

Inter-American Commission on Human Rights

Case No. 406/03

**Miguel Ignacio Fredes González
and Andrea Tuzek Fries**

v.

Chile

Written Comments of:

ARTICLE 19 – Global Campaign for Free Expression

Instituto Prensa y Sociedad

Libertad de Información Mexico, Asociación Civil

Open Society Justice Initiative

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I. Introduction

1. The following signatory organizations respectfully submit this *amicus curiae* brief for the benefit of the Inter-American Commission on Human Rights (hereinafter “the Commission”) in its consideration of the issues raised by the above-referenced matter:
 - ARTICLE 19 – Global Campaign for Free Expression (hereinafter “ARTICLE 19”) is an international human rights non-governmental organization, based in London, with offices in different regions of the world, including Argentina. Taking its name from Article 19 of the Universal Declaration of Human Rights, ARTICLE 19 works globally to protect and promote the right to freedom of expression, including access to information and the means of communication. ARTICLE 19 is well known for its authoritative work in elaborating the implications of the guarantee of freedom of expression in different thematic areas. It has particular expertise in the area of access to information. In June 1999, ARTICLE 19 published *The Public's Right to Know: Principles of Freedom of Information Legislation*, a set of principles on international standards and best comparative practice relating to access to information legislation. In July 2001, it published *A Model Freedom of Information Law*, which translates that set of principles into legislative form. ARTICLE 19 submitted an *amicus curiae* brief, together with other organizations, to the Commission in the recent case of *Marcel Claude Reyes, et al. v. Chile*, Case No. 12.108.
 - Instituto Prensa y Sociedad (hereinafter “IPYS”) defends and promotes freedom of the press, freedom of expression, and freedom of information in Peru and Latin America. The goals of this organization include defending these freedoms through litigation at local and international levels. IPYS is also a promoter of governmental transparency efforts and civil empowerment in the region. Since 1999, IPYS has made a systematic monitoring of freedom of expression and information throughout North America with correspondents in Argentina, Bolivia, Chile, Colombia, Ecuador, Mexico, Paraguay, Uruguay, Venezuela, Guatemala, El Salvador, and Brazil. IPYS submitted an *amicus curiae* brief, together with other organizations, to the Commission in the recent case of *Marcel Claude Reyes, et al. v. Chile*, Case No. 12.108.
 - Libertad de Información Mexico, Asociación Civil (hereinafter “LIMAC”) is a nonpartisan, nonprofit civil society association that advocates the right of people in a democratic society to access public information. LIMAC’s mission is to promote and defend the right of access to public information at federal and local levels in Mexico, including through strategic litigation. LIMAC is also a leading promoter of government transparency efforts in Latin America. In particular, it has provided assistance for the adoption and implementation of freedom of information laws in several countries in the region, including Argentina, Chile, Ecuador, Nicaragua, Paraguay, and Peru. As an organization committed to

promoting the right to information at the international level, LIMAC takes a strong interest in the issues presented by this case. LIMAC submitted an *amicus curiae* brief, together with other organizations, to the Commission in the recent case of *Marcel Claude Reyes, et al. v. Chile*, Case No. 12.108.

- Open Society Justice Initiative (hereinafter the “Justice Initiative”), an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. It has offices in New York City, Budapest and Abuja. Among its activities, the Justice Initiative prepares legal submissions for national and international courts and tribunals on questions of law where its expertise may be of assistance. In the area of access to information, the Justice Initiative has extensive experience in promoting the adoption and implementation of freedom of information laws in Latin America, Eastern Europe and elsewhere. It has also contributed to international standard-setting and monitoring of government transparency around the world. As an organization that promotes the highest international standards of freedom of expression and information, the Justice Initiative has a particular interest in the questions raised by this case. The Justice Initiative submitted an *amicus curiae* brief, together with other organizations, to the Commission in the recent case of *Marcel Claude Reyes, et al. v. Chile*, Case No. 12.108.
2. The present matter before the Commission raises issues of great importance for the continued development of the public’s right to access state-held information throughout the Americas. Here, the information that the State of Chile (hereinafter “Chile”) is withholding from the public concerns the precise location of any genetically-modified (hereinafter “GM”) crops in Chile, the varieties of these GM crops including their specific genetic modifications, the identities of the individuals and/or companies who introduced GM crops into the environment in Chile, and the bio-security measures employed during the introduction and cultivation of these GM crops in Chile. The state-held information at issue directly implicates the environment and public health and safety in Chile.
 3. Because Chile has denied the public its right to access this information, Chile has failed to fulfill its international obligations and has thereby violated the following Articles of the American Convention on Human Rights (hereinafter “Convention”) to the detriment of Petitioners Miguel Ignacio Fredes González and Andrea Tuczek Fries (hereinafter “Petitioners”): Articles 13 (Freedom of Thought and Expression), 23 (Right to Participate in Government), and 25 (Right of Judicial Protection) in relation to the overall obligations set forth in Articles 1(1) (Obligation to Respect Rights), 2 (Domestic Legal Effects), and 30 (Scope of Restrictions).
 4. This Commission has already set forth sound precedent that directly supports the Petitioners’ claims. For example, in the recent case of *Marcel Claude Reyes, et al. v.*

Chile, this Commission found that Chile violated the Convention by denying the public its right to access state-held environmental information concerning the scope and terms of a deforestation project approved by Chile's Committee on Foreign Investment, and to be performed by a non-governmental third-party.¹

5. Here, as in *Claude*, Chile has failed to demonstrate a legally-adequate justification for its refusal to allow public access to state-held environmental information. Although Chile now argues that the "secrecy" provisions of Chilean law 19.653 permit Chile to deny the public its right to access this information, this Commission has already carefully considered and rejected this argument:

89. The Commission considers that while this new law [19.653] shows the Chilean State's interest in improving access to state-held information in Chile, it is insufficient to guarantee full respect for the right to access to information and to ensure that violations such as that which occurred in the present cases are not repeated. First, the law only applies to "administrative acts" and supporting documents, which excludes a vast quantity of records and other information in the possession of the State that do not constitute "administrative acts" or may not be related to final or contentious administrative decision-making.

90. Second, the exemptions provided for in the law [19.653] are overly broad, vague, and confer an excessive degree of discretion on the official determining whether or not to disclose the information.²

6. The *amici* organizations respectfully request that this Commission declare that Chile has violated Articles 1(1), 2, 13, 23, 25, and 30 of the Convention by denying the Petitioners their right to access the state-held environmental information in question, and issue any and all relief deemed appropriate by this Commission and as requested by the Petitioners.

II. Statement of Facts and Procedural History

7. While the *amici* organizations hereby rely upon and adopt the facts and procedural history as presented to this Commission by the Petitioners, a brief summary of the relevant facts and procedural history is included herein.

¹ See Application Submitted by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights Against the State of Chile in the Matter of Marcel Claude Reyes, et al., Case 12.108, July 8, 2005 (hereinafter "*Claude*"), located at Amicus Appendix (hereinafter "AA-") 1.

² *Id.* at AA-22-23, ¶¶ 89-90.

8. The subject of GM organisms (hereinafter “GMOs”) raises public concern, due at least in part to the following hazardous effects that GMOs have been shown to have upon a country’s population and agro-ecosystem:
 - Damage to human health (*e.g.*, allergenicity, horizontal transfer and antibiotic resistance, eating foreign DNA, cauliflower mosaic virus promoter, changed nutrient levels);
 - Damage to the natural environment (*e.g.*, Monarch butterfly deaths, crop-to-weed gene flow, antibiotic resistance, leakage of GM proteins into the soil);
 - Disruption of current practices of farming and food production in developed countries (*e.g.*, crop-to-crop gene flow); and
 - Disruption of traditional practices and economies in less developed countries.³
9. Regarding GM crop contamination of non-GM crops, farmers in close proximity to where GM crops are grown need to be aware of the location of such crops in order to determine if GM contamination may occur. GM contamination of non-GM crops can occur by the movement of pollen by wind or insects from GM fields to non-GM fields.⁴ Once the pollen of GM plants and non-GM plants mixes, it is usually impossible to separate the plants that have been contaminated.⁵ Non-GM plants are not usually visibly different, but tests can detect the presence of GM material.⁶ Therefore, when a neighboring farmer’s field is contaminated, the farmer may lose the premium on his or her crop if the targeted consumers prefer to buy only non-GMO products.⁷
10. Contamination of a field may also threaten consumer health, as not all GM plants are safe for human consumption. For example, the U.S. Environmental Protection Agency approved GM StarLink corn only for animal feed and industrial products like ethanol

³ *Transgenic Crops: An Introduction and Resource Guide*, University of Colorado State, available at <http://www.colostate.edu/programs/lifesciences/TransgenicCrops/risks.html> at AA-30.

⁴ Bill Wilcke, *Segregating Genetically Modified Crops*, University of Minnesota (1999), available at www.bae.umn.edu/extens/postharvest/gmoip.html. at AA-38.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

because StarLink corn has a biopesticide that can cause allergic reactions in humans.⁸ Farmers growing StarLink corn did not properly segregate their fields and corn grown for human consumption was contaminated.⁹ The contaminated corn was found in nearly 300 food products, including Kraft taco shells and corn products at Taco Bell.¹⁰ The company that developed StarLink corn admitted that because of the contamination, the food supply will never be completely free of the StarLink corn strain.¹¹ Farmers therefore need to be aware of what their neighbors are growing in order to prevent crop contamination. If the farmers had known that StarLink corn was being grown in neighboring farms, they may have been able to prevent such contamination from occurring.

11. In addition, farmers need access to information regarding where GM crops are planted so that they can play a role in assessing the environmental impacts of GM crops. Currently, the international scientific community lacks long-term knowledge of all of the environmental effects from growing GM crops.¹² Such effects “could occur at the field level, *e.g.*, in weed control or on the environment.”¹³ Good farm management practices are necessary, including the monitoring of weeds in order to determine what species are becoming more resistant.¹⁴ Some experts also note that farmers should monitor non-GM crops and agro-ecosystems for unexpected effects.¹⁵ If farmers are kept unaware of the properties of the GM crops that are being grown near them, farmers will not be able to realize that their participation is necessary in order to help prevent contamination and to monitor the effects of GM crops on non-GM crops and the agro-ecosystem.

12. Here, the Petitioners belong respectively to the “Tierra Viva” Organic Growers Association of Chile and the Southern Environmental Law Center, which are

⁸ David R. Moeller, *GMO Liability Threats for Farmers: Legal Issues Surrounding the Planting of Genetically Modified Crops*, Farmers’ Legal Action Group, Inc. (2001) at AA-40.

⁹ *Id.*

¹⁰ *Id.*; *StarLink Contamination is Forever*, Knight Ridder/Tribune (March 19, 2001) (hereinafter “*StarLink Contamination*”) at AA-48.

¹¹ *StarLink Contamination*.

¹² See FAO, *Report of the FAO Expert Consultation on Environmental Effect on Genetically Modified Crops* (2003) at AA-50.

¹³ *Id.* at AA-53.

¹⁴ *Id.* at AA-53-54.

¹⁵ *Id.* at AA-57.

organizations dedicated to protecting the environment and sustainable development in Chile.

13. The Petitioners collectively requested access from Chile, through Chile's Servicio Agrícola y Ganadero (hereinafter "SAG"), to state-held information related to the introduction and cultivation of GM crops for the 1999-2000 and 2000-2001 seasons in Chile. Specifically, the Petitioners requested access to state-held information related to the precise location of GM crops, the varieties of these GM crops including their specific genetic modifications, the identities of the individuals and/or companies who introduced these GM crops, and the bio-security measures employed during the introduction and cultivation of these GM crops.
14. Regarding the 1999-2000 season, the SAG responded by only providing general information regarding the GM crops' species, genetic modification, general region, and total surface area nationwide. The SAG's response was even more limited for the 2000-2001 season, as it provided only the GM crops' species, general region, and total surface area nationwide. The SAG informed the Petitioners that it could not provide them with any additional state-held information because such information was "part of a confidential file for protection of competitiveness factors that must be handled by SAG."
15. The Petitioners subsequently requested access to several administrative acts, decrees, and reports containing regulations and other information related to GMOs, and also to specific state-held information related to administrative approvals of production and release of GM products and trees in Chile. Chile did not release any of this state-held information to the Petitioners.
16. Thereafter, the Petitioners filed a civil action against the SAG in the 26th Civil First Instance Court of Santiago to contest the SAG's denial of their right to access the requested state-held information. The SAG's main arguments in opposition were: (1) part of the state-held information had already been released to the Petitioners, (2) the release of any additional state-held information could (without the SAG specifically demonstrating how) affect the interests of GMO-producing companies, and (3) the release of any additional state-held information could (again, without the SAG specifically demonstrating how) affect the SAG's control function.
17. The Court granted the Petitioners' request, finding that the SAG's arguments were vague and not supported by specific evidence to contradict the Petitioners' right to access the state-held information. The Court, in finding that the Petitioners had the right to access the state-held information in question, based its decision, in part, upon its consideration and application of Article 13 of the Convention.
18. The SAG subsequently filed an appeal with the Santiago Court of Appeals. The Court of Appeals reversed, and found that: (1) Chilean law, specifically law 19.653, states that only the acts of state agencies and the documents on which those acts are based are

available to the public, and (2) information provided by private companies to the SAG regarding GMOs being introduced and cultivated on Chilean soil is confidential and not subject to disclosure under Chilean law, specifically law 19.653. The Court of Appeals also refused the Petitioners' request to consider and apply the Convention, including Article 13, to the Petitioners' claims.

III. Legal Discussion

A. The Public's Right To Access State-Held Environmental Information In The Americas

1. Information In General

19. The public's right to access state-held information in the Americas is guaranteed by Article 13 of the Convention that was ratified by the Organization of American States (hereinafter "OAS") member states, including Chile which ratified the Convention in August of 1990. Article 13 provides in relevant part:

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 this 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.

20. In discussing Article 13, this Commission declared that

the right to freedom of expression includes both the right to disseminate and the right to seek and receive ideas and information. *Based on this principle, access to information held by the State is a fundamental right of*

individuals and States have the obligation to guarantee it. In terms of the specific objective of this right, it is understood that individuals have a right to request documentation and information held in public archives or processed by the State. . . .^{16]}

21. This Commission also agreed that Article 13 guarantees the public's right of access to "state-held information," particularly in light of Article 29 of the Convention which provides:

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from the representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Based on its interpretation of Article 29, this Commission held in *Claude*: "The emphasis [in Article 29] on choosing the least restrictive interpretation possible and the dramatic importance of representative democracy in these contextual excerpts both suggest that an interpretation of the word 'seek' [in Article 13] that protects the right of access to state-held information is appropriate."¹⁷

22. In addition, this Commission has declared as one of its "Principles" that:

Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this

¹⁶ Report on Terrorism and Human Rights, OAS/Ser.L./V/II.116, Doc. 5 rev. 1 corr., October 22, 2002 at AA-67, AA-254, ¶ 281 (emphasis added) (hereinafter "*Terrorism Report*").

¹⁷ *Claude* at AA-14, ¶ 59.

right. *This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.*^[18]

23. In accordance with this “Principle,” this Commission added in *Claude*:

the right to access to information must be governed by the “*principle of maximum disclosure.*” In other words, the presumption should be that information will be disclosed by the government. Limited restrictions on disclosure, based on the same criteria that allow sanctions to be applied under Article 13, may be included in the law. The burden of proof is on the State to show that limitations on access to information are compatible with the inter-American standards on freedom of expression.^[19]

24. The permissible “limited restrictions” that can be placed on the public’s right to access state-held information must meet the same criteria that allow sanctions to be applied under Article 13, *i.e.*, the “limited restrictions” must be “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.” This Commission has declared that “not only must the restriction relate to one of these aims, it must also be shown that the disclosure threatens to cause substantial harm to that aim and that the harm to the aim must be greater than the public interest in having the information.”²⁰

25. In addition, these permissible “limited restrictions” must satisfy Article 13’s requirement of “necessity.” Regarding the “necessity” requirement, the Inter-American Court of Human Rights holds that a state’s justifications for the “limited restrictions” must be more than just “useful,” “reasonable,” or “desirable,”²¹ and this Commission has declared that:

[Any such restrictions must represent] the least restrictive of possible means to achieve the government’s compelling interest. The penalty

¹⁸ *Declaration of Principles on Freedom of Expression*, adopted at the Commission’s 108th regular session, October 19, 2000, at AA-350, AA-351, ¶ 4 (emphasis added).

¹⁹ *Claude* at AA-16-19, ¶ 69 (emphasis added); *see also Terrorism Report* at AA-255, ¶ 284 (emphasis added).

²⁰ *Terrorism Report* at AA-256, ¶ 286 (citations omitted).

²¹ Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, November 13, 1985, Ser. A No. 5 at AA-352, AA-364 ¶ 46 (hereinafter “*1985 Advisory Opinion*”).

“must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees.” Moreover, the provision “must be so framed so as not to limit the right protected by Article 13 more than is necessary. . . . [T]he restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.” *This is an extremely high standard and any [restrictions placed on] . . . the exercise of freedom of expression must be carefully examined using this proportionality test in order to prevent undue limitations of this fundamental right.*^[22]

26. In order to promote and strengthen the public’s right to access information as guaranteed by Article 13, the OAS General Assembly passed resolutions in 2003, 2004, and 2005.²³ In its 2003 Resolution, the OAS General Assembly found

that access to public information is a requisite for the very functioning of democracy, greater transparency, and good governance and that, in a representative and participatory democratic system, the citizenry exercises its constitutional rights, *inter alia*, the rights to political participation, the vote, education, and association, by means of broad freedom of expression and free access to information.^[24]

In each of these three resolutions, the OAS General Assembly resolved “to reaffirm that everyone has the freedom to seek, receive, access, and impart information and that access to public information is a requisite for the very exercise of democracy.”²⁵

27. In *Claude*, this Commission recognized that:

The value of access to information extends to the promotion of the most important goals in the Americas, including transparent and effective democracies, respect for human rights, stable economic markets, and socioeconomic justice. It is widely acknowledged that without public

²² *Terrorism Report* at AA-252-253, ¶ 278 (citing *1985 Advisory Opinion* at ¶ 46) (emphasis added).

²³ AG/Res. 1932 (XXXIII-O/03) at AA-393; AG/Res. 2057 (XXXIV-O/04) at AA-395; AG/Res. 2121 (XXXV-O/05) at AA-400.

²⁴ AG/Res. 1932.

²⁵ *Id.*; AG/Res. 2057; AG/Res. 2121.

access to state-held information, the political benefits that flow from a climate of free expression cannot be fully realized.^[26]

The Commission previously recognized that:

Without the information that every person is entitled to, it is clearly impossible to exercise freedom of expression as an effective vehicle for civic participation or democratic oversight of government management. Lack of effective oversight gives rise to conduct that runs counter to the essence of a democratic State and opens a door to wrongdoing and unacceptable abuses.^[27]

28. The public's right to access state-held information as guaranteed by Article 13 goes hand-in-hand with several other rights guaranteed by the Convention. For example, in this matter, the Petitioners have made an Article 13 claim, along with several derivative claims based upon the following Articles of the Convention:

- Article 23 (Right to Participate in Government) provides that “every citizen shall enjoy the . . . rights . . . to take part in the conduct of public affairs, directly or through freely chosen representatives . . . and to have access, under general conditions of equality, to the public service of his country.”
- Article 25 (Right to Judicial Protection) provides that “[e]veryone has the right to simple and prompt recourse . . . to a competent court or tribunal for protection against acts that violate his fundamental rights[.]”
- Article 1(1) (Obligation to Respect Rights) provides that member states have an affirmative obligation to “undertake to respect the rights and freedoms recognized [in the Convention, including the public's right to access information,] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination[.]”
- Article 2 (Domestic Legal Effects) provides that “[w]here 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 [have an affirmative obligation to] 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.”

²⁶ *Claude* at AA-10, ¶ 48

²⁷ *Terrorism Report* at AA-255, ¶ 283 (citation omitted).

- Article 30 (Scope of Restrictions) limits the application of “[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein” to circumstances in which such restrictions are “in accordance with laws enacted for reasons of general interest[.]”

2. Environment Information

29. The Convention guarantees citizens’ rights to take part in public affairs and access state-held information. A government cannot selectively choose to limit access on specific subjects without reasonable justification, *e.g.*, legitimate protection of national security. One area of public affairs in which citizens have a right to take part and access state-held information is the environment.
30. The OAS General Assembly has recognized the public’s right to live in a healthy environment.²⁸ The Inter-American Democratic Charter recognizes the right of the public to participate in environmental affairs as a tenant of democratic society.²⁹ Specifically, Article 15 provides that “[t]he exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the states of the Hemisphere implement policies and strategies to protect the environment”
31. Thus, in order for the public to be involved in environmental policies and strategies, the public must be empowered—by having access to state-held environmental information—with the ability to be informed.
32. In *Claude*, this Commission found that the public has a right to access state-held environmental information under the Convention. Specifically, this Commission found that “there is a substantial public interest in the disclosure of the information requested because it relates to a deforestation project that could be damaging to the environment and impede sustainable development in Chile if the company carrying out the project does not follow appropriate standards.”³⁰
33. In addition, several American states have passed laws and promulgated regulations that provide for the release of information regarding GMOs. These laws and regulations

²⁸ General Assembly Resolution AG/RES 1819 (XXXI-O/01), at AA-404, calls for OAS institutions to explore the relationship between human rights and the environment, and General Assembly Resolutions AG/RES 1896 (XXXII-O/02), at AA-406, and AG/RES 1926 (XXXIII-O/03), at AA-407, encourage international cooperation in human rights and the environment.

²⁹ GA, September 11, 2001 at AA-409.

³⁰ *Claude* at AA-18-19, ¶ 74.

specify what is confidential information and mandate disclosure of information like the names of companies that develop GMOs, the varieties of GM crops, and the locations of the GM crops. For example, in Peru, an applicant that wants to introduce GM crops must publish an informative summary at the national level.³¹ Information about activities that may damage human health, the environment, and biodiversity cannot be withheld from the public as “confidential.”³² Costa Rica has a similar law regarding the release of information and the restriction on confidentiality.³³ The Costa Rican law specifically states that trade secrets will not be protected if disclosure is for biosafety reasons.³⁴

B. The Public’s Right To Access State-Held Environmental Information In The International Community

1. Environmental Information In General

34. In conjunction with the progress made in the Americas, there is an emerging international consensus demonstrating a strong relationship between the public’s right to both enjoy a healthy environment and have access to state-held information. Many states have constitutional guarantees to a safe or healthy environment, and these guarantees are reflected in their legislation. According to the OAS Committee on Juridical and Political Affairs, 109 state constitutions mention the protection of the environment and natural resources, and 53 specifically provide for a right to a healthy environment.³⁵

35. In June 1992, member states at the United Nations Conference on Environment and Development meeting in Rio de Janeiro adopted the Rio Declaration on Environment and Development (hereinafter “the Rio Declaration”) to advance the concept of states’ rights and responsibilities with regard to the environment.³⁶ The Conference was attended by 172 states, including Chile. Principle 10 of the Rio Declaration provides:

³¹ Law No. 27104 on the Prevention of Risks Derived from Biotechnology (*Diario Oficial* 1999) at AA-429.

³² *Id.*

³³ Law 7788 on Biodiversity at AA-440.

³⁴ *Id.*

³⁵ OAS Permanent Council, *Report of the Unit for Sustainable Development and Environment on its Efforts in the Field of Human Rights and the Environment*, OEA/Ser.G CP/CAJP-2100/03, November 14, 2003, at AA-473, AA-475.

³⁶ A/CONF.151/26 (Vol. 1) at AA-478.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

36. Applying Principle 10 of the Rio Declaration, the United Nations Economic Commission for Europe (hereinafter “UNECE”)³⁷ adopted the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the “Aarhus Convention”).³⁸ Though the Aarhus Convention is a UNECE convention, it is open to all member states of the United Nations, including Chile. To date, 37 states³⁹ have ratified the Aarhus Convention, many of which are states with economies in transition. The Aarhus Convention contains three broad themes: public access to information, public participation, and public access to justice on environmental matters. The Aarhus Convention calls for governments to guarantee the right of access to information.⁴⁰ Public access to information covers the obligation of public authorities to respond to public requests for information and other obligations relating to providing environmental information.

³⁷ The UNECE is a regional commission of the United Nations, and has 55 member states from North America, Western, Central and Eastern Europe, and Central Asia.

³⁸ ECE/CEP/43 (1998), entered into force June 25, 1998 at AA-497.

³⁹ The ratifying states are as follows: Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, European Community, Finland, France, Georgia, Hungary, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovenia, Spain, Sweden, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, and the United Kingdom of Great Britain and Northern Ireland.

⁴⁰ See AA-499, 501-505, Articles 1, 4, and 5.

37. European Union member states have enacted a directive that strengthens public access to information under the Aarhus Convention.⁴¹ The directive grants a right of access to environmental information. The directive also has a broader definition of environmental information.
38. On June 27, 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on Environment and Human Rights, which recommends that states “safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention.”⁴²

2. Information About Genetically Modified Organisms

39. Many states recognize and guarantee public access to state-held information concerning GMOs. The international community, including the Americas, has entered into treaties, enacted laws, and promulgated regulations that, at a minimum, mandate disclosure of the names of companies that develop GMOs, the specific varieties of GMOs sought to be introduced into the environment, and the locations of GM crops.
40. A recent study by the Food and Agriculture Organization of the United Nations (hereinafter “FAO”) looked at international and national laws and regulations on biotechnology, and concluded that “the biosafety instruments examined were generally found to be more specific on public participation than the food safety or consumer protection instruments examined[, which] demonstrates that the general principle of public participation is well established in the biosafety field.”⁴³
41. Because GMOs are an emerging technology and the subject of wide debate, public access to state-held GMO information is important. The aforementioned FAO study noted:

One of the most useful legal tools for realizing the potential and avoiding the risks of modern biotechnology may be legally requiring public participation in the policy-making and regulatory decision-making processes. Opening decision-making processes up to the public may help to ensure that decision-makers have the best information at their disposal

⁴¹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Access to Environmental Information and Repealing Council Directive 90/313/EEC at AA-522.

⁴² See AA-530, Section 9(iii).

⁴³ Lyle Glowka, *Law and Modern Biotechnology: Selected issues of relevance to food and agriculture*, FAO Legislative Study (2003) at AA-531, 541.

in order to evaluate the benefits and risks that modern biotechnology could present. Public participation could also help to ensure better transparency and accountability in decision-making.^[44]

42. The Aarhus Convention specifically mentions GM food in the preamble, and paragraph 11 of Article 6 (concerning public participation in decision-making by public authorities to permit or license specific activities) provides that “[e]ach Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.” The 20th recital in the preamble recognizes “the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field.”
43. In the first meeting of the parties to the Aarhus Convention in 2002, the parties recognized the public’s concern over GMOs and the corresponding need to increase public confidence in GMO-related decisions.⁴⁵ As a result, the parties developed a Working Group on Genetically Modified Organisms to address public participation in the decision-making process to authorize the release of GMOs.
44. Subsequently, the parties adopted amendments to the Aarhus Convention to further address public concern over GMOs.⁴⁶ First, to ensure public participation in decisions to release GMOs, each of the 37 member states to the Aarhus Convention must provide transparency in the GMO-related decision-making process and provide a reasonable time for the public to comment prior to permitting the release.⁴⁷ Second, public requests for information may only be refused according to enumerated criteria, but governments are to restrictively interpret the reasons for refusal, and take the public interest served by disclosure into account.⁴⁸ The following information shall not be considered confidential: (a) a general description of the GMO; (b) the name and address of the

⁴⁴ *Id.* at AA-553. The study also noted that though a state may have specific laws for public participation in biotechnology or general public participation laws, the presence of a legal structure does not necessarily correlate to the degree of public participation. *Id.* at AA-542. For example, a state may lack specific laws for biotechnology, but have extensive public participation because of its general laws on public participation. *Id.*

⁴⁵ ECE/MP.PP/2/Add.5 (2004), Decision I/4, Genetically Modified Organisms at AA-600.

⁴⁶ ECE/MP.PP/2005/2/Add.2 (2005), Decision II/1, Genetically Modified Organisms (hereinafter “Aarhus Convention Amendment”) at AA-603.

⁴⁷ *Id.* at AA-605-607, Article 6 bis and Annex I bis (1), (4), (5).

⁴⁸ Aarhus Convention at AA-501-503, Article 4.

applicant; (c) the intended uses for the GMO; and (d) the location of the GMO or GM crop.⁴⁹ Third, parties must also release their methods and plans to monitor the GMO release, their emergency response, and the environmental risk assessment information.⁵⁰

45. Another relevant body of law is the Cartagena Protocol on Biosafety. The 130 state parties to the Cartagena Protocol on Biosafety, including Chile, are required to promote and facilitate public awareness, education, and participation relating to GM plants in relation to biodiversity conservation and sustainable use.⁵¹ Each state party must respect the confidentiality of commercial and industrial information (which includes research and development) and information where there is a disagreement as to its confidentiality.⁵² But a state cannot keep a company's name and a general description of the GM crop confidential.⁵³
46. The United Nations Industrial Development Organization Voluntary Code of Conduct for the Release of Organisms into the Environment (hereinafter "the Code") sets forth general principles relating to the standards of practice for the introduction of organisms into the environment.⁵⁴ Specifically, the Code provides that the local community should be informed of and provided with educational materials concerning a planned introduction prior to its release.⁵⁵
47. Under the European Union directive, the "Deliberate Release of GMOs into the Environment," all member states must provide public information on all GMO releases.⁵⁶ The European Commission is to make available to the public the summaries of the notifications and observations received by the member states' competent authorities', as well as a list of GMOs released into the member states' territories.⁵⁷ Confidential

⁴⁹ Aarhus Convention Amendment at AA-606, Annex I bis (4)(a).

⁵⁰ *Id.* at AA-606, Annex I bis (4)(b), (c).

⁵¹ ICCP, EM-I/3, Article 23, entered into force September 11, 2003 at AA-608. In addition, each contracting party needs to inform the public about access to information through the Biosafety Clearing-house. *Id.*

⁵² *Id.* at AA-618, Article 21(5).

⁵³ *Id.* at AA-618, Article 21(6).

⁵⁴ UNIDO/UNEP/WHO/FAO Working Group on Biosafety (1991) at AA-627.

⁵⁵ *Id.* at AA-632, Section II-C-2(i).

⁵⁶ 2001/18/EC, at AA-636, AA-643, Article 9(2) (first release).

⁵⁷ *Id.* at AA-643, Article 11.

information is protected, but the applicant has the burden of proving that disclosure would harm the applicant's competitive position.⁵⁸

48. The African Union has issued draft model legislation regarding access to GMO information. A state official will make the information in an application publicly available.⁵⁹ The name of the applicant, the type of GM crop that will be planted, and the location of the introduction cannot be kept confidential.⁶⁰

49. In addition, many individual countries have laws that address GMOs. For example, applicants seeking to release GMOs into the environment in the United Kingdom must publish a notice in a newspaper or newspapers in the areas likely to be affected.⁶¹ The notice must at least provide (a) the applicant's name and address; (b) the general description of the GMO; and (c) the location and general purpose of the release.⁶² The applicant must also notify specific individuals that he, she, or it has made the application and provided the information in the notice.⁶³

C. Chile Has Violated Articles 13, 23, 25, 1(1), 2, And 30 Of The Convention By Denying The Petitioners Their Right To Access State-Held Environmental Information

1. Article 13 – Right To Access State-Held Information

50. The public has the right under Article 13 of the Convention to access state-held information.⁶⁴ The public's right of access is governed by a "principle of maximum

⁵⁸ *Id.* at AA-649, Article 25.

⁵⁹ OAU, *African Model National Law on Safety in Biotechnology*, AA-674, at AA-679, 682-683, Articles 5 and 12 (2001).

⁶⁰ *Id.*

⁶¹ Environmental Protection Act (1990), Part VI; Genetically Modified Organisms (Deliberate Release) Regulations 2002, 2002 No. 2443 (hereinafter "GMO Deliberate Release") at AA-689.

⁶² GMO Deliberate Release at AA-713, AA-739-741, Article 34.

⁶³ The individuals include (a) the owner or owners of the site when different from the applicant; (b) the local authority for the area of the proposed release; (c) a number of different councils and commissions; and (d) the members of the genetic modification safety committee. *Id.*

⁶⁴ *See Claude* at AA-14, ¶ 59; *Terrorism Report* at AA-254, ¶ 281.

disclosure” and is subject only to “exceptional” and “limited” restrictions.⁶⁵ The state has the burden of proving that a restriction is justified, and the state’s burden of proof is subject to an “extremely high standard” in favor of the public’s right of access.⁶⁶

51. In order for the state to satisfy its burden of proof, the state must first prove that its restriction achieves one of the aims of Article 13, which include: “respect for the rights or reputations of others,” and “protection of national security, public order, or public health or morals.”⁶⁷
52. Second, the state must prove that its limited restriction is “necessary” to ensure one of the aforementioned Article 13 aims. In other words, the state must prove that its restriction is “the least restrictive of possible means to achieve the government’s compelling interest.”⁶⁸ The state must also prove that the objectives of its restriction “clearly outweigh” the public’s rights under the Convention, and that its restriction is “proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.”⁶⁹
53. Here, Chile has not met its burden of proof, particularly with regards to the “extremely high standard” that is applicable, and thus cannot lawfully deny the public’s right to access state-held information under the Convention. Specifically, Chile has not articulated any Article 13 aim that its restriction ensures, and thus Chile cannot demonstrate that its restriction is the least restrictive means to ensure an Article 13 aim. Moreover, Chile has not offered any evidence demonstrating how its supposed need for its restriction “clearly outweigh[s]” the public’s right under the Convention to access state-held information.
54. On the contrary, the evidence shows that the public’s interest in state-held environmental information concerning the introduction and cultivation of GMOs and GM crops is significant because such information has a direct effect on public health and the welfare of Chile’s agro-ecosystem. Allowing public access to this information outweighs any interest that Chile could have in keeping it secret.

⁶⁵ See *Claude* at AA-16-17, ¶ 69; *Terrorism Report* at AA-255, ¶ 284; *Declaration of Principles on Freedom of Expression* at AA-351, ¶ 4.

⁶⁶ See *Claude* at AA-16-17, ¶ 69; *Terrorism Report* at AA-252-253, 255, ¶¶ 278, 284; *1985 Advisory Opinion* at AA-364, ¶ 46.

⁶⁷ See *Claude* at AA-16-17, ¶ 69; *Terrorism Report* at AA-255, ¶ 284.

⁶⁸ *Terrorism Report* at AA-252-253, 255, ¶¶ 278, 284. See *Claude* at AA-16-17, ¶ 69; *1985 Advisory Opinion* at AA-364, ¶ 46.

⁶⁹ *1985 Advisory Opinion* at AA-364, ¶ 46.

55. Chile's lone substantive argument in support of its restriction rests upon law 19.653, which provides that only "administrative acts of the organs of the Administration of the State as well as the documents that support or directly and essentially complement them, are public."⁷⁰ Law 19.653 allows Chile to deny public access to information on several other grounds, including:

- "If the information is classified as 'reserved' or 'secret' under other laws or regulations[;]"
- "If publicizing the information impedes the proper functioning of the agency from which the information is requested[;]"
- "If the information requested affects the rights or interests of third persons, according to the well-founded judgment of the head of the agency from which the information is requested[;]" and
- "If the publication of the information affects national security or the national interest."⁷¹

56. Law 19.653 neither addresses nor satisfies the required "extremely high standard" necessary to overcome the public's right to access state-held information under the Convention. Indeed, this Commission already found that "the law only applies to 'administrative acts' and supporting documents, which excludes a vast quantity of records and other information in the possession of the State that do not constitute 'administrative acts' or may not be related to final or contentious administrative decision-making."⁷² This Commission also found that "the exemptions provided for in the law are overly broad, vague, and confer an excessive degree of discretion on the official determining whether or not to disclose the information."⁷³

57. In addition, although Chile does not raise this argument, these circumstances cannot support a "right or reputations of others" defense under Article 13. It is implausible that all of the information that Chile has denied releasing to the public implicates commercially confidential information. In any event, there remains an overriding public

⁷⁰ *Claude* at AA-22, ¶ 88 (translating law 19.653 into English).

⁷¹ *Id.*

⁷² *Id.* at AA-22-23, ¶ 89.

⁷³ *Id.* at AA-23, ¶ 90.

interest in full and complete disclosure of this environmental public health and safety information.

2. Article 23 – Right To Participate in Government

58. Article 23 (Right to Participate in Government) provides that “every citizen shall enjoy the . . . rights . . . to take part in the conduct of public affairs, directly or through freely chosen representatives . . . and to have access, under general conditions of equality, to the public service of his country.”

59. Because Chile has denied the public its right to access to this environmental information, which is information that impacts public health and the welfare of Chile’s agro-ecosystem, Chile has violated Article 23 of the Convention by effectively denying its citizenry the right “to take part in the conduct of public affairs.” If the public lacks the information that is necessary to participate in public affairs, citizens are denied an opportunity to participate in “the public service of [their] country.” Citizens cannot adequately participate in the GMO policy debate if they are unaware of the types of GM crops that are being grown and the location of the GM crops. Citizens need this information to know how impact, or are impacting, public health and the agro-ecosystem.

3. Article 25 – Right To Judicial Protection

60. Article 25 (Right to Judicial Protection) provides that “[e]veryone has the right to simple and prompt recourse . . . to a competent court or tribunal for protection against acts that violate his fundamental rights[.]”

61. This Commission has found that “the lack of an effective judicial remedy to address violations of rights protected by the Convention constitutes a separate violation of the Convention.”⁷⁴ While an “effective judicial remedy” does not require that a claim be resolved favorably for a particular party, it does require the judicial body to “enter[] into an evaluation of the merits of the claim.”⁷⁵ Here, because the Court of Appeals refused to consider and apply the Convention to the Petitioners’ claims—despite the fact that Chile had ratified the Convention in 1990—the Petitioners were denied an effective judicial remedy to address their rights under the Convention in violation of Article 25.

⁷⁴ *Id.* at AA-20, ¶ 80; *see also* Order of the Inter-American Court of Human Rights, Case of the Constitutional Court (Aguirre Roca, et al.) vs. Peru, Compliance with Judgment, November 27, 2003 at AA-762; Inter-American Court of Human Rights, Constitutional Court Case, Aguirre Roca, et al. vs. Peru, Series C No. 71, Judgment of January 31, 2001, at AA-768, AA-810, ¶ 89.

⁷⁵ *Claude* at AA-21-22, ¶ 81; *see also* Inter-American Commission on Human Rights, Report No. 30/97, Case 10.087, Gustavo Caranza vs. Argentina, Judgment of September 30, 1997, at AA-822, AA-834-835, ¶ 74.

4. Articles 1, 2, 30 – General Obligations To Respect And Ensure Human Rights

62. Article 1(1) (Obligation to Respect Rights) provides that member states have an affirmative obligation to “undertake to respect the rights and freedoms recognized [in the Convention, including the public’s right to access information,] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination[.]”
63. Article 2 (Domestic Legal Effects) provides that “[w]here 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 [have an affirmative obligation to] 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. Article 30 (Scope of Restrictions) limits the application of “[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein” to circumstances in which such restrictions are “in accordance with laws enacted for reasons of general interest[.]”
65. Chile’s failure to allow access to state-held information prevents the government from meeting its affirmative obligation to uphold the Convention. Chile has not provided any evidence that justifies how restricting the public’s right to access state-held information about GMOs is “for reasons of general interest.” Chile also lacks adequate domestic legal measures that protect the public’s right to access state-held information. As discussed, Chile’s public access law, Law 19.653, does not provide for the level of access to information that the Convention requires. Chile has not met its burden to adopt an adequate access law that is consistent with the Convention. Chile, by refusing to give the public the requested environmental information, has also violated its general obligations under the Convention to respect and ensure human rights.

IV. Conclusion

66. For the foregoing reasons, the *amici* organizations respectfully request that this Commission declare that Chile has violated Articles 1(1), 2, 13, 23, 25, and 30 of the Convention by denying the Petitioners their right to access state-held environmental information, and issue any and all relief deemed appropriate by this Commission and as requested by the Petitioners.

Respectfully submitted,

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