. . Case of López Álvarez, supra note 72, para. 163; . Case of Ricardo Canese, supra note 72, para. 80; and . Case of Herrera Ulloa, supra note 72, paras. 108-111.

---

78. In this regard, it is important to emphasize that there is a regional consensus among the States that are members of the Organization of American States (hereinafter "the OAS") about the importance of access to public information and the need to protect it. This right has been the subject of specific resolutions issued by the OAS General Assembly. [FN75] In the latest Resolution of June 3, 2006, the OAS General Assembly, "urge[d] the States to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application." [FN76]

[FN75] Cf. Resolution AG/RES. 1932 (XXXIII-O/03) of June 10, 2003, on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. (XXXIV-O/04) of June 8, 2004, on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. 2121 (XXXV-O/05) of June 7, 2005, on "Access to Public Information: Strengthening Democracy"; and AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on "Access to Public Information: Strengthening Democracy."
[FN76] Cf. Resolution AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on "Access to Public Information: Strengthening Democracy," second operative paragraph.
---

79. Article 4 of the Inter-American Democratic Charter [FN77] emphasizes the importance of "[t[ransparency in government activities, probity, responsible public administration on the part of Governments, respect for social rights, and freedom of expression and of the press" as essential components of the exercise of democracy. Moreover, Article 6 of the Charter states that "[i]t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy"; therefore, it invites the States Parties to "[p]romot[e] and foster[...] diverse forms of [citizen] participation."

[FN77] Cf. Inter-American Democratic Charter adopted by the General Assembly of the OAS on September 11, 2001, during the twenty-eighth special session held in Lima, Peru.
---

80. In the Nueva León Declaration, adopted in 2004, the Heads of State of the Americas undertook, among other matters, "to provid[e] the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens," recognizing that "[a]ccess to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation […]." [FN78]

[FN78] Cf. Declaration of Nueva León, adopted on January 13, 2004, by the Heads of State and Government of the Americas, during the Special Summit of the Americas, held in Monterrey, Nuevo León, Mexico.
---

81. The provisions on access to information established in the United Nations Convention against Corruption [FN79] and in the Rio Declaration on Environment and Development should also be noted. [FN80] In addition, within the Council of Europe, as far back as 1970, the Parliamentary Assembly made recommendations to the Committee of Ministers of the Council of Europe on the "right of freedom of information," [FN81] and also issued a Declaration establishing that, together with respect for the right of freedom of expression, there should be "a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits […]." [FN82] In addition, recommendations and directives have been adopted [FN83] and, in 1982, the Committee of Ministers adopted a "Declaration on

freedom of expression and information," in which it expressed the goal of the pursuit of an open information policy in the public sector. [FN84] In 1998, the "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" was adopted during the Fourth Ministerial Conference "Environment for Europe," held in Aarhus, Denmark. In addition, the Committee of Ministers of the Council of Europe issued a recommendation on the right of access to official documents held by the public authorities, [FN85] and its principle IV establishes the possible exceptions, stating that "[these] restrictions should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecti[on]."

[FN79] Cf. Articles 10 and 13 of the United Nations Convention against Corruption, adopted by Resolution 58/4 of the General Assembly of the United Nations of October 31, 2003.
[FN80] Cf. Principle 10 of the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development held from June 3 to 14, 1992.
[FN81] Cf. Recommendation No. 582 adopted by the Council of Europe Parliamentary Assembly on January 23, 1970. It recommended instructing the Committee of Experts on Human Rights Experts to consider and make recommendations on:
(i) the extension of the right of freedom of information provided for in Article 10 of the European Convention on Human Rights, by the conclusion of a protocol or otherwise, so as to include freedom to seek information (which is included in Article 19(2) of the United Nations Covenant on Civil and Political Rights); there should be a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations;
[FN82] Cf. Resolution No. 428 adopted by the Council of Europe Parliamentary Assembly on January 23, 1970.
[FN83] Cf. Resolution No. 854 adopted by the Council of Europe Parliamentary Assembly on February 1, 1979, which recommended the Committee of Ministers "to invite member states which have not yet done so to introduce a system of freedom of information," which included the right to seek and receive information from government agencies and departments; and Directive 2003/4/EC of the European Parliament and Council of January 28, 2003, on public access to environmental information.
[FN84] Declaration on the Freedom of Expression and Information adopted by the Committee of Ministers of April 29, 1982.
[FN85] Cf. Recommendation No. R (2002)2, adopted on February 21, 2002.
---

82. The Court also finds it particularly relevant that, at the global level, many countries have adopted laws designed to protect and regulate the right to accede to State-held information.

83. Finally, the Court finds it pertinent to note that, subsequent to the facts of this case, Chile has made significant progress with regard to establishing by law the right of access to State-held information, including a constitutional reform and a draft law on this right which is currently being processed.

***

84. The Court has stated that "[r]epresentative democracy is the determining factor throughout the system of which the Convention is a part," and "a 'principle' reaffirmed by the American States in the OAS Charter, the basic instrument of the inter-American system." [FN86] In several resolutions, the OAS General Assembly has considered that access to public information is an essential requisite for the exercise of democracy, greater transparency and responsible public administration and that, in a representative and participative democratic system, the citizenry exercises its constitutional rights through a broad freedom of expression and free access to information. [FN87]

[FN86] Cf. . Case of YATAMA. Judgment of June 23, 2005. Series C No. 127, para. 192; and The Word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 34.
[FN87] Cf. Supra note 75.

---

85. The Inter-American Court referred to the close relationship between democracy and freedom of expression, when it established that:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free. [FN88]

[FN88] Cf. . Case of Ricardo Canese, supra note 72, para. 82; . Case of Herrera Ulloa, supra note 72, para. 112; and Advisory Opinion OC-5/85, supra note 72, para. 70.

---

86. In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.

87. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. [FN89] Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society.

[FN89] Cf. . Case of Palamara Iribarne, supra note 72, para. 83; . Case of Ricardo Canese, supra note 72, para. 97; and . Case of Herrera Ulloa, supra note 72, para. 127. Likewise, cf. Feldek v. Slovakia, no. 29032/95, § 83, ECHR 2001-VIII; and Surek and Ozdemir v. Turkey, nos. 23927/94 and 24277/94, § 60, ECHR Judgment of 8 July, 1999.

B) The restrictions to the exercise of the right of access to State-held information imposed in this case

88. The right of access to State-held information admits restrictions. This Court has already ruled in other cases on the restrictions that may be imposed on the exercise of freedom of thought and expression. [FN90]

[FN90] Cf. Case of López Álvarez, supra note 72, para. 165; . Case of Palamara Iribarne, supra note 72, para. 85; . Case of Ricardo Canese, supra note 72, para. 95; and . Case of Herrera Ulloa, supra note 72, paras. 120-123.

---

89. In relation to the requirements with which a restriction in this regard should comply, first, they must have been established by law to ensure that they are not at the discretion of public authorities. Such laws should be enacted “for reasons of general interest and in accordance with the purpose for which such restrictions have been established.” In this respect, the Court has emphasized that:

From that perspective, one cannot interpret the word "laws," used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature.
[…]
The requirement that the laws be enacted for reasons of general interest means they must have been adopted for the "general welfare" (Art. 32(2)), a concept that must be interpreted as an integral element of public order (ordre public) in democratic States […]. [FN91]

[FN91] Cf. Advisory Opinion. OC-6/86, supra note 86, paras. 26-29.

---

90. Second, the restriction established by law should respond to a purpose allowed by the American Convention. In this respect, Article 13(2) of the Convention permits imposing the restrictions necessary to ensure “respect for the rights or reputations of others” or “the protection of national security, public order, or public health or morals.”

91. Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to

achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right. [FN92]

[FN92] Cf. Case of Palamara Iribarne, supra note 72, para. 85; . Case of Ricardo Canese, supra note 72, para. 96; . Case of Herrera Ulloa, supra note 72, paras. 121 and 123; and Advisory Opinion OC-5/85, supra note 72, para. 46.

---

92. The Court observes that in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.

93. It corresponds to the State to show that it has complied with the above requirements when establishing restrictions to the access to the information it holds.

94. In the instant case, it has been proved that the restriction applied to the access to information was not based on a law. At the time, there was no legislation in Chile that regulated the issue of restrictions to access to State-held information.

95. Furthermore, the State did not prove that the restriction responded to a purpose allowed by the American Convention, or that it was necessary in a democratic society, because the authority responsible for responding to the request for information did not adopt a justified decision in writing, communicating the reasons for restricting access to this information in the specific case.

96. Even though, when restricting the right, the public authority from which information was requested did not adopt a decision justifying the refusal, the Court notes that, subsequently, during the international proceedings, the State offered several arguments to justify the failure to provide the information requested in sections 3, 6 and 7 of the request of May 7, 1998 (supra para. 57(13)).

97. Moreover, it was only during the public hearing held on April 3, 2006 (supra para. 32), that the Vice President of the Foreign Investment Committee at the time of the facts, who appeared as a witness before the Court, explained the reasons why he did not provide the requested information on the three sections (supra para. 57(20)). Essentially he stated that “the Foreign Investment Committee […] did not provide the company’s financial information because disclosing this information was against the collective interest,” which was “the country’s development,” and that it was the Investment Committee’s practice not to provide financial information on the company that could affect its competitiveness to third parties. He also stated that the Committee did not have some of the information, and that it was not obliged to have it or to acquire it.

98. As has been proved, the restriction applied in this case did not comply with the parameters of the Convention. In this regard, the Court understands that the establishment of restrictions to the right of access to State-held information by the practice of its authorities, without respecting the provisions of the Convention (supra paras. 77 and 88 to 93), creates fertile ground for discretionary and arbitrary conduct by the State in classifying information as secret, reserved or confidential, and gives rise to legal uncertainty concerning the exercise of this right and the State's powers to limit it.

99. It should also be stressed that when requesting information from the Foreign Investment Committee, Marcel Claude Reyes "proposed to assess the commercial, economic and social elements of the [Río Cóndor] project, measure its impact on the environment […] and set in motion social control of the conduct of the State bodies that intervene or intervened" in the development of the "Río Cóndor exploitation" project (supra para. 57(13)). Also, Arturo Longton Guerrero stated that he went to request information "concerned about the possible indiscriminate felling of indigenous forests in the extreme south of Chile" and that "[t]he refusal of public information hindered [his] monitoring task" (supra para. 48). The possibility of Messrs. Claude Reyes and Longton Guerrero carrying out social control of public administration was harmed by not receiving the requested information, or an answer justifying the restrictions to their right of access to State-held information.

***

100. The Court appreciates the efforts made by Chile to adapt its laws to the American Convention concerning access to State-held information; in particular, the reform of the Constitution in 2005, which established that the confidentiality or secrecy of information must be established by law (supra para. 57(41), a provision that did not exist at the time of the facts of this case.

101. Nevertheless, the Court considers it necessary to reiterate that, in accordance with the obligation established in Article 2 of the Convention, the State must adopt the necessary measures to guarantee the rights protected by the Convention, which entails the elimination of norms and practices that result in the violation of such rights, as well as the enactment of laws and the development of practices leading to the effective respect for these guarantees. In particular, this means that laws and regulations governing restrictions to access to State-held information must comply with the Convention's parameters and restrictions may only be applied for the reasons allowed by the Convention (supra paras. 88 to 93); this also relates to the decisions on this issue adopted by domestic bodies.

102. It should be indicated that the violations in this case occurred before the State had made these reforms; consequently, the Court concludes that, in the instant case, the State did not comply with the obligations imposed by Article 2 of the American Convention to adopt the legislative or other measures necessary to give effect to the right to freedom of thought and expression of Marcel Claude Reyes and Arturo Longton Guerrero.

***

103. Based on the above, the Court finds that the State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and failed to comply with the general obligation to respect and ensure the rights and freedoms established in Article 1(1) thereof. In addition, by not having adopted the measures that were necessary and compatible with the Convention to make effective the right of access to State-held information, Chile failed to comply with the general obligation to adopt domestic legal provisions arising from Article 2 of the Convention.

VIII. ARTICLE 23 (RIGHT TO PARTICIPATE IN GOVERNMENT) OF THE AMERICAN CONVENTION IN RELATION TO ARTICLES 1(1) AND 2 THEREOF

104. The Commission did not allege that Article 23 of the Convention had been violated.

The arguments of the alleged victims' representative:

105. The representative alleged that Chile had violated Article 23 of the Convention, in relation to Articles 1(1) and 2 thereof, an opinion that does not appear in the application lodged by the Commission. The representative stated that:

(a) The State violated the right to participate directly in public affairs, because this is not legally recognized in Chile. To be effective, it is essential that citizens can also exercise the right to accede to public information, since these two rights "converge, legitimate and sustain the right of social control";
(b) "The unjustified refusal to provide the requested information regarding the name of the investor, his suitability and soundness, represents an evident violation of the right to participate in government, by hindering the alleged victims' participation in the public debate on a relevant aspect of foreign investment of public interest concerning the exploitation of the country's natural resources"; and
(c) The State violated the general obligations established in Articles 1 and 2 of the American Convention because it lacked practices and measures to promote the exercise of the general right to citizen participation and because it did not have specific legal recourses to protect this.

106. The State did not submit arguments on the alleged violation of Article 23 of the American Convention.

The Court's findings

107. The Court will not examine the alleged violation of Article 23 of the Convention because it has already taken into consideration the arguments made by the representative in this respect when examining the violation of Article 13 of the American Convention.

IX. VIOLATION OF ARTICLES 8 AND 25 (RIGHTS TO A FAIR TRIAL AND TO JUDICIAL PROTECTION) OF THE CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF

108. The Commission did not allege any violation of Article 8 of the Convention. However, regarding Article 25, in relation to Articles 1(1) and 2 thereof, it stated that:

(a) The absence of an effective judicial recourse to repair the violation of rights protected by the Convention constitutes a violation thereof. For the recourse to be effective, the judicial body must assess the merits of the complaint; and
(b) The State is obliged to provide an effective judicial recourse for alleged violations of the right of access to information. Chile did not grant this recourse to the alleged victims in this case, because "Chilean justice never attempted, even superficially, to determine the rights of the victims," "nor has it ensured an appropriate mechanism or procedure for an individual who requests information to have access to an independent and effective regulatory judicial body to ensure his right of access to information."

109. The alleged victims' representative submitted his arguments on the alleged violations of Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention together; therefore, this is how they are summarized below:

(a) The Santiago Court of Appeal did not hear the appellant's petition, and declared it inadmissible "without providing any type of reasoning on how it reached this conclusion"; that decision was ratified by the Supreme Court. This "declaration of the inadmissibility of the recourse prevented the victims from being heard with due guarantees in order to protect the alleged right;
(b) In his final arguments, he stated that the State had failed to comply with the provisions of Articles 1 and 2 of the Convention, since the formal procedure for processing the judicial recourse for the protection of fundamental rights established in Article 20 of the Chilean Constitution is not incorporated into the system by law as the Convention requires, but by a decision of the Supreme Court. The Judiciary's practice reveals a restrictive application of the criteria on the admissibility of this recourse. He requested the Court to declare that the decision taken by the Supreme Court of Justice regulating the said recourse "violates Articles 8 and 25 of the Convention".

110. The State did not refer to the alleged violation of Article 8 of the American Convention, but in relation to Article 25 indicated that:

(a) Article 25 of the Convention "imposes on the State an obligation concerning means rather than results." As of 1999, Chile has had a remedy of habeas data that offers the necessary guarantees to obtain access to public information." This recourse may be filed at any time; consequently, the alleged victims, could have filed it, if they were denied information; and
(b) The alleged victims, "including Deputy Arturo Longton," also had another domestic recourse that they could have filed before the Chamber of Deputies. They announced that they would file it, but never did so, despite its effectiveness. Using this recourse, any deputy "could, during the time devoted to motions, request specific reports or information from body of the State Administration through the Secretariat of the Chamber of Deputies."

The Court's findings

111. Regarding the alleged violation of Article 8 of the Convention, the Court reiterates its case law concerning the possibility of the alleged victims or their representatives invoking rights other than those included in the Commission's application. [FN93]

[FN93] Cf. Case of Acevedo Jaramillo et al.. Judgment de February 7, 2006. Series C No. 144, para. 280; Case of López Álvarez, supra note 72, para. 82; and . Case of the Pueblo Bello Massacre. Judgment of January 31, 2006. Series C No. 140, para. 54.

---

112. The proven facts (supra para. 57(12) to 57(17) and 57(23) to 57(30)) have established that the Executive Vice President of the Foreign Investment Committee (in the administrative sphere) and the Santiago Court of Appeal (in the judicial sphere) adopted decisions on the request for access to State-held information by Mr. Claude Reyes and Mr. Longton Guerrero.

113. The Court will first examine whether the administrative decision was adopted in accordance with the guarantee of due justification protected by Article 8(1) of the Convention. Then, the Court will determine whether the judicial decision complied with this guarantee and whether, in the instant case, Chile guaranteed the right to a simple and prompt recourse, or any other effective recourse, embodied in Article 25(1) of the Convention.

1) Application of Article 8(1) of the Convention in relation to the decision of the administrative body

114. Article 8(1) of the Convention establishes that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

115. The Court will now consider whether, in the instant case, Chile complied with the guarantee of justifying the decision not to provide part of the requested information adopted by the Vice President of the Foreign Investment Committee.

116. Article 8 of the American Convention applies to all the requirements that must be observed by procedural instances, whatsoever their nature, to ensure that the individual may defend himself adequately with regard to any act of the State that may affect his rights. [FN94]

[FN94] Cf. Case of YATAMA, supra note 86, para. 147; Ivcher Bronstein case, supra note 72, para. 102; Case of Baena Ricardo et al.. Judgment of February 2, 2001. Series C No. 72, para. 124; and the Case of Constitutional Court. Judgment of January 31, 2001. Series C No. 71, para. 69.

---

117. According to the provisions of Article 8(1) of the Convention, when determining the rights and obligations of the individual of a criminal, civil, labor, fiscal or any other nature, "due guarantees" must be observed that ensure the right to due process in the corresponding procedure. [FN95] Failure to comply with one of these guarantee results in a violation of this provision of the Convention.

[FN95] Cf. Case of YATAMA, supra note 86, paras. 148-164; and Case of Baena Ricardo et al., supra note 94, paras. 127-134.

---

118. Article 8(1) of the Convention does not apply merely to judges and judicial courts. The guarantees established in this provision must be observed during the different procedures in which State entities adopt decisions that determine the rights of the individual, because the State also empowers administrative, collegiate, and uni-personal authorities to adopt decisions that determine rights.

119. Consequently, the guarantees established in Article 8(1) of the Convention are also applicable when a public authority adopts decisions that determine such rights, [FN96] bearing in mind that, although the guarantees inherent in a jurisdictional body are not required of him, he must comply with the guarantees designed to ensure that his decision is not arbitrary.

[FN96] Cf. Case of YATAMA, supra note 86, para. 149; Case of Ivcher Bronstein, supra note 72, para. 105; and Case of Baena Ricardo et al., supra note 94, para. 124.

---

120. The Court has established that decisions adopted by domestic bodies that could affect human rights should be duly justified; otherwise, they would be arbitrary decisions. [FN97]

[FN97] Cf. Case of Palamara Iribarne case, supra note 72, para. 216; and Case of YATAMA case, supra note 86, para. 152. Also, cf. García Ruiz v. Spain [GC], no. 30544/96, § 26, ECHR 1999-I; and Eur. Court H.R., Case of H. v. Belgium, Judgment of 30 November 1987, Series A no. 127-B, para. 53.

---

121. It has been proved (supra para. 57(17)) that, in response to the request for State-held information made by Mr. Claude Reyes and Mr. Longton Guerrero, the Executive Vice President of the Foreign Investment Committee decided to refuse to provide part of the information. As this Court has found (supra paras. 88 to 103), the decision adopted by this official adversely affected the exercise of the right to freedom of thought and expression of Marcel Claude Reyes and Arturo Longton Guerrero.

122. In this case, the State's administrative authority responsible for taking a decision on the request for information did not adopt a duly justified written decision, which would have

provided information regarding the reasons and norms on which he based his decision not to disclose part of the information in this specific case and established whether this restriction was compatible with the parameters embodied in the Convention. Hence, this decision was arbitrary and did not comply with the guarantee that it should be duly justified protected by Article 8(1) of the Convention.

123. In view of the above, the Court concludes that the said decision of the administrative authority violated the right to judicial guarantees embodied in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero.

2) Application of Article 8(1) of the Convention in relation to the decision of the Santiago Court of Appeal and the right to a simple and prompt recourse, or any other effective recourse, established in Article 25(1) of the Convention

124. Article 25(1) of the Convention stipulates that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

125. Article 2 establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

126. The Court has established that all State bodies which exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the American Convention. [FN98]

[FN98] Cf. Case of Palamara Iribarne, supra note 72, para. 164; Case of YATAMA, supra note 86, para. 149; and Case of Ivcher Bronstein, supra note 72, para. 104.

---

127. The Court has affirmed that the effective recourse mentioned in Article 25 of the Convention must be processed in accordance with the rules of due process established in Article 8(1) thereof, in keeping with the general obligation of the States to guarantee the free and full exercise of the rights established in the Convention to all persons subject to their jurisdiction (Article 1(1)). [FN99] To this end, the application for protection of rights filed before the Santiago Court of Appeal should have been processed respecting the guarantees embodied in Article 8(1) of the Convention.

[FN99] Cf. Case of Ximenes Lopes, supra note 2, para. 193; Case of Palamara Iribarne, supra note 72, para. 163; and Case of the Moiwana Community case. Judgment of June 15, 2005. Series C No. 124, para. 142.

---

128. Article 25(1) of the Convention has established the broad scope of the State's obligation to offer to all persons subject to their jurisdiction an effective judicial recourse to contest acts that violate their fundamental rights. It also establishes that the guarantee embodied therein applies not only with regard to the rights contained in the Convention, but also those recognized by the Constitution and by law. [FN100]

[FN100] Cf. Case of YATAMA, supra note 86, para. 167; Case of Cantos. Judgment of November 28, 2002. Series C No. 97, para. 52; Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79, para. 111; and Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 23.

---

129. Safeguarding the individual from the arbitrary exercise of public authority is the main purpose of the international protection of human rights. [FN101] The inexistence of effective domestic recourses places the individual in a state of defenselessness. [FN102]

[FN101] Cf. Case of Acevedo Jaramillo et al., supra note 93, para. 213; Case of García Asto and Ramírez Rojas. Judgment of November 25, 2005. Series C No. 137, para. 113; and Case of Palamara Iribarne, supra note 72, para. 183.

[FN102] Cf. Case of García Asto and Ramírez Rojas, supra note 101, para. 113; Case of Palamara Iribarne, supra note 72, para. 183; Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, para.92; and Advisory Opinion OC-9/87, supra note 100, para. 23.

---

130. The inexistence of an effective recourse against violations of the rights established in the Convention constitutes a violation thereof by the State Party. [FN103] States Parties to the Convention are obliged to establish the said effective recourse by law and ensure its due implementation.

[FN103] Cf. Case of YATAMA, supra note 86, para. 168; Case of the Yakye Axa Indigenous Community. Judgment of June 17, 2005. Series C No. 125, para. 61; and Case of "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, para. 136.

---

131. For the State to comply with the provisions of Article 25 of the Convention, it is not enough that recourses exist formally; they must be effective [FN104] in the terms of that article.

The existence of this guarantee "constitutes one of the basic pillars not only of the American Convention on Human Rights, but also of the rule of law itself in a democratic society, according to the Convention." [FN105] The Court has stated repeatedly that this obligation implies that the recourse must be appropriate to contest the violation, and that its implementation by the competent authority must be effective. [FN106]

[FN104] Cf. Case of Ximenes Lopes, supra note 2, para. 192; Baldeón García case, supra note 2, para. 144; and Case of Acevedo Jaramillo et al., supra note 93, para. 213.
[FN105] Cf. Case of Ximenes Lopes, supra note 2, para. 192; Case of Baldeón García, supra note 2, para. 144; and Case of López Álvarez, supra note 72, para. 138.
[FN106] Cf. Case of López Álvarez, supra note 72, para. 139; Case of Palamara Iribarne, supra note 72, para. 184; and Case of Acosta Calderón, supra note 102, para. 93.

---

132. In this case, Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola filed an application for protection before the Santiago Court of Appeal on July 27, 1998 (supra para. 57(23)), based, inter alia, on the fact that "the omissive conduct of the Foreign Investment Committee" affected the constitutional guarantee contained in Article 19(12) ("freedom to issue an opinion and impart information") of the Constitution, "in relation to Article 5(2) thereof[[FN107]] and Articles 13(1) of the American Convention on Human Rights and 19(2) of the International Covenant on Civil and Political Rights, because it constituted an arbitrary omission concerning access to public information, which was not permitted by law and which prevented the appellants […] from exercising social control of the body of the State Administration."

[FN107] Which establishes that "the exercise of sovereignty recognizes as a limitation respect for the fundamental human rights. It is the obligation of the State to respect and promote these rights, guaranteed by this Constitution and also by the international treaties ratified by Chile and which are in force."

---

133. The said application for protection is established in Article 20 of the Constitution, and it can be filed by an individual "on his own behalf, or by another person on his behalf" before the respective court of appeal, when "owing to arbitrary or illegal acts or omissions, he suffers denial of, interference with or threat to the legitimate exercise of the rights and guarantees established in specific subparagraphs of Article 19 of the Constitution (supra para. 57(24)).

134. When deciding this recourse, the Santiago Court of Appeal failed to decide on the dispute resulting from the action of the Vice President of the Foreign Investment Committee by ruling on the existence of the right of access to the requested information in this specific case, since the judicial decision was to declare that the filed application for protection was inadmissible (supra para. 57(25)).

135. First, the Court finds that this judicial decision lacked sufficient justification. The Santiago Court of Appeal merely indicated that it had adopted the decision on the basis that,

"from the facts described […] and from the background information attached to the application, it is clearly without grounds." The Court of Appeal also indicated that it considered that "the purpose of the application for protection is to re-establish the rule of law when this has been disrupted by arbitrary or illegal acts or omissions that threaten, interfere with or deny the legitimate exercise of one of the guarantees specifically included in Article 20 of the Constitution, without prejudice to other legal actions," without developing any other conclusions in this regard.

136. The said judicial decision does not contain any justification other than the one indicated above. The Santiago Court of Appeal did not make even the least reference to the reasons why it was "evident" from the "facts" and "background information" in the application that it was "clearly without grounds." Moreover, it did not asses whether the action of the administrative authority, by not providing part of the requested information, related to any of the guarantees that can be the object of the application for protection, or whether any other recourse before the regular courts would be admissible.

137. When State-held information is refused, the State must guarantee that there is a simple, prompt and effective recourse that permits determining whether there has been a violation of the right of the person requesting information and, if applicable, that the corresponding body is ordered to disclose the information. In this context, the recourse must be simple and prompt, bearing in mind that, in this regard, promptness in the disclosure of the information is essential. According to the provisions of Articles 2 and 25(2)(b) of the Convention, if the State Party to the Convention does not have a judicial recourse to protect the right effectively, it must establish one.

138. Regarding the alleged violation of Article 25 of the Convention, Chile merely indicated that "the petitioners filed the application for protection of constitutional guarantees without obtaining results that satisfied their claims," and explained the reforms carried out as of November 1999 which, inter alia, established a "specific [judicial] recourse concerning access to information."

139. The Court considers that, in the instant case, Chile failed to guarantee an effective judicial recourse that was decided in accordance with Article 8(1) of the Convention and which resulted in a ruling on the merits of the dispute concerning the request for State-held information; in other words, a ruling on whether the Foreign Investment Committee should have provided access to the requested information.

140. The Court appreciates the efforts made by Chile in 1999 when it established a special judicial recourse to protect access to public information. Nevertheless, it should be pointed out that the violations in this case occurred before the State made this progress in its legislation, so that the State's argument that the alleged victims in this case "could have filed it" is inappropriate since, at the time of the facts of this case, the said recourse had not been established.

141. The Court considers that the three persons who filed the judicial recourse before the Santiago Court of Appeal are victims. They are Marcel Claude Reyes, Arturo Longton Guerrero

and Sebastián Cox Urrejola because, although the Court has determined that the right of freedom of thought and expression has been violated only in the case of Marcel Claude Reyes and Arturo Longton Guerrero (supra paras. 69 to 71 and 103), the Chilean judicial body should have issued a ruling if the recourse was inadmissible in the case of one of the appellants owing to active legal standing.

142. Based on the above, the Court concludes that the State violated the right to judicial protection embodied in Article 25(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, by failing to guarantee them a simple, prompt and effective recourse that would protect them from actions of the State that they alleged violated their right of access to State-held information.

143. The Court also concludes that the said decision of the Santiago Court of Appeal declaring the application for protection inadmissible did not comply with the guarantee that it should be duly justified. Accordingly, the State violated the right to judicial guarantees embodied in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola.

144. The alleged violation of Articles 8 and 25 of the Convention regarding the regulation of the formal procedure of processing the judicial recourse for the protection of fundamental rights (supra para. 109(b)), was not alleged by the representative at the due procedural opportunity. However, the Court considers it necessary to recall that the regulation of the processing of the recourse referred to in Article 25 of the Convention must be compatible with this treaty.

X. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE CONVENTION) (Obligation to Repair)

The Commission's arguments

145. The Commission requested the Court to order that the State should:

(a) Grant "adequate reparation to Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero for the violations of their rights, and also provide them with the requested information." Even though the State argued that all these sections were invalid now, because the Río Cóndor Project was never implemented, this information "was relevant to assess the functioning of the Foreign Investment Committee, and not merely one specific project." "It was for the [alleged] victims and not the State to decide whether the information was still of interest to them";
(b) Regarding the measures of satisfaction and guarantees of non-repetition: "acknowledge that it erroneously retained the information requested by the victims and immediately grant [them] access to the information they were seeking from the Foreign Investment Committee"; and that it "adopt laws and practices that guarantee effective access to information held by State bodies, in keeping with the terms of Article 13 of the Convention," because "the Commission considers that the Chilean legislation in force is insufficient to guarantee access to State-held information"; and

(c) Regarding costs and expenses: pay the costs arising at the domestic level when processing the legal actions filed by the victims under the domestic judicial system, as well as those arising at the international level when processing the case before the Commission and the Court.

The representative's arguments

146. The representative requested the Court to order that the State should:

(a) "Adapt domestic legislation, establish autonomous and independent supervision and control mechanisms, and adopt the necessary measures to develop practices that guarantee the individual's real access to public information [and direct participation in the administration of public affairs], including providing information on matters relating to the well-being of society, such as the protection of human rights, the environment, health, and public security";
(b) "Arrange for the disclosure of the information held by the Investment Committee concerning the investor, Forestal Trillium Ltda";
c) "Apologize publicly to the victims, through the Foreign Investment Committee, as a measure of non-pecuniary reparation";
d) "Publish a copy of all the operative paragraphs of the judgment in the national media, and disseminate its content and the public apology";
(e) In his final arguments, he requested that Chile should be ordered "to adopt legislative measures to provide a legal framework for the procedure of processing the application for protection embodied in Article 20 of the Constitution"; and
(f) Regarding costs and expenses, he requested that Chile should be ordered to reimburse the expenses and costs that the proceedings under domestic law and within the inter-American system have signified for the victims and their representatives. He requested US$50,000.00 (fifty thousand United States dollars) for professional honoraria before the domestic courts and before the inter-American system; US$4,000.00 (four thousand United States dollars) for "operating and administrative expenses, and US$6,000.00 (six thousand United States dollars) for the "presence of the victims' representatives before the Commission and the Court.

The State's arguments

147. Regarding reparations, Chile indicated that:

(a) "The claims in the [Commission's] application lack any purpose, because the information requested has already been provided and the guarantees requested are in the new Chilean legislation on the right to information." "Should the State's international responsibility for the alleged violations be confirmed, there has been no damage that justifies reparation"; and
(b) "Based on the fact that in its Report on Merits the Commission concluded that the State had violated the rights established in Articles 13 and 25 of the American Convention, it had informed [the Commission] that it was considering […] a reparation of a symbolic nature that would encompass the situation of the rights violations of which Messrs. Claude, Cox and Longton were victims, and also publicize the progress made by Chile in the area of access to information."

The Court's findings

148. In view of the facts described in the preceding chapters, the Court has decided that the State is responsible for the violation of Article 13 of the American Convention in relation to Articles 1(1) and 2 thereof, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola.

149. In its case law, the Court has established that it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately. [FN108] In this regard, the Court has based itself on Article 63(1) of the American Convention, according to which:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Consequently, the Court will now consider the measures necessary to repair the damage caused to Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, owing to these violations of the Convention.

[FN108] Cf. Case of Baldeón García, supra note 2, para. 174; Case of Acevedo Jaramillo et al., supra note 93, para. 294; and Case of López Álvarez, supra note 72, para. 179.

---

150. Article 63(1) of the American Convention reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility. Thus, when an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused. [FN109]

[FN109] Cf. Case of Montero Aranguren et al. (Detention Center of Catia). Judgment of July 5, 2006. Series C No. 150, para. 116; Case of Ximenes Lopes, supra note 2, para. 208; and Case of the Ituango Massacres, supra note 2, para. 346.

---

151. Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (restitutio in integrum), which consists in the re-establishment of the previous situation. If this is not possible, the international Court must determine measures to guarantee the violated rights, and repair the consequences of the violations. [FN110] It is necessary to add the measures of a positive nature that the State must adopt to ensure that harmful facts such as those that occurred in the instant case are not repeated. [FN111] The

responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law. [FN112]

[FN110] Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra note 109, para. 117; Case of Ximenes Lopes, supra note 2, para. 209; and Case of The Ituango Massacres, supra note 2, para. 347.
[FN111] Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra note 109, para. 117; Case of Baldeón García, supra note 2, para. 176; and Case of López Álvarez, supra note 72, para. 182.
[FN112] Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra note 109, para. 117; Case of Ximenes Lopes, supra note 2, para. 209; and Case of the Ituango Massacres, supra note 2, para. 347.

---

152. Reparations, as the word indicates, consist of measures tending to eliminate the effects of the violations that have been committed. Thus, the reparations established should be proportionate to the violations declared in the preceding chapters of this judgment. [FN113]

[FN113] Cf. Case of Baldeón García, supra note 2, para. 177; Case of Acevedo Jaramillo et al., supra note 93, para. 297; and Case of López Álvarez, supra note 72, para. 181.

---

153. In accordance with the probative elements gathered during the proceedings, and in light of the above criteria, the Court will examine the claims submitted by the Commission and the representative regarding reparations, costs and expenses in order to determine the beneficiaries of the reparations and then order the pertinent measures of reparation and costs and expenses.

A) BENEFICIARIES

154. The Court has determined that the facts of the instant case constituted a violation of Article 13 of the American Convention in relation to Articles 1(1) and 2 thereof, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola who, as victims of the said violations, are eligible for the reparations established by the Court.

B) PECUNIARY DAMAGE

155. In the instant case, the victims' representative did not make any statement or request regarding possible pecuniary damage, and the Court has confirmed that the violations declared and the evidence provided did not result in damage of this type that would require reparations to be ordered.

C) NON-PECUNIARY DAMAGE

156. The Court considers that this judgment constitutes, per se, a significant and important form of reparation and moral satisfaction for the victims. [FN114] However, in order to repair the non-pecuniary damage in this case, the Court will determine those measures of satisfaction and guarantees of non-repletion that are not of a pecuniary nature, but have public repercussions. [FN115]

[FN114] Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra note 109, para. 131; Case of the Ituango Massacres, supra note 2, para. 387; and Case of Baldeón García, supra note 2, para. 189.

[FN115] Cf. Case of Palamara Iribarne, supra note 72, para. 249; Case of the Girls Yean and Bosico. Judgment of September 8, 2005. Series C No. 130, para. 229; and Case of Ricardo Canese, supra note 72, para. 208.

Measures of satisfaction and guarantees of non-repetition

C.1) Request for State-held information

157. Regarding the argument that Chile submitted to the Court, according to which there is no longer any interest in providing the information, since the "Río Cóndor" Project was not implemented, it should be indicated that the social control sought through access to State-held information and the nature of the information requested are sufficient motives for responding to the request for information, without requiring the applicant to prove a specific interest or a direct involvement.

158. Therefore, since in this case the State has not provided part of the requested information and has not issued a justified decision regarding the request for information, the Court considers that the State, through the corresponding entity, should provide the information requested by the victims, if appropriate, or adopt a justified decision in this regard.

159. If the State considers that it was not the Foreign Investment Committee's responsibility to obtain part of the information requested by the victims in this case, it should provided a justified explanation of why it did not provide the information.

C.2) Publication of the pertinent parts of this judgment

160. As ordered in other cases as a measure of satisfaction, [FN116] the State must publish once in the official gazette and in another newspaper with extensive national circulation, the chapter on the Proven Facts of this judgment, paragraphs 69 to 71, 73, 74, 77, 88 to 103, 117 to 123, 132 to 137 and 139 to 143 of this judgment, which correspond to Chapters VII and VIII on the violations declared by the Court, without the corresponding footnotes, and the operative paragraphs hereof. This publication should be made within six months of notification of this judgment.

[FN116] Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra note 109, para. 151; Case of Ximenes Lopes, supra note 2, para. 249; and Case of Baldeón García, supra note 2, para. 194.

C.3) Adoption of the necessary measures to guarantee the right of access to State-held information

161. The Court also considers it important to remind the State that, in keeping with the provisions of Article 2 of the Convention, if the exercise of the rights and freedoms protected by this treaty is not guaranteed, it has the obligation to adopt the legislative and other measures necessary to make these rights and freedoms effective.

162. The Court appreciates the significant normative progress that Chile has made concerning access to State-held information, that a draft law on access to public information is being processed, and that efforts are being made to create a special judicial recourse to protect access to public information (supra para. 57(35)).

163. Nevertheless, the Court finds it necessary to reiterate that the general obligation contained in Article 2 of the Convention involves the elimination of norms and practices of any type that result in violations of the guarantees established in the Convention, as well as the enactment of laws and the development of practices conducive to the effective observance of these guarantees (supra para. 64). Hence, Chile must adopt the necessary measures to guarantee the protection of the right of access to State-held information, and these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials.

C.4) Training for public entities, authorities and agents on access to State-held information

164. In this case, the administrative authority responsible for deciding the request for information of Messrs. Claude Reyes and Longton Guerrero adopted a position that violated the right of access to State-held information. In this regard, the Court observes with concern that several probative elements contributed to the case file reveal that public officials do not respond effectively to requests for information.

165. The Court considers that, within a reasonable time, the State should provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this should incorporates the parameters established in the Convention concerning restrictions to access to this information that must be respected (supra paras. 77 and 88 to 101).

D) COSTS AND EXPENSES

166. As the Court has indicated previously, costs and expenses are included in the concept of reparations embodied in Article 63(1) of the American Convention, because the activity deployed by the victim in order to obtain justice at both the national and the international levels entails expenditure that must be compensated when the State's international responsibility is declared in a judgment against it. Regarding their reimbursement, the Court must prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, and also those resulting from the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity and taking into account the expenses indicated by the Inter-American Commission and by the representatives, provided the quantum is reasonable. [FN117]

[FN117] Cf. Case of Montero Aranguren et al. (Detention Center of Catia), supra note 109, para. 152; Case of the Ituango Massacres, supra note 2, para. 414; and Case of Baldeón García, supra note 2, para. 208.

---

167. The Court takes into consideration that the victims incurred expenses in the course of the measures taken in the domestic judicial sphere, and were represented by a lawyer in this sphere and before the Commission and the Court during the international proceedings. Since there is no documentary evidence to authenticate the expenses incurred in the international proceedings or in the domestic sphere, based on the equity principle, the Court establishes the sum of US$10,000.00 (ten thousand United States dollars) or the equivalent in Chilean currency, which must be delivered in equal parts to Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola for costs and expenses, within one year. They will deliver the corresponding amount to their legal representative, in keeping with the assistance he has provided to them.

E) METHOD OF COMPLIANCE

168. The State must comply with the measures of reparation established in paragraphs 158, 159 and 160 of this judgment within six months; and the measures established in paragraphs 163 and 165 within a reasonable time. These time limits are calculated as of notification of this judgment.

169. The State must pay the amount established for reimbursement of costs and expenses as established in paragraph 167 of this judgment.

170. The State must comply with its pecuniary obligations by payment in United States dollars or the equivalent amount in Chilean currency, using the exchange rate between the two currencies in force on the New York, United States of America, market the day prior to payment to make the respective calculation.

171. The amount allocated in this judgment for reimbursement of costs and expenses may not be affected, reduced or conditioned by current or future taxes or charges. Consequently, it must be delivered to the victims integrally, as established in this judgment.

172. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in Chile.

173. In accordance with its consistent practice, the Court will exercise the authority inherent in its attributes to monitor compliance with all the terms of this judgment. The case will be closed when the State has fully complied with all its terms. Within one year of notification of the judgment, Chile shall provide the Court with a report on the measures adopted to comply with it.

XI. OPERATIVE PARAGRAPHS

174. Therefore,

THE COURT

DECLARES,

Unanimously, that:

1. The State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention on Human Rights, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, in relation to the general obligations to respect and guarantee the rights and freedoms and to adopt provisions of domestic law established in Articles 1(1) and 2 thereof, in the terms of paragraphs 61 to 103 of this judgment.

By four votes to two, that:

2. The State violated the right to judicial guarantees embodied in Article 8(1) of the American Convention on Human Rights, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, with regard to the administrative authority's decision not to provide information, in relation to the general obligation to respect and guarantee the rights and freedoms established in Article 1(1) thereof, in the terms of paragraphs 114 to 123 of this judgment.

Dissenting Judge Abreu Burelli and Judge Medina Quiroga.

Unanimously, that:

3. The State violated the rights to judicial guarantees and judicial protection embodied in Articles 8(1) and 25 of the American Convention on Human Rights, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, with regard to the judicial decision concerning the application for protection, in relation to the general obligation to respect and guarantee the rights and freedoms established in Article 1(1) thereof, in the terms of paragraphs 124 to 144 of this judgment.

Unanimously, that:

4. This judgment constitutes, per se, a form of reparation in the terms of paragraph 156 hereof.

AND DECIDES,

Unanimously, that:

5. The State shall, through the corresponding entity and within six months, provide the information requested by the victims, if appropriate, or adopt a justified decision in this regard, in the terms of paragraphs 157 to 159 and 168 of this judgment.
6. The State shall publish, within a period of six months, once in the official gazette and in another newspaper with extensive national circulation, the chapter on the Proven Facts of this judgment, paragraphs 69 to 71, 73, 74, 77, 88 to 103, 117 to 123, 132 to 137 and 139 to 143 of this judgment, which correspond to Chapters VII and VIII on the violations declared by the Court, without the corresponding footnotes, and the operative paragraphs hereof, in the terms of paragraphs 160 and 168 of this judgment.
7. The State shall adopt, within a reasonable time, the necessary measures to ensure the right of access to State-held information, pursuant to the general obligation to adopt provisions of domestic law established in Article 2 of the American Convention on Human Rights, in the terms of paragraphs 161 to 163 and 168 of this judgment.
8. The State shall, within a reasonable time, provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this training should incorporate the parameters established in the Convention concerning restrictions to access to this information, in the terms of paragraphs 164, 165 and 168 of this judgment.
9. The State shall pay Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, within one year, for costs and expenses, the amount established in paragraph 167 of this judgment, in the terms of paragraphs 167 and 169 to 172.
10. It will monitor full compliance with this judgment and will consider the case closed when the State has fully executed its operative paragraphs. Within a year of notification of this judgment, the State shall send the Court a report on the measures adopted to comply with it, in the terms of paragraph 173 of this judgment.

Judge Abreu Burelli and Judge Medina Quiroga informed the Court of their joint dissenting opinion concerning the second operative paragraph. Judge García Ramírez informed the Court of his separate concurring opinion on the second operative paragraph. These opinions accompany this judgment.

Done in San José, Costa Rica, on September 19, 2006, in Spanish and English, the Spanish text being authentic.

Sergio García Ramírez
President

Alirio Abreu Burelli
Antônio A. Cançado Trindade
Cecilia Medina Quiroga
Manuel E. Ventura Robles
Diego García-Sayán

Pablo Saavedra Alessandri
Secretary

So ordered,

Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGES ALIRIO ABREU BURELLI AND CECILIA MEDINA QUIROGA

1. We regret to dissent from the Court's decision to apply Article 8(1) to the decision of the Vice President of the Foreign Investment Committee to refuse information to the victims in this case (see paragraphs 115 to 123 of the judgment). Article 8(1) establishes every person's right to be heard "with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal [...] for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." This provision seeks to protect the right of the individual to have disputes arising between two parties, whether private individuals or State bodies and whether or not they refer to human rights issues, decided with the most complete judicial guarantees. This provision is the guarantee, par excellence, of all human rights and a requirement sine qua non for the existence of a State in which the rule of law prevails. We consider that its importance should not be trivialized by applying it to situations that, in our opinion, cannot be the focus of this regulation.

2. A basic presumption for the application of this right is that the State has failed to respect a right or that the State has not provided a remedy should an individual fail to respect a right. When a right has been denied, the Convention establishes (under Article 8) the human right that a body with the characteristics indicated in this article will decide the dispute; in other words, the right to proceedings being initiated, where the parties who disagree may, inter alia, submit their respective arguments, present evidence, and contest each other.

3. The case examined in this judgment is clearly not a proceeding. A request for access to information and the refusal to grant it is not a juridical situation in which a legally-empowered State body determines the application of the right in a specific situation in which the norm embodying the right has been contested or violated. To the contrary, the act of refusing access to information creates the dispute and this gives rise to the right of those affected to resort to a body

that will decide it, that will settle the dispute, based on its jurisdiction and competence. Under the State's legal system, this body is the respective court of appeal, by means of the proceeding initiated with the filing of an application for protection. Transforming the sequence "request-refusal" into a proceeding, requiring the application of Article 8 to process the request, would imply claiming that the request must be received and decided by an independent and impartial body and with all the guarantees that this provision establishes (inter alia, respect for the principles of equality and the adversary procedure), since Article 8(1) must be applied integrally and any element of it that is violated constitutes a violation thereof. This would have consequences that are not perhaps the most favorable for the petitioner in terms of difficulties and time limits. It would mean, in turn, requiring two jurisdictional proceedings in non-criminal cases, one to regulate the request for information and the other to review its refusal, and this is not a State obligation under the Convention.

4. The fact that Article 8(1) is applicable to proceedings that determine (rather than affect) rights or obligations and that they are opened when an act of the State has affected a right has been clearly established by the Court in the precedents cited in the judgment. In the Case of Constitutional Court, which examined the application by the Legislature of a sanction dismissing the three victims (para. 67), considerations, paragraph 69, starts by maintaining that although Article 8 of the American Convention is entitled "Right to a Fair Trial" [Note: "Judicial Guarantees" in the Spanish version], its application is not strictly limited to judicial remedies, "but rather the procedural requirements that must be observed to be able to speak of effective and appropriate judicial guarantees so that a person may defend himself adequately when any type of act of the State affects his rights." It adds that the State's exercise of its power to sanction "not only presumes that the authorities act with total respect for the legal system, but also involves granting the minimum guarantees of due process to all persons who are subject to its jurisdiction, as established in the Convention" (para. 68). In paragraph 71, the Court emphasized that "although the jurisdictional function belongs, in particular, to the Judiciary [...], other public body or authorities may exercise functions of the same type," and added that, consequently, the expression "competent judge or court" required to "determine" rights referred "to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations." The Court concluded this reasoning by stating that "any State body that exercises functions of a substantially jurisdictional nature has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention."

This means that Article 8 is applied when a State body is exercising jurisdictional powers, and it does not appear possible to argue this with regard to an official's refusal to provide information to a private individual. In keeping with its position, in the Constitutional Court case, the Court proceeded to examine whether the dismissal of the justices, alleged victims in the case, complied with each and every requirement of this article, such as the impartiality, independence and competence of the State body and the right to defense of those affected (considerations, paragraphs 74, 77 and 81 to 84).

5. In the Case of Baena Ricardo et al., the Court stated the same position, because the case was of a similar nature, since it also dealt with the State's exercise of its powers to sanction (see considerations, paragraphs 124 and 131). In the Case of Ivcher-Bronstein, considerations,

paragraph 105, repeats paragraph 171 of the Constitutional Court judgment and establishes as grounds for the violation of Article 8 the impediments that had been placed on the victim to defend himself, such as not informing him that his file had been lost, not allowing him to reconstruct it, not advising him of the charges of which he was accused, or allowing him to present witnesses (considerations, paragraph 106). In the Case of Yatama, the Court repeated its position that Article 8 applied to "procedural bodies" (paragraph 147); it stated that, in this case, the Supreme Electoral Council exercised jurisdictional functions, not only owing to the actions that it executed in this case, but because Nicaraguan legislation described these functions as jurisdictional in nature (paragraph 151).

6. None of the above corresponds to the case we are examining. The act that affected the right of Mr. Claude Reyes et al. was an official's refusal to allow a private individual access to information; the proceedings used to contest this refusal was the application for protection and this is why we have concurred with the Court in finding a violation of Article 25, because the Chilean appellate court did not comply with the basic tenet for any judicial decision, that it should be justified.

7. However, this conclusion does not imply leaving the right to request access to information to the discretion of the State. The right to petition authorities, established in general in the laws of the countries of the region and certainly in Chile (Article 19(14) of the Chilean Constitution) requires a response from the State, which should be, in the words of the Constitutional Court of Colombia, "clear, prompt and substantial." [FN118] The right of petition would be meaningless and useless, if this was not required of the State. The lack of this response to Mr. Claude Reyes et al. has constituted, in our opinion, a violation of the constitutional right of petition and, since this petition was to accede to information, recognized in the American Convention as part of the right to freedom of expression, it has violated that right.

[FN118] Judgment T-281 of 1998. Reporting Judge Dr. Alejandro Martínez Caballero, Colombian Constitutional Court. Reproduced in www.ramajudicial.gov.co, http://200.21.19.133/Judgments/programas/relatoria.

Alirio Abreu Burelli
Judge

Cecilia Medina Quiroga
Judge

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ REGARDING THE JUDGMENT DELIVERED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN CLAUDE REYES ET AL. V. CHILE OF SEPTEMBER 19, 2006

1. Over the past twenty-five years, the case law of the Inter-American Court has had to explore the meaning and scope of numerous rights and freedoms contained in the American Convention. This re-interpretation of the international treaty, in light of its object and purpose – which focuses on the most comprehensive protection of human rights possible – and imposed by new circumstances, has allowed it to clarify the meaning of the treaty-based principles in an evolutive manner without abandoning the course set by the Convention or changing its fundamental nature. To the contrary, these have been affirmed and enhanced. The reinterpretation of the texts – characteristic of constitutional courts in the national system and of treaty-based courts in the international system – allows the protection of rights to be updated and to respond to innovations resulting from the evolution of relations between the individual and the State.

2. Consequently, the concept maintained by the Inter-American Court, influenced in this matter by European case law, acquires relevance when it affirms that "human rights treaties are living instruments whose interpretation must take into consideration changes over time and current conditions. This evolutive interpretation is consequent with the general rules of interpretation embodied in Article 29 of the American Convention, and also those established in the Vienna Convention on the Law of Treaties."

3. Obviously, none of this implies that the Court should use its imagination and change the general contents of the Convention, without going through the formal normative instances. In brief, it is not a question of "reforming" the text of the Convention, but of developing the legal decisions taken under the Convention, so that they retain their "capacity of response" to situations the authors of the instrument were not faced with, but that concern issues that are essentially the same as those considered in the Convention and that involve specific problems and require relevant solutions, evidently based on the values, principles and norms in force. Inter-American case law has advanced in this direction, governed by the provisions signed in 1969, in which it has generally been able to find a current and pertinent meaning in order to deal with and resolve the circumstances of each new stage. There are numerous examples of this development.

4. Among the issues examined most frequently by the Inter-American Court is the so-called due process of law, a concept developed by Anglo-American case law and regulations. The Pact of San José does not invoke "due process" literally. However, with other words, it organizes the system of hearing, defense and decision contained in that concept. It fulfills this mission – essential for the protection of human rights – in different ways and with different provisions, including Article 8, which is entitled "Right to a Fair Trial" (Note: "Judicial Guarantees" in Spanish). The purpose of this article is to ensure that the State bodies called on to determine an individual's rights and obligations – in many aspects – will do so using a procedure that provides the individual with the necessary means to defend his legitimate interests and obtain duly reasoned and justified rulings, so that he is protected by the law and safeguarded from arbitrariness.

5. If the beneficiary of the protection offered by the Convention and the entity that applies the protection adhere to the letter of the text, as it was written several decades ago, the former's expectation of protection and the latter's possibility of granting it will be limited to the

hypothesis of the formal proceedings before the judicial body. Indeed, Article 8 alludes to "judicial" guarantees [Note: the title of the article in Spanish], and then refers to a "tribunal [or judge]." However, this limited scope would be totally insufficient nowadays to achieve the goals that the international system for the protection of human rights has set itself. If the guarantees established in Article 8, which governs the most relevant issues of procedural protection, are limited to the actions of the judicial body, the definition of rights and freedoms by mechanisms that are formally different from the judicial mechanism, but essentially close to the latter to the extent that they serve the same end – to define rights and establish obligations - would not be protected.

6. For example, in several countries the solution of disputes between the Public Administration and the citizen is entrusted to the judicial body: in others, to jurisdictional or administrative body located outside the Judiciary. In some States, once certain information de facto and de jure has been established, the investigation of offenses and the decision on whether there is criminal liability is entrusted to an administrative authority, the Attorney General's Office (el Ministerio Público) – which is neither judge nor court – while in others, it is entrusted to trial judges, who have this formal and material nature. Some transcendental decisions regarding harm to property, the definition of rights between members of different social sectors, the responsibilities of public servants, and measures of protection for children and adolescents (different from those resulting from the violation of a criminal law) have been entrusted to judicial instances, but others – that involve the denial of rights and the control of obligations – are entrusted to instances of a different nature. Historic and contemporary national experiences allow us to add new and abundant examples.

7. The Inter-American Court's case law concerning due process, judicial protection, procedural guarantees or the preparation and execution of the defense of the individual – all expressions that involve a sole concern – have evolved the content of due process of law in a progressive direction – invariably "garantista" [privileging or prioritizing due process and the rights of the individual]. Thus, the Court's case law has established what I have called "procedure's 'current frontier'" (separate opinion to Advisory Opinion OC-16), which changes as necessary, not at whim or giving rise to uncertainty, to adapt the defense of the individual to emerging requirements.

8. Thus, the Court has established that the right of the foreign detainee to be informed of the consular assistance he can receive – a right that is not asserted before judicial body – is a right within the framework of due process; that the guarantees established for criminal proceedings – embodied in Article 8(2) – are also applicable to administrative proceedings, to the extent that the latter (as the former) involve a manifestation of the punitive powers of the State; that the rights established by law in favor of the accused in the criminal sphere must also be applied at other procedural levels, when applicable, etcetera.

9. All the above – and evidently I realize that they are situations of a different type, but connected by a single guiding principle – reveals a sole purpose of protection that is identified by the objective that the decisions of the authorities defining individual rights and obligations, whatever these may be, should satisfy the minimum conditions of objectivity, rationality and legality.

10. In the Case of Claude Reyes et al., I have maintained that the decision of the administrative body determining which information would be provided to the applicants and which information would not be provided to them constituted an act that defined rights – in this case, the right to seek and receive specific information, in the terms of Article 13 of the Pact of San José – and, when issuing this decision, specific guarantees established in Article 8 of the Convention were not respected. This failure determined that in addition to infringing Article 13 on freedom of thought and expression, declared unanimously by the members of the Inter-American Court, there was also a violation of Article 8, according to the majority, although not according to two members of the Court, for whose opinion I have the highest esteem. Consequently, owing to the consideration that my colleagues merit – whether we agree or disagree – I wish to state my personal sections of view in a comparison of legitimate and constructive opinions.

11. Obviously, during the administrative stage of their démarches, the persons who requested information were not participating in a judicial hearing before a judge or court, but intervened in an administrative procedure before an administrative authority. Nevertheless, I consider that the latter was obliged to act as prescribed by Article 8, in all that was pertinent and applicable, to the extent that his decision would define the right of those requesting the information.

12. The need to respect the requirements of Article 8 does not derive, in my understanding, from the nature of the authority within the State's structure, but from the nature of the function that the latter exercises in the specific case and from the transcendence that this can have in relation to the rights and obligations of the individual who appears before that authority, exercising what he considers is his right and awaiting the justified decision that should be taken on his request.

13. The decision of that administrative authority could be contested before a judicial body – as indeed was attempted – for the latter to take a final decision; and the guarantee established in Article 8(1) of the Convention was clearly applicable to the said judicial body. Nevertheless, it is also true that the existence of a means of controlling legality by resorting to law does not imply that the first step in the exercise of the power of decision on individual rights and obligations is removed from the procedural guarantees in exchange for those that exist when the second step of that exercise is undertaken - when proceedings have been filed before the judicial authorities. Strictly speaking, the guarantees must be respected at all stages, each of which leads, either provisionally or finally, to the determination of the rights. The control that the latter stage ensures to the individual does not justify disregarding these guarantees during the first stage (whatsoever leads to this), in the expectation that they will be respected subsequently.

14. Consequently, I consider that the guarantees established in Article 8, in keeping with their meaning in the Court's current case law, do not apply only to the legal action or proceeding, but to the procedure on which the definition of rights and obligations depends, as I have stated repeatedly. Once again I emphasize that this applicability has the scope permitted by the characteristics of the corresponding procedure in each case. Hence, I refer to the obligation to provide justification and not to each and every one of the obligations established in Article 8, both literally and through the new scope that inter-American case law has established.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary