Order of the
Inter-American Court of Human Rights
Case of Claude-Reyes *et al. v.* Chile
Judgment of September 19, 2006
(Merits, Reparations and Costs)

In the Case of Claude Reyes *et al*,

[...]

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.

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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."[1] 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.[2]

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.[3]

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."[4]

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

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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.[5]

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.[6]

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).[7]

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 […]."[8] The project had a "significant environmental impact" and gave rise to public debate.[9]

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57(8) The Foreign Investment Committee approved the foreign investment application based on the examination of the background information provided by the investors.[10] 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.[11]

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,[12] 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.[13]

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."[14]

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.[15]

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]."[16]

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."[17] In

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this letter, the Executive Director of the Terram Foundation requested the Foreign Investment Committee to provide the following information "of public interest":[18]

> "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.
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> 2. Identity of the foreign and/or national investors in this project.
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> 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.
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> 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.
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> 5. Capital effectively imported into the country to date, as the investors' own capital, capital contributions and associated credits.
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> 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.
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> 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."[19]

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.[20] 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"[21] when the project was approved, the companies involved, the investments made to date, the type of project and its location.[22]

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." [23]

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

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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)).[24]

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)).[25]

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.[26]

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)).[27]

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;
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> (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
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> 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."[28]

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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,[29] 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."[30]

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.[31]

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.[32] 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)).

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

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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."[33]

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]."[34]

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."[35]

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."[36] 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."

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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."[37]

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."[38]

57(30) On August 6, 1998, the Santiago Court of Appeal declared that "the requested reconsideration is inadmissible"[39] (*supra* para. 57(27)).

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.[40]

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."[41] 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."[42]

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.[43]

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

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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."[44]

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.[45] 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:[46]

> (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";
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> (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";
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> (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;
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> (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";
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> (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

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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.

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.[47] 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.[48] 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;[49]

(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;[50]

(c) The declaration of secrecy or confidentially is made by the head of the service in a reasoned decision;[51]

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(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;[52]

(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;[53]

(f) The body of the State Administration shall classify acts and documents using explicit criteria, according to the required level of protection;[54] 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.[55]

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.[56]

57(38) On May 29, 2003, Act No. 19,880[57] 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."

57(39) On October 4, 2004, the Comptroller General's Office issued Opinion No. 49,883,[58] 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

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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."

57(40) On January 4, 2005, two senators presented a draft law on access to public information.[59] 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."

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.[60]

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."[61]

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."[62] This draft law is currently at its second constitutional stage.

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."[63]

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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."[64]

57(45) On February 15, 2006, the Presidential Advisory Committee for the Protection of Human Rights[65] 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."[66]

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 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.
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> 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:

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> a. respect for the rights or reputations of others; or
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> b. the protection of national security, public order, or public health or morals.
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> 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.
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> […]

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.[67]

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.

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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.

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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)).

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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.[68]

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."[69] 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.

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.[70]

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.[71] In the latest Resolution of June 3, 2006, the OAS General Assembly,

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"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."[72]

79. Article 4 of the Inter-American Democratic Charter[73] emphasizes the importance of "[t[ransparency in government activities, probity, responsible public administration on the part of Gove
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rnments, 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."

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 [...]."[74]

81. The provisions on access to information established in the United Nations Convention against Corruption[75] and in the Rio Declaration on Environment and Development should also be noted.[76] 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,"[77] 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 [...]."[78] In addition, recommendations and directives have been adopted[79] 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.[80] 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

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authorities,[81] 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]."

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.

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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."[82] 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.[83]

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.[84]

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.[85] Hence, for the individual to be able to exercise democratic control, the State

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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.

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.[86]

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 […].[87]

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.[88]

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.

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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.

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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.

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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.

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