

COMPARATIVE ANALYSIS OF  
THE LEGAL STANDARDS RELATED TO  
ACCESS TO ENVIRONMENTAL INFORMATION  
BETWEEN THE ESCAZÚ AGREEMENT AND  
THE CHILEAN LEGAL ORDER

Alejandra Silva Meneses



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LL.M. IN INTERNATIONAL LAW –  
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## INTRODUCTION

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The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, known as the Escazú Agreement, represents the region's commitment towards a more equitable, just, and sustainable development. Its main focus is to guarantee present and future generations the right to a healthy environment and sustainable development through access to information, public participation and access to justice (hereafter 'access rights'), providing concrete mechanisms regarding every access right, trying to overcome barriers to access to these rights. As it happened with the Aarhus Convention,<sup>1</sup> adopted 20 years ear-

1 United Nations Economic Commission For Europe (UNECE) (1998). 'Convention on access to information, public participation in decision-making and access to justice in environmental matters' (Aarhus Convention). Aarhus, Denmark. 25 June 1998, which is a regional legally binding agreement that established minimum standards for the implementation of access rights, being a really important milestone –after the 1992 Rio Declaration– as a direct precedent of the Escazú Agreement. Pigrau Solé and Borràs Pentinat have considered the Aarhus Convention as the most important legal international instrument ever adopted associated with the recognition and guarantee of citizenry rights in environmental matters. See, Pigrau

lier, the Agreement is thought to be an important means to upgrade the virtuous circle of democracy, environmental protection, and effective exercise of human rights in Latin America and the Caribbean.<sup>2</sup>

In Rio+20, the human rights, environment, and development agendas converged and gave rise to two fundamental processes: the first one, at an international level related to the Sustainable Development Goals, and the second one, at a regional level related to the Escazú Agreement.<sup>3</sup> In respect to the latter, one of the first stages of Rio+20 was a presentation of proposals from States, NGOs, and the civil society, which generated a debate about three relevant features for a future instrument: its

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Solé, A. and Borrás Pentinat, S. (2008). 'Diez años del Convenio de Aarhus sobre el acceso a la información, la participación y el acceso a la justicia en materia de medio ambiente.' In Pigrau Solé, A. (Ed.) 'Acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente: diez años del Convenio de Aarhus.' Atelier, Barcelona España, p. 25. Apud. Cfr. Médiçi, Gastón (2018). 'El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe.' *Revista Catalana de Dret Ambiental*, Vol. IX Núm. 1, p. 20.

2 Cfr. Bárcena, Alicia (2020). 'Prólogo'. In Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe'. Ediciones UNI. 17 November 2020, p. 11.

3 Cfr. Di Paola, María. (2018). 'El Derecho Humano al Ambiente y la Agenda 2030, Suplemento de Derecho Ambiental, La Ley'. FARN. November 2018.



viability, opportunity, and impact.<sup>4</sup> In 2014, Chile was the fourth meeting venue of the focal points designed by the Governments of the signatory States of Rio+20. In this meeting, with the support of ECLAC as secretary, the negotiations towards an Agreement that later would become the Escazú Agreement began. Chile participated in the negotiations for four years, being part of the Board of Directors of the Negotiation Committee, as co-president along with Costa Rica.<sup>5</sup>

The road to the Escazú Agreement has implied a positive evolution concerning human rights, environmental matters, access rights, and sustainable development

- 4 Orellana, Marcos (2014). 'Democracia Ambiental y Desarrollo Sostenible: Hacia un Instrumento Regional sobre Derechos de Acceso.' In Di Pangrazio, A., Nápoli, A. and Sangalli, F. (Eds) (2014). Informe Ambiental Anual 2014. FARN. Buenos Aires, Argentina, p. 44. The first ten signatory States from Latin America and the Caribbean of this declaration –Chile, Costa Rica, Ecuador, Jamaica, Mexico, Panamá, Paraguay, Perú, Dominican Republic and Uruguay–, exposed their will to analyze the viability of having a regional instrument open to the entire region with an active participation of the population. See, Di Paola, M. and Castillo, M. (2020). 'Principio 10: de Río a Río+20 América Latina y el Caribe. ¿Qué 20 años no es nada?' In op. cit. Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe', p. 42. Also, cfr. op. cit. Orellana, Marcos (2014), 'Democracia Ambiental y Desarrollo Sostenible: Hacia un Instrumento Regional sobre Derechos de Acceso,' p. 44.
- 5 Economic Commission For Latin America And The Caribbean (ECLAC) (2012). 'Report of the first meeting of the focal points appointed by the governments of the signatory countries of the declaration on the application of principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean.' November 6-7, 2012.

agendas since the 1992 Rio Declaration. However, regulation, legislation applicability, institutionality regarding environmental matters, sustainable development, and access rights have presented uneven progress across the States within the region. Along with that situation, social and economic inequality and the increase of environmental conflicts made clear that it was urgent to include sustainability criteria in an integral, inclusive and participative manner.<sup>6</sup>

Hence, Rio+20 symbolized the opportunity to move forward –as a region and for every State regarding its national legal order– towards the construction of a regional agreement that would allow proper protection of the human right to the environment and access rights. In this context, the Escazú Agreement represented a mechanism without precedents that symbolized a milestone regarding environmental democracy in Latin America and the Caribbean, that catalyzes the 2030 Agenda and climate action.<sup>7</sup>

The right to access to information of public interest held by the State allows participation in public administration by social control manners that can be exercise

6 Cfr. op. cit. Orellana, Marcos (2014), 'Democracia Ambiental y Desarrollo Sostenible: Hacia un Instrumento Regional sobre Derechos de Acceso,' p. 43.

7 Cfr. op. cit. Bárcena, Alicia (2020), 'prólogo', p. 10.

through access rights.<sup>8</sup> In this sense, under international environmental law, the specific duty to provide access to information in environmental matters has been established in principle 10 of the Rio Declaration<sup>9</sup> and this right implies an obligation for States to provide at a national level, the possibility for every person to have the same access to adequate information on the environment as the public authorities do—including information related to materials and activities that may enshrine a danger to the communities or the opportunities for citizens to participate in decision-making processes—.<sup>10</sup>

- 8 See Inter-American Court Of Human Rights (IACtHR) (2005). Case of Palamara-Iribarne v. Chile (Merits, Reparation and Costs), Judgment of November 22, 2005, para. 83. The IACtHR expressed that “democratic checks and balances, exercised by society through public opinion, encourage transparency in State activities and promote accountability of public officials for their administration. This is why there should be more tolerance and openness to criticism, in the face of statements and opinions advanced by individuals in the exercise of said democratic mechanism.”
- 9 United Nations (1992). Rio Declaration on Environment and Development. E/CN.4/RES/1994/65. 12 August 1992. Principle 10: “...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.”
- 10 Cfr. De Los Ríos, Isabel (2020). ‘El acuerdo regional sobre el acceso a la información, la participación pública y el acceso a la justicia en asuntos ambientales en américa latina y el caribe.’ In op. cit. Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), ‘Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe’, p. 49.

Regarding the characteristics of this obligation, the Bali Guidelines<sup>11</sup> and other international instruments established that access to environmental information should be affordable, effective, and timely. Besides, the right of the individual to obtain information is complemented by a correlative positive obligation of the State to provide the information requested, so that the public may have access to it to examine and assess it.<sup>12</sup> In this regard, the State's obligation to provide information, *ex-officio*, the so-called "obligation of active transparency," imposes on States the obligation to provide the necessary information for individuals to be able to exercise other rights, and this is particularly relevant concerning the rights to life, personal integrity and

11 Cfr. United Nations Environmental Programme (UNEP) Governing Council (2010). 'Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (Bali Guidelines), Decision SS. XI/5, part A. *apud. cit. op. Inter-American Court Of Human Rights (IACtHR) (2018). Advisory Opinion OC-23/17 requested by the Republic of Colombia. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Articles 4(1) And 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights). 15 November 2017, para. 220.*

12 Cfr. Inter-American Court Of Human Rights (IACtHR) (2006). Case of Claude Reyes et al. v. Chile (Merits, Reparations and Costs). Judgment of 19 September 2006, para. 77. See also, Inter-American Court Of Human Rights (IACtHR) (2016). Case of I.V. v. Bolivia (Preliminary objections, merits, reparations and costs), Judgment of 30 November 2016, para. 156. *apud. op. cit. Inter-American Court Of Human Rights (IACtHR) (2018). Advisory Opinion OC-23/17, para. 221.*

health.<sup>13</sup> Also, general principles of environmental international law imply that environmental information is mandatory, both for citizens and for management instruments.<sup>14</sup>

In this regard, the Escazú Agreement treated the right to access to information –the same way Aarhus Convention did– in two articles which establish both the right of the citizenry and obligations for the States Parties as

13 Cfr. *op. cit.* Inter-American Court Of Human Rights (IACtHR) (2016). Case of I.V. v. Bolivia, para 156 and 163. See also, Inter-American Court Of Human Rights (IACtHR) (2012). Case of Furlan and family members v. Argentina (Preliminary Objections, Merits, Reparations and Costs), Judgment of 31 August 2012, para. 294. *apud. cit. op.* Inter-American Court Of Human Rights (IACtHR) (2018). Advisory Opinion OC-23/17, para. 219-221.

14 For instance, general principles of environmental law have a direct link to information: principle of the right to access to information, principle of public participation, principle of exchange of information and the principle of prevention. The latter implies the acknowledgement of planification as an essential mechanism for environmental management and the duty to take into account impact studies. In other words, environmental law is characterized for its complexity owing to the fact that it is based on natural sciences –hence, it must be supported with other disciplines–, and that its two main tools are sustained on scientific and factual information, therefore all of its principles, in some way or another, are related to information. Cfr. *op. cit.* De Los Ríos, Isabel (2020), ‘El acuerdo regional sobre el acceso a la información, la participación pública y el acceso a la justicia en asuntos ambientales en américa latina y el caribe,’ p. 48-49. Scientific data is a social outcome and a relevant element for sustainable development, and some international environmental instruments have highlighted its importance. For instance, the 1972 Stockholm Conference in its principle 18 and 20 or the 1992 Rio Declaration in its principle 14.

a consequence of the right. Article 5 specifically regulates the accessibility of environmental information, the regime of exceptions, the conditions applicable to the delivery of environmental information and the independent oversight mechanisms; and article 6, the generation and dissemination of environmental information.<sup>15</sup>

About this access right, the Escazú Agreement included in Article 5 the passive transparency and in Article 6 the active transparency. Concerning the former –which means requested information–, the Escazú Agreement followed the same traditional structure as the Aarhus Convention did, with the so-called “liberty laws of information” which regulate in a precise manner the diverse categories of information that might be exempt from the access to information and the proceeding for spreading information. However, the Escazú Agreement differs from the Aarhus Convention in the sense that the latter provides for a very detailed international legal standard regarding the scope of environmental information and the categories of information that might be excluded from spreading, albeit the Escazú Agreement just provides for a general definition of environmental information and does not in-

15 Cfr. *op. cit.* Medici, Gastón (2018), ‘El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe,’ p. 31.

clude an exhaustive regime of exceptions, allowing to deny information “in conformity to national laws.”<sup>16</sup>

About the final text of the Agreement, it is noteworthy to mention that the public submissions associated with this right during the negotiation were relevant for the outcome. There were three groups of proposals that ended up being included in several articles. The first one is in relation to clear guarantees for the full exercise of this right and to achieve the maximum level of dissemination and accomplishment of the legislation in force. In this sense, the idea was to guarantee the principle of maximum disclosure, hence the regime of exceptions included in the agreement could be exhaustive.

The right to access to environmental public information must also be complemented with the generation and dissemination of information from States. Thus, the public submissions were focused on having an environmental information system (Article 6(3) Escazú Agreement), a pollutant release and transfer register (Article 6(4) Escazú Agreement), and to publish and disseminate at regular intervals national report on the state of the environment (Article 6(7) Escazú Agreement), along with the States obligation

16 This different treatment of the right might be derived from the different contexts both instruments were written. In the case of the Escazú Agreement, most of the countries already possessed elaborated general regimes in relation to this right, and because of that, States might have resisted the introduction of a detailed international regime associated with this right. Cfr. Jendróska, Jerzy (2020). ‘El Acuerdo de Escazú a la luz de la experiencia del Convenio de Aarhus.’ In op. cit. Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), ‘Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe’, Ediciones UNI. 17 November 2020, pp. 80-81.

to immediately disclose and disseminate relevant information in cases of an imminent threat to public health or the environment (Article 6(5) Escazú Agreement).

They also focused on broadening the limits and scope of the subjects obliged to provide information (Article 6(9) Escazú Agreement), centered on expanding the scope of access to public information, by promoting access to environmental information contained in documents such as contracts or concessions, along with administrative provisions that grant authorizations to operate—due to the fact that these last ones are the main sources of information regarding environmental, social and economic impacts that projects or activities may provoke—. Into the bargain, the submissions also focused on the possibility to access to information under private possession related to activities that might generate impacts on health or the environment (Article 6(12) Escazú Agreement)—which is remarkable progress in relation to broadening the scope of transparency in activities that might threaten the well-being of citizenry—. <sup>17</sup>

Thus, this thesis is focused on a comparative analysis of the standards related to access to environmental information, provided by the Escazú Agreement and the Chilean national legislation. The Chilean legal order, as will be revised along with the analysis, has advanced remarkably regarding access to information. However, the expected outcome of this analysis is to see and conclude to

17 Cfr. Sanhueza, A. and Nápoli, A. (2020). 'El aporte de la Sociedad civil al Acuerdo de Escazú. Nuevas formas para la negociación internacional.' In op. cit. Prieur, M., Sozzo, G. And Nápoli, A. (Eds.) (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe', p. 148.



what extent the Chilean environmental legal order shares the standards provided by the Escazú Agreement, and particularly, to identify those 'lagoons' in which the Chilean legal order does not consider those determined standards.

In other words, the ultimate purpose of this investigation is to identify those matters in which there are still some substantial aspects that are not completely fulfilled at the same level compared to the standards included in the Escazú Agreement, so as to be aware and be able to suggest the inclusion of the non-complied standards into the national legislation to advance even further in this respect.

The relevance of this comparative analysis is that as mentioned before, the Escazú Agreement is the first regional instrument focused on access rights, and particularly, the right to access to environmental information with an aim to not just guarantee access rights such as the right to access to information, but to also ensure effective implementation of them (Article 4(8) Escazú Agreement), establishing minimum guarantees and better standards to guide States in the fulfillment of this goal.

Thus, as will be revised, Chile since the enactment of the 20.285 Act on Access to Public Information, has established relevant mechanisms to strengthen access to information, but the standards provided by the Agreement as the first regional instrument focused on the Latin American and the Caribbean issues in this matter, are specialized in providing the best or vital standards that every State should apply in their national legal orders to properly guarantee this right, hence comparing those standards with the ones included in the Chilean legal order, would make possible to identify those aspects in which the Chilean legal order could still advance even further.

So, to carry out the comparative analysis, I contemplated, on one hand, Articles 4, 5 and 6 of the Escazú Agreement, because as mentioned before, those are the articles in which the most enforceable environmental obligations concerning access to information are concentrated; and, on the other hand, the relevant Chilean regulation, with special focus on the 19.300 Act which establishes the Environmental General Grounds, the 20.417 Act which establishes the Ministry of the Environment, the Environmental Assessment Service and the Superintendency of the Environment and the 20.285 Act on Access to Public Information, among others.

The present work will start in chapter 1, with an overview of the general aspects of the right to access environmental information, by highlighting the importance of this right as such, for the achievement of other rights and as an underpinning for democracy. Then I will continue to revise the most relevant principles regarding the right of access to environmental information, which will serve as a guide to interpret the different aspects of the right of access to environmental information, in concrete, the principle of transparency, accountability, and maximum disclosure.

Then I will continue in chapter 2 by revising the general dispositions of the Escazú Agreement related to the right of access to environmental information. In this regard, I will revise and compare the provisions on disclosing environmental information so as to determine to what extent the Chilean environmental legal order provides for mechanisms to ensure that the public is duly informed, and to facilitate the acquisition of knowledge on access rights. In addition, I will compare standards to determine if the Chilean legal order has the same or alike obliga-

tion to apply a favorable interpretation of the exercise and respect of access rights as the one included by the Escazú Agreement. And finally revise the Chilean mechanisms for the promotion of the use of new information technologies and environmental information systems, as mentioned by the Agreement and if they exist, to determine if generate restrictions or discriminations to the access to the information referred to in the Escazú Agreement.

In chapter three, I will delve into active transparency obligations, and to that end, I will revise if Chile guarantees or not that the State's competent authorities, in fact, generate, collect and disseminate environmental information in a systematized, proactive, timely, regular, accessible and proactive manner, and to update it periodically, as provided by the Article 6 of the Escazú Agreement. Particularly, in relation to environmental management mechanisms such as the environmental impact assessment system and the establishment of systems of environmental information. Besides, to be able to determine to what extent Chile complies with the performance of such obligations, I will revise if the administration is supportive in terms of ensuring that the information obtained and collected along that process is, in fact, understandable and comprehensible to the public, which is the purpose after all behind of this obligation to generate and disseminate environmental information.

In chapter four, I will delve into passive transparency so to determine the level of compliance concerning the access to information of the Chilean legal order compared to the standards provided by the Escazú Agreement. To this end, I will revise the conditions by which the access to information is exercised, so as to see if the Chilean legal order shares the same approach of the Esca-

zú Agreement in respect of environmental information that may be sought, the class of requester who may invoke the right to access to information and purpose for which access to information may be sought, periods for the Administration to respond to these requests, what is expressed by the Escazú Agreement compared to the Chilean legal order in cases the requested information is not available and as well as other conditions such as the format of the delivery of information and gratuity or costs of accessing to environmental information.

Finally, in chapter five, after the analysis of the conditions of the right to access information provided by the Chilean legal order compared to the ones established by the Escazú Agreement, I will revise the refusal to access to environmental information. As we will see, both the Escazú Agreement and the Chilean legal order contemplate the possibility to withhold information on the grounds of confidentiality and secrecy due to the necessity to protect some interests. Therefore, in this part of the thesis, I will intend to compare the provisions included in the Escazú Agreement to the ones included in the Chilean legal order, thus, to determine if the latter shares the same level of restriction to the right of access environmental information or has a lower level of restriction or if it, in fact, exceeds it.

In case the Chilean legal order exceeds the standards of the regime of exceptions provided by the Escazú Agreement, and therefore, overpasses the restriction to the right to access to information, I will revise to what extent it is problematic in alliance with the other standards and provisions analyzed in the previous chapters of this thesis, because as we will see, the Escazú Agreement provides a minimum standard of protection of the

right of access to information, meaning it is the ground and never the ceiling. So, the comparative analysis will help to determine if the Chilean legal order shares this floor of protection, exceeds it or in some cases stays below it.



# CHAPTER I: GENERAL ASPECTS OF THE RIGHT TO ACCESS TO ENVIRONMENTAL INFORMATION

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## 1.1 The importance of the right to access to information in environmental matters

Improving the availability of information regarding the state of the environment and activities that may have adverse effects or represent threats to the environment are well-established objectives of environmental law, and therefore well developed within the international regime for environmental protection.<sup>18</sup> As Fenster highlighted “without access to the government, the public can neither evaluate the government’s performance in the past, nor hold the government accountable in the present, nor deliberate over

18 Cfr. Sands, Philippe (2003). ‘Principles of International Environmental Law’, 2<sup>a</sup> Edition. Cambridge University Press, pp. 826-868.

the government's future representatives or policies.”<sup>19</sup> Therefore, democracy is based upon the possibility of being informed. The uninformed is a mutilated citizen.<sup>20</sup>

The right to access information has progressively acquired acceptance, both at domestic and international level.<sup>21</sup> At a domestic level, the recognition of the right to access to information is relatively new.<sup>22 23</sup> Whilst some countries have expressly recognized this right in their

- 19 Fenster, Mark (2010). ‘Seeing the State: Transparency as Metaphor’, 62 *Admin L. Rev* 617. University of Florida Levin College of Law, UF Law Scholarship Repository, p. 619.
- 20 Cfr. Leme Machado, Paulo (2018). ‘Direito à Informação e Meio Ambiental’ 3. 1º ed. São Paulo: Malheiros Editores, p. 51. apud Leme Machado, Paulo (2020). ‘El Derecho de acceso a la información ambiental en el Acuerdo de Escazú’. In op. cit. Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), ‘Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe’, p. 191.
- 21 Mcdonagh, Maeve (2013). ‘The Right to Information in International Human Rights Law’. *Human Rights Law Review* 13:1. Oxford University Press, p. 25.
- 22 Hovell, Devika (2009). ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ In Farrall, J. and Rubenstein, K. ‘Sanctions, Accountability and Governance in a Globalized World.’ Cambridge University Press, United Kingdom, p. 101.
- 23 The first access to information law in the world, was the 1766 Swedish Freedom of the Printing Press. For the history of access to information laws see Darbishire, Helen (2015). ‘Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks’. In Mcdonagh, T. and Donders, Y. (Eds.) ‘The United Nations and Freedom of Expression and Information Critical Perspectives.’ Universiteit van Amsterdam. June 2015, pp. 4-8.



constitutions,<sup>24</sup> confirming it by that as a fundamental right.<sup>25</sup> In some other cases, the right has been implied

- 24 The first countries to give constitutional recognition to the right to access to information were Finland and Sweden in 1990. See *op. cit.* Darbshire, Helen (2015), 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks', p. 6.
- 25 *Op. cit.* Darbshire, Helen (2015), 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks', p. 2; See also, Inter-American Commission On Human Rights (IACHR) (2011) 'The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks.' Office of the Special Rapporteur for Freedom of Expression. OEA/SER.L/V/II. CIDH/RELE/INF.7/12. 30 December 2011, para 99. The IACHR has acknowledged the right of access to information as a universal human right. However, the idea of a right of access to information as fundamental right has not been broadly accepted. For instance, in the process of drafting the Council of Europe Convention on Access to Official Documents, many government representatives rejected the idea to consider this right as a fundamental right. A tension was created between countries that had given the right a constitutional level and those still doubting about that or with national laws which had a more restricted scope. Even further, when the UN Human Rights Committee was elaborating the Draft of the 'General Comment No. 34-Article 19: Freedom of Opinion and Expression CCPR/C/CG/34', Germany tried to remove the right of access to public documents of it and urged the Committee not to conclude that access to information was a right due to the lack of legal or constitutional framework in the German national order to consider it as a fundamental right. See *op. cit.* Darbshire, Helen (2015), 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks', pp. 9-11.

from constitutional recognition of a right to freedom of speech and expression.<sup>26</sup>

The latter was expressly recognized by the UN Commission on Human Rights in 1946 when Resolution 59 was adopted: “In contemporary society, because of the social and political role of information, the right of everyone to receive information and ideas has to be carefully protected. This right is not simply a converse of the right to impart information, but it is a freedom in its own right. The right to seek or have access to information is one of the most essential elements of freedom of speech and expression. Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is, therefore, to be strongly checked.”<sup>27</sup>

This acknowledgment by the UN Commission on Human Rights underlined the relevance of the right of ac-

26 Op. cit. Hovell, Devika (2009), ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ p. 92.

27 United Nations Commission On Human Rights (1994). ‘Question of the Human Right of all persons subjected to any form of detention or imprisonment. Promotion and protection of the right to freedom of opinion and expression. Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights.’ Resolution 1993/45 (E/CN.4/1995/32. 14 December 1994, para. 35. The interlinkage was also acknowledged by the Inter-American Court of Human Rights in op. cit. Inter- American Court Of Human Rights (IACtHR) (2006). Case of Claude Reyes et. al v. Chile, para. 77. See also, European Court Of Human Rights (ECtHR) (2009). ‘Case of Tár-saság a Szabadságjogokért v. Hungary’ (App. No. 37374/05), Judgment of 14 April 2009, paras. 36 and 38.

cess to information at different levels: in itself, for the achievement of other rights and as an underpinning of democracy.<sup>28</sup> Additionally, it has been broadly recognized the right to freedom of expression –protected by every international human rights treaty<sup>29</sup>–as the underpinning for a right to information.<sup>30</sup> The interaction of these rights is grounded on the idea that access to information is a prerequisite of the right to freedom of expression.<sup>31</sup> Professor Roberts pinpointed “if no right of Access to information is recognized, the right to free expression is hollowed out. Citizens will have the right to say what they

28 See also *op. cit.* Inter-American Court Of Human Rights (IACtHR) (2017). Advisory Opinion OC-23/17, paras. 217 and 218: “access to information also forms the basis for the exercise of other rights. In particular, access to information has an intrinsic relationship to public participation with regard to sustainable development and environmental protection. The right of access to information has been incorporated into numerous sustainable development projects and agendas (...) [and] within the framework of these plans and declarations, the States of Latin America and the Caribbean have commenced a process towards the adoption of a regional instrument on access to information, public participation, and access to justice in environmental matters (...) [t]he Court welcomes this initiative as a positive measure to ensure the right of access to information in this matter.”

29 *Cfr. op. cit.* McDonagh, Maeve (2013), ‘The Right to Information in International Human Rights Law’. p. 29.

30 *Cfr. op. cit.* McDonagh, Maeve (2013), ‘The Right to Information in International Human Rights Law’. p. 26.

31 *Cfr. op. cit.* McDonagh, Maeve (2013), ‘The Right to Information in International Human Rights Law’. p. 29.

think, but what they think will not count for much, precisely because it is known to be grossly uninformed.”<sup>32</sup>

The Escazú Agreement in its Article 4(4) established that “with the aim of contributing to the effective application of the present Agreement, each Party shall provide the public with information to facilitate the acquisition of knowledge on access rights.” Thus, as mentioned earlier, the right to access to the information besides being a right itself is a means to an effective exercise of the other access rights—participation in decision-making and access to justice in environmental matters—as well. Furthermore, these three access rights are, by extent, means to fulfill other human rights. In sum, the right to access to information is the foundation of all, it is relevant as a right as such and as the manner to exercise other access rights that will allow the further exercise of other human rights.

In sum, the relevance of strengthening a right such as the right to access to information favors a more rational economic-political decision-making, decreases information asymmetries, provides transparency when evaluating externalities of activities, and contributes to better management of public goods. Moreover, it would help to avoid expensive social-environmental conflicts and perceptions of social injustice which undermines political credibility. With that in mind, it is logical that this right is the most developed in the Escazú Agreement compared to the other two access rights, because it is the underpinning of all, as we will see.

32 Roberts, Alasdair (2001). ‘Structural Pluralism and the Right to Information.’ *University of Toronto Law Journal*, Vol. 51, No. 3, July 2001, p. 262 (in the online document p. 19).

## 1.2 Relevant principles related to the right to access to information

### 1.2.1 PRINCIPLE OF TRANSPARENCY

Regarding the content of the principle of transparency, there is no consensus on how transparency should be defined or measured because this term is commonly used in so many different issue areas,<sup>33</sup> thus impeding a general or common notion of transparency. It is “often associated with information and knowledge, legitimacy and accountability, participatory democracy and good governance.”<sup>34</sup> For the aim of this work, I chose the definition of transparency given by the UNESCAP, since it is one of the few that was almost exclusively focused on information.<sup>35</sup> In this sense, legally speaking, the idea of transparency is most often associated with the concept of good gover-

33 Cfr. Florini, Ann. (2007). ‘Introduction: The Battle Over Transparency’. In Florini, Ann. (Ed.), ‘The Right to Know: Transparency for an Open World’. Columbia University Press. New York, USA., p. 5: g.e. in politics, in economics and in the security field.

34 Bianchi, Andrea (2013). ‘On Power and Illusion: The Concept of Transparency in International Law.’ In Bianchi, A. and PETERS, A. (Eds.) ‘Transparency in International Law.’ Cambridge University Press, United Kingdom, p. 8.

35 United Nations Economic And Social Commission For Asia And The Pacific (UNESCAP) (2007). ‘What is good governance?’: Transparency “means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media.”

nance, and it “has been touted as a core attribute of good governance.”<sup>36</sup>

Its value, in broad terms, is because it contributes to overcoming what social scientists have conceptualized as ‘agency problems’. In all governance circumstances, principals (g.e. citizens) delegate responsibility to agents (g.e. government and its competent authorities) to decide on their behalf. Nuisances arise because principals cannot fully supervise or monitor their agents, therefore they know much less information about the circumstances the agents face and the actions they take concerning those situations than the agents themselves do. Hence, there is a constant risk that the agents may make misguided or self-serving decisions that are contrary to the interests of their unknowing and unseeing bosses. However, it is not recommendable or desirable that principals take the matters into their own hands because they cannot acquire the full range of information available to their agents without negating the efficiency advantage of having agents.<sup>37</sup> And therefore, that is what the principle of accountability is for, as we will see in the section related to this principle.

Although, a huge disadvantage of this division of labor, is that it creates opportunities for agents/insiders to withhold so much information that accountability becomes difficult. Officials have strong motives for keeping

36 Op. cit. Hovell, Devika (2009), ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ p. 102.

37 Op. cit. Florini, Ann. (2007), ‘Introduction: The Battle Over Transparency,’ pp. 6-7.

the ignorance of their behavior.<sup>38</sup> Nevertheless, authorities in principle do not have the right to hold information from people unless there is an overriding public reason to justify it.<sup>39</sup>

Into the bargain, to avoid the tendency to keep the public ignorant, the principle of transparency can be applied in two aspects: active transparency and passive transparency. The former is focused on the idea that communication flows without being requested and the competent authorities have to inform the public without being asked. The passive transparency's aim, on the other hand, is to provide information when requested<sup>40</sup> These two dimensions are different although interrelated in terms that, as Florini highlighted, decision-makers have to release information both proactively and in response to requests."<sup>41</sup>

The Principle of transparency as mentioned before was expressly included in the Escazú Agreement in arti-

38 Op. cit. Florini, Ann. (2007), 'Introduction: The Battle Over Transparency,' p. 7.

39 See Fenster, Mark (2006). 'The Opacity of Transparency', 91 Iowa L. Rev. 885. University of Florida Levin College of Law, UF Law Scholarship Repository, pp. 895-902.

40 Cfr. op. cit. Leme Machado (2018) 'Direito à Informação e Meio Ambiental', p. 67 and 69. apud. op. cit. Leme Machado, Paulo (2020) 'El Derecho de acceso a la información ambiental en el Acuerdo de Escazú'. In op. cit. Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe', p. 189-190. See also op. cit. Fenster, Mark (2010), 'Seeing the State: Transparency as Metaphor', pp. 621-622.

41 Op. cit. Florini, Ann. (2007), 'Introduction: The Battle Over Transparency,' p. 5.

cle 3(a)(b) and its dimensions as well. For instance, article 5 titled “access to information” which provides rights and obligations concerning requests of information is the dimension of passive transparency; and article 6 titled “generation and dissemination of environmental information” is focused on obligations to provide information without being requested constitutes the active dimension of transparency.<sup>42</sup> Likewise, Chile included this principle in the Law on Transparency, by which all information in the possession of the State bodies is presumed to be public unless it is subject to exceptions (Article 11(c) 20.285 Act).

As we will see along with this work, the main bodies obliged to provide access to information are the State’s administrative bodies. Hence, the 19.880 Act is relevant because it establishes the basis for the administrative procedures that govern the acts by the State’s administrative bodies and is applied subsidiarily in matters not regulated by *lex specialis*. As expressed by Article 62 of the 20.417 Act as the organic law of the Superintendency of the Environment, in respect to everything not foreseen by this law, 19.880 Act would be supplementary applied (Article 62 of the 20.417 Act).

Thus, Article 16 of the 19.880 Act included the principles of transparency and publicity and expressed that the administrative procedure has to be carried out in a transparent manner, thus it allows and promotes acknowledgment, contents, and fundamentals for the decision-making

42 Examples of this are article 6(3), article 6(4), article 6(5), article 6(7), and article 6(11) Escazú Agreement. All of those sources of information are expected to be available without having to be requested by anyone.



within those administrative procedures. Hence, acts and resolutions adopted by administrative bodies, the fundaments, and documents contained in them and the procedures applied to their drafting and dictation of them, are public inasmuch as they do not fall within the regime of exceptions contemplated by Article 16 of the 20.285 Act (Law on Transparency).

Also, the principle of transparency has been recognized at a constitutional level, due to its inclusion in Article 8 of the Chilean Political Constitution, which must guide the performance of the State's administrative bodies, in which the right to access to public information is understood as implicitly included, as have been acknowledged by the Chilean Constitutional Tribunal in 2006.<sup>43</sup> However, as it is understood as implicitly included but it does not expressly recognize it, the constitutional provision does not formally establish the right to access to information at a constitutional level. Therefore, the principle of transparency recognized by the 20.285 Act came as to complementarily materialize this right into the Chilean legal order, as we will see.

Concerning the 20.285 Act, in its Article 3, expressed that the public function has to be carried out with transparency, in a way it permits and promotes the acknowledgment of the proceedings, contents, and decisions adopted along that public performance. And went on to say in Article 4 that the authorities, no matter the denomina-

43 Cfr. Bermúdez, Jorge (2014). 'Fundamentos de Derecho Ambiental', 2º Edition. Ediciones Universitarias de Valparaíso, Pontificia Universidad Católica de Valparaíso, p. 340. See also, Chilean Constitutional Tribunal (2006). Decision No. 634-2006. Judgment of 9 August 2007.

tion used by the Constitution and laws, and the officials of the State's Administration, must strictly comply with the principle of transparency of the public function. Hence, in this regard, the provision stated that the principle of transparency of public function means to respect and safeguard the publicity of the acts, resolutions, proceedings, and documents of the Administration, as well as their fundamentals, and to facilitate access to that information by any person, through the means and proceedings established by the law (Article 4 of the 20.285 Act).

Then, in Article 5 of the same 20.285 Act was expressed that by virtue of the principle of transparency, the acts and resolutions of the State's Administration bodies, their fundamentals, the documents used as the basis or direct and essential complement, and the proceedings used to their dictation, are public. However, as will be revised in chapter 4, exceptions were established in this regard. Also, expressed that information generated with a public budget and any other information held by the administrative bodies, no matter its format, support, date of generation, origin, classification, or processing, is public unless it is subject to the mentioned exceptions (Article 5 of the 20.285 Act).

### 1.2.2. PRINCIPLE OF ACCOUNTABILITY

Following the liberal democratic theory, the principle of accountability imposes an obligation to competent authorities at all levels to give an account of themselves and explain their actions to the public.<sup>44</sup> This principle,

44 Cfr. *op. cit.* Leme Machado, Paulo (2020), 'El Derecho de acceso a la información ambiental en el Acuerdo de Escazú,' p. 190. See also, *op. cit.* Fenster, Mark (2006), 'The Opacity of Transparency', pp. 895-899.

as mentioned before, derives from the principle of transparency in as much as it is grounded, as a general rule, on the conception that to be held accountable and to perform rightly, institutions must be visible, and ultimately transparent, to the public.<sup>45</sup> This principle is additionally linked to the right to participate in the decision-making because it is by the information recovered through accountability that citizenry is well-informed and enabled to properly deem the management of the government and thus participate in the decision-making.<sup>46</sup>

Moreover, there is an additional positive consequence, which will be assessed in regard to access to information through economic mechanisms such as eco-labeling or environmental permits as part of the environmental assessment mechanisms, that Fenster highlighted when expressed that “additional information enables individuals to make better decisions in their private lives and regarding their engagement in the market, resulting, for example, in changed consumer and industry behavior in fields as diverse as health and the environment.”<sup>47</sup>

As the Supreme Court of India noted: “where society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide

45 Op. cit. Fenster, Mark (2010), ‘Seeing the State: Transparency as Metaphor’, p. 619.

46 Cfr. op. cit. Leme Machado, Paulo (2020), ‘El Derecho de acceso a la información ambiental en el Acuerdo de Escazú,’ p. 190. See also, op. cit. Fenster, Mark (2006), ‘The Opacity of Transparency’, p. 897.

47 Op. cit. Fenster, Mark (2006), ‘The Opacity of Transparency’, p. 899.

by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how the government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.”<sup>48</sup>

Also, Florini highlighted that “the successful implementation of a transparency law requires a number of supporting institutions: the bureaucratic apparatus to store information and process access requests, watchdog groups to pressure the government to keep its commitment to access, and legal institutions to uphold the access law. Without each of these, information access can easily be stifled even with the best laws.” The author went on to underline that “policy makers and citizens alike have to do the hard work –designing intelligent policies, ensuring their implementation, and keeping up political pressures to ensure that private interests in preserving secrecy do not succeed.”<sup>49</sup>

Moreover, the IACtHR explained that the principle of accountability is closely related to the right to participate in decision-making through getting access to information. It said that ‘Public participation is one of the fundamen-

48 Supreme Court Of India (1981). Case of S.P. Gupta v. President of India and Ors. (AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365). Judgment of 30 December 1981, para. 63.

49 Op. cit. Florini, Ann. (2007), ‘Introduction: The Battle Over Transparency,’ pp. 10-11.

tal pillars of instrumental or procedural rights because it is through participation that the individual exercises democratic control of the State's activities and is able to question, investigate and assess compliance with public functions. In this regard, public participation allows the individual to become part of the decision-making process and have his or her opinion heard. In particular, public participation enables communities to require accountability from public authorities when taking decisions and, also, improves the efficiency and credibility of government processes... public participation requires implementation of the principles of disclosure and transparency and, above all, should be supported by access to information that permits social control through effective and responsible participation."<sup>50 51</sup>

### 1.2.3 PRINCIPLE OF MAXIMUM DISCLOSURE

This principle relates to the principle of transparency inasmuch as it shows the obliged information- holder to provide information to disseminate it, even in hard cir-

50 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). 'Advisory Opinion OC-23/17,' para. 226.

51 In this regard, the IACtHR has underlined that "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." Op. cit. Inter-American Court Of Human Rights (IACtHR) (2006). Case of Claude Reyes et al. v. Chile, para. 86.

cumstances, such as natural or unnatural disasters. The principle of maximum disclosure as a ground for the access to information has been acknowledged by the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression along with the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe (OSCE), which assessed in a joint declaration the recognition of the access right of information as a fundamental human right grounded on the principle of maximum disclosure.<sup>52</sup>

Also, the IACtHR expressed that “in a democratic society, it is indispensable that State’s authorities be governed by a principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to restricted systems of exceptions”<sup>53</sup> On the other hand, the principle of maximum disclosure is applied

52 Osce Representative On Freedom Of The Media (2004). ‘International Mechanisms for Promoting Freedom of Expression. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression, the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe (OSCE).’ 6 December 2004: “The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”

53 Inter-American Court Of Human Rights (IACtHR) (2010) Case of Gomes Lund et. al (‘Guerrilha do Araguaia’) v. Brazil. Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations, and Costs), para. 199.

when there is doubt on the pertinence of disclosure or dissemination of information, the principle says that publicize of information must prevail. This scope of the principle has been expressly included by the Agreement in its Article 5(7) and implicitly in its Article 5(8). Likewise, Chile expressly included this principle in the Law in the 20.285 Act, in which the Administration bodies must provide information in the widest possible terms, excluding only the information exempt from disclosure by a constitutional or legal exception (Article 11(d) of the 20.285 Act).

But, as will be revised in the section dedicated to the refusal of the right to access information, this principle is not absolute. In fact, it has three corollaries in order to limit the possibilities to apply exceptions that would undermine this right and could give rise to potential abuses by the Administration. These corollaries were expressed by the IACHR and they are: (1) the right of access to information is the rule and secrecy the exception; (2) the State bears the burden of proof to justify limits on the right of access to information (3) supremacy of the right to information in the event of conflicting statutes or lack of regulation.<sup>54</sup>

Thus, overall, these principles are relevant in the context of a region like LAC, which has experienced an increase of population's discomfort and distrust from the institutions endowed with powers to take actions to promote sustainable development, which should have considered an equative distribution of the economic profits

<sup>54</sup> These corollaries were revised in the op. cit. Inter-American Commission On Human Rights (IACHR) (2011). 'The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,' pp. 7-22.

and environmental impacts with the ultimate purpose of evolving from highly dependent to fossil fuel economies to lower carbon dependent societies—.<sup>55</sup>

Hence, these three principles are interlaced as noted by the IACtHR when explained that “the State’s actions should be governed by the principles of disclosure, 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

55 Cfr. op. cit. Bárcena, Alicia (2020). ‘Prólogo’. In op. cit. Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), ‘Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe’, p.10. Also, this tenseness has enhanced environmental and social conflicts related to land and natural resources usage and human rights contraventions, see De Miguel, C. and Torres, V. (2016), ‘América Latina y el Caribe. Avanzando hacia el Desarrollo Sostenible mediante la Aplicación del principio 10 de la Declaración de Río. Informe Ambiental FARN’, p. 65-67. In this regard, economic and political factors have implied strong threats to social, cultural and environmental richness, but also, in relation to the possibilities for protection. In this sense, economies based on great developing projects derived from extractive policies, historical economic and cultural colonialism and fragile recent democracies have provoked that this region is the world’s most unequal region, see Economic Commission For Latin America And The Caribbean (ECLAC) (2015). ‘Latin America and the Caribbean: looking ahead after the Millennium Development Goals. Regional monitoring report on the Millennium Development Goals in Latin America and the Caribbean’ (LC/G.2646). Santiago, Chile, p. 5. Also, Chile is the 14th country with more reported cases of social conflicts around environmental issues, see Environmental Justice Atlas, available on <https://ejatlas.org/country>



utilizing the social control that can be exercised through such access. It also fosters transparency in the State's activities and promotes the accountability of its officials in the performance of their duties."<sup>56</sup>

To finalize this chapter, we must bear in mind that access to information is so important, because it is also narrowly connected to the right to participate in public affairs. The rationale for acknowledging a right to information on the grounds of the right to participate in public affairs is based on the fact that well-functioning democracy demands an informed citizenry. Particularly, models of participative democracies call for electorates to be sufficiently well-informed to efficiently participate in government.<sup>57</sup> In this regard, James Madison, the mastermind of the First Amendment of the U.S. Constitution safeguarding the right of free speech, captured the crux of the rationale and wrote compellingly on the relevance of information in democracy: "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who means

56 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017), 'Advisory Opinion OC-23/17', para. 213. See also, op. cit. Inter-American Court Of Human Rights (IACtHR) (2006) 'Case Claude Reyes et. al. v. Chile' paras. 86-87.

57 Cfr. op. cit. McDonagh, Maeve (2013), 'The Right to Information in International Human Rights Law', p. 38.

to be their own governors must arm themselves with the power which knowledge gives.”<sup>58</sup>

In this context, Stiglitz pinpointed that “meaningful participation in democratic processes require informed participants”.<sup>59</sup> Additionally, Roberts expressed that “the logic suggests that access right [to information] is better understood as a corollary of basic political participation rights, rather than the right to free expression alone.”<sup>60</sup> The author went on to say that the right to access to information is an instrumental basis for the access to participation, when he recognized: “[the right to participation] ha[s] a little meaning if government’s informational monopoly is not regulated.”<sup>61</sup>

In this sense, the IACtHR in the Case *Claude Reyes et al. v. Chile*, although considered the applicant’s claim inadmissible, considered the rationale concerning the role played by the right to access to information in the promotion of participation and underlined that the withholding of information comprised the violation of the right to freedom of expression safeguarded in the American Convention. Particularly, the Court considered that the informa-

58 Letter from James Madison to William T. Barry, 4 August 1822. apud Stiglitz, Joseph (2002). ‘Transparency in Government.’ In World Bank, ‘The Right to Tell: The Role of the Mass Media in Economic Development.’ WBI Development Studies. Washington, D.C. World Bank, p. 30.

59 Op. cit. Stiglitz, Joseph (2002), ‘Transparency in Government,’ p. 30.

60 Op. cit. Roberts, Alasdair (2001), ‘Structural Pluralism and the Right to Information,’ p. 20.

61 Op. cit. Roberts, Alasdair (2001), ‘Structural Pluralism and the Right to Information,’ p. 20.

tion could enable participation “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.”<sup>62</sup>

62 Cfr. *op. cit.* Inter-American Court Of Human Rights (IACtHR) (2006). Case of Claude Reyes et. al. v. Chile, para. 86.



## **CHAPTER II: GENERAL DISPOSITIONS OF THE ESCAZÚ AGREEMENT RELATED TO THE RIGHT TO ACCESS TO INFORMATION**

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### **2.1 Provision of information on access rights to the public**

The Escazú Agreement in its Article 4(4) expressed that “with the aim of contributing to the effective application of the present Agreement, each Party shall provide the public with information to facilitate the acquisition of knowledge on access rights.” Through this provision, the Agreement is giving access to information on the role of the basis regarding the effective exercise of the other access rights.

In the Chilean environmental legislation, as we will see, environmental education is contemplated as an environmental management instrument (Article 2(h) of the 19.300 Act), however, there are no specific mechanisms to ensure that the public acquires knowledge and thus become aware on their access rights, and in this case, the right to access to information. Nevertheless, some provisions

that will be revised along with the analysis must be bear in mind in this regard.<sup>63</sup>

The Supreme Decree No. 680 of the Ministry of Interior which approves the instructions for the establishment of information offices for the public users of the State's administration, in its Article 1, imposed the obligation to create information offices for the public users in Ministries, Intendencies, Governorates and other public services contemplated in Article 18 of the 18.575 Act, to assist the public in their right to file requests, suggestions or complaints before the State's Administration (Article 1 of the Supreme Decree No. 680).

Into the bargain, Article 2(a) of the Supreme Decree No. 680 expressed that among the assignments of these information offices, these offices must inform the administered on the organization, competence and functioning, requirements, formalities and timelines of applications or requests directed to that public Administration in particular, the proceedings and any other information necessary to ensure that the public has expeditious and timely access to their applications.

Also, these offices must assist the administered in cases of difficulties during the proceeding of their matters before that public Administration in particular. Also, these information offices are usable for the public in general, although it contemplates just one exceptional situation in Article 5 of the Supreme Decree No. 680, concerning the incapacity to submit written applications, without giving any further normative treatment to people in a vulnerable

63 Cfr. NGO FIMA (2020). 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile'. Santiago, Chile, p. 5

situation. Thus, in sum, Chile complies scarcely with this provision of the Agreement.<sup>64</sup>

## **2.2 Advance towards a favorable interpretation of exercise and respect of access rights**

The Escazú Agreement in its Article 4(8) expressed that “each Party shall seek to adopt the most favorable interpretation for the full enjoyment of and respect for the access right when implementing the present Agreement.” In this regard, in Chile, the interpretation of the environmental regulation follows the general rules provided by the Chilean Civil Code in its Articles 19 et. seq., which consider the literal wording, history, systematicity and spirit of the law, without any express reference to the notion of a more favorable interpretation to access rights.<sup>65</sup>

In respect of the right to access to information, the reasonable interpretation that should be given to the environmental regulation in access to information should be in line with favorable applicability of this right, since the Chilean legal system considers the right to access to public information in Article 31 bis of the 19.300 Act. However, there is no such rule in the Chilean legal order, being left to the Administration and Tribunals’ discretion on a case-to-case basis. For instance, although the access to public information has a specific regulation, which is the 20.285 Act on access to public information, the Constitutio-

64 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 5.

65 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 8.

nal Tribunal has repeatedly sentenced against this right.<sup>66</sup> Thus, in sum, Chile complies scarcely with this provision of the Agreement.<sup>67</sup>

### **2.3 Promotion on the use of new information technologies**

The Escazú Agreement in its Article 4(9) expressed that “for the implementation of the present Agreement, each Party shall encourage the use of new information and communications technologies, such as open data, in the different languages used in the country, as appropriate. In no circumstances shall the use of electronic media constrain or result in discrimination against the public.”

In this regard, at a general administrative level, the 20.285 Act on access to public information, included as an express mechanism, the use of new technologies of information and communication. For instance, in its Article 7 imposed the obligation to the State’s Administration bodies to keep at permanent disposal to the public, through electronic sites, information related to its organic structure, its competencies, its normative framework, the personnel, contracts, public funds transferences, acts and resolutions that affect third parties, procedures and requirements, information

66 Chilean Constitutional Tribunal (2020). Decision No. 8118-2020. Judgment 23 July 2020; Chilean Constitutional Tribunal (2016). Decision No. 3111-2016. Judgment of 23 March 2016; Chilean Constitutional Tribunal (2018). Decision No. 4669-18. Judgment 14 March 2019; and Chilean Constitutional Tribunal (2018). Decision No. 4986-18. Judgment 14 May 2019.

67 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 9.



related to subsidies programs, public participation mechanisms, information on the assigned budget, financial audit outcomes and all the entities in which the Administration has participation; establishing that it has to be incorporated in the electronic sites in a complete and updated manner, thus to allow and easy identification and expeditious access. Additionally, the 20.285 Act in its Article 12, included the possibility to request information through a written application or through electronic websites. In practice, the [www.portaltransparencia.cl](http://www.portaltransparencia.cl) website was created for that purpose.

At a specific environmental information level, the 19.300 Act, 20.417 Act and 20.600 Act considered the creation and publication of information on websites and electronic means for the Environmental Assessment Service, the Superintendency of the Environment, the Ministry of the Environment and Environmental Tribunals. This improvement is a relevant progress regarding access to information. Nevertheless, still, there are some relevant issues related to the education on the use of these mechanisms, which may be difficult for the public –as it happens with the Environmental Assessment Service’s website<sup>68</sup>– or does not possess up-to-date information –such as the Superintendency of the Environment’s website.<sup>69</sup>

68 Cfr. Republic Of Chile. Ministry Of The Environment (2016). Final Report. Presidential Advisory Commission to Assess the Environmental Impact Assessment System, p. 145 and 294.

69 NGO FIMA and NAMATI (2019). ‘Estado del ODS 16.3 sobre acceso a la justicia en Chile: avances y desafíos para la justicia ambiental’. September 2019, p. 34.

## 2.4 Environmental Information Systems

In addition, the Escazú Agreement in the last part of Article 8(3) expressed that “Each Party shall guarantee the environmental information systems are duly organized, accessible to all persons and made progressively available through information technology and georeferenced media, where appropriate.”

As we will see, one of the grounds of active transparency is an obligation to provide information without being requested and make information available in a systematic, proactive, timely, regular, accessible and comprehensible manner. To that end, competent authorities need to collect, publicize and disseminate relevant information to their functions (Article 6(1) Escazú Agreement).<sup>70</sup> This dimension is relevant because “if the only channel for access to information were via requests filed by individuals, huge information inequalities would rapidly arise with different people knowing different things about the functioning of government, with large sections of the population remaining ill-informed, to the detriment of socie-

70 The agreement required that this obligation has to be in relation to ‘relevant information’, however, it did not specify what had to be understood as such. Although, in Chile, Article 11(a) established the principle of relevance, which presumes relevant all the information possessed by the State’s Administrative Bodies, no matter its format, support, date of generation, origin, classification or processing. See also, *op. cit.* Inter-American Commission On Human Rights (IACHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ paras. 261-264.

ty as a whole... Proactive disclosure, therefore, levels the playing field for access to government-held information”<sup>71</sup>

In addition, the IACtHR explained that “the obligation of active transparency imposes on States the obligation to provide the public with as much information as possible on an informal basis. This information should be complete, understandable, in an accessible language, and current, and be provided in a way that is helpful to the different sectors of the population.”<sup>72</sup>

To that end, the Escazú Agreement in its Article 6(1) included the obligation for competent authorities to proactively put in the public domain information held by the government of public interest, and expressed that this obligation would require “generate, collect, publicize and disseminate environmental information relevant to their functions in a systematic, proactive, timely, regular, accessible and comprehensible manner, and periodically upda-

71 Op. cit. Darbshire, Helen (2015), ‘Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,’ p. 21.

72 Op. cit. Inter-American Court Of Human Rights (IACtH) (2017), ‘Advisory Opinion OC-23/17’, para. 221. Also, para. 242: “States must regulate, supervise and monitor the activities within their jurisdiction that could produce significant environmental damage; conduct environmental impact assessments when there is a risk of significant environmental damage; prepare a contingency plan to establish safety measures and procedures to minimize the possibility of major environmental accidents, and mitigate any significant environmental damage that may have occurred, even when it has happened despite the State’s preventive actions.” See also, op. cit. Inter-American Court Of Human Rights (IACtH) (2012). ‘Case of Furlan and family members v. Argentina,’ para 294.

te this information and encourage disaggregation and decentralization of environmental information at the sub-national and local levels.”

Chile, in this regard, established the duty to publish an extensive catalog of information. For example, Article 7 of the 20.285 Act on Access to Public Information, which establishes the active transparency obligation for the State’s Administrative bodies, to establish a catalog of information that should be posted permanently on their websites, which must also be updated monthly. The information that must be disclosed includes each agency’s organizational structure, its functions and powers, mechanisms for citizen participation, and information related to contracting proceedings and the transfer of public funds.

Into the bargain, in Chile, the 20.417 Act introduced diverse systems of information to the 19.300 Act, which are interlaced with the general regulation incorporated by the 20.285 Act on Access to Public Information, which are: National Environmental Information System, System of Information of Compliance and Regulation Accomplishment, System of Information of Environmental Permits and Authorizations, System of Base Lines Information and National System of Environmental Supervision Information.<sup>73</sup>

In respect of having available information in the different languages used in the country, none of these websites are available in other languages besides Spanish, even though in Chile are groups and communities which speak other languages, such as indigenous communities and im-

73 Cfr. *op. cit.* Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 336 et. seq.

migrants. Thus, in sum, Chile complies partially with this provision of the Agreement.<sup>74</sup>

74 Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 10.



## **CHAPTER III: ACTIVE TRANSPARENCY (GENERATION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION)**

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The Escazú Agreement emphasized in its Article 4(7) that it just provides minimum standards which States are welcomed to be overpassed and granted broader access to environmental information. Hence, this section aims to determine the level of the Chilean environmental legal order compared to the standards provided by the Escazú Agreement concerning access to information in the active transparency phase.

We must bear in mind that the most well-built laws related to access to information are those that explicitly include the dissemination and disclosure of environmental information. Although some countries have not enacted such laws, they have embraced access to environmental information through provisions in their environmental protection laws, and sometimes, this enactment has been preceded by wider information disclosure laws.<sup>75</sup>

75 Cfr. Ramkumar, V. and Petkova, E. (2007). 'Transparency and Environmental Governance.' In op. cit. Florini, Ann. (Ed.), 'The

In this regard, the Escazú Agreement expressed in Article 6(1) that “Each Party shall guarantee, to the extent possible within available resources, that the competent authorities generate, collect, publicize and disseminate environmental information relevant to their functions in a systematic, proactive, timely, regular, accessible and comprehensible manner, and periodically update this information and encourage the disaggregation and decentralization of environmental information at the subnational and local levels. Each Party shall strengthen coordination between the different authorities of the State.”

In the Chilean legal order, Article 7 of the 20.285 Act on Transparency, established a mandate for the State’s administration bodies of active transparency. This provision included obligations to publish information in a complete and updated manner, to allow to easily and expeditiously access to information. Also, Article 4 of the 19.300 established the duty of the State to allow access to environmental information, which is reflected in the establishment of specific obligations to provide information. For example, regarding the Ministry of the Environment, in conformity with Article 70 (ñ) of the 19.300 Act, it is in charge of drafting an annual report on the state of the environment every four years, as we will see.

Nevertheless, there are several deficiencies if we focus on the idea that information has to be timely, regular, comprehensible, and updated.<sup>76</sup> In fact, the Performing Assessment elaborated by OECD in 2016, highlighted that

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Right to Know: Transparency for an Open World.’ Columbia University Press. New York, USA., p. 284.

76 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 20.



“while Chile has created systems for managing environmental information, serious issues remain with respect to coverage and completeness. For example, little information is available on water abstraction and use, and almost none on biodiversity protection and negative impacts on ecosystems. Air and water quality monitoring stations often collect data on only a few parameters. As a result, Chile has difficulties in providing environmental statistics under international conventions and to international organizations such as the OECD.”<sup>77</sup>

Additionally, in general, information is not delivered in comprehensible formats in cases of highly technical information. For example, in the context of the Environmental Impact Assessment System, as pinpointed by the Presidential Advisory Commission when assessed the Environmental Impact Assessment System<sup>78</sup> and also by Environmental Tribunals,<sup>79</sup> the amount and difficulty of the technical information contained in projects, provokes an information asymmetry which affects public participation and the real chance to be involved in decision-making in environmental matters. Finally, according to Arti-

77 Organization For Economic Co-Operation And Development (OECD) (2016). ‘OECD Environmental Performance Reviews: Chile 2016’.

78 Cfr. *op. cit.* Republic Of Chile. Ministry Of The Environment (2016). Final Report. Presidential Advisory Commission to Assess the Environmental Impact Assessment System, p. 9.

79 See, Chilean Third Environmental Tribunal (2017). Case of Ilustre Municipalidad de Puerto Varas v. Empresa de Servicios Sanitarios de los Lagos S.A., Rol No. D 30-2017. 8 August 2019, para. 12; and Chilean Second Environmental Tribunal (2013). Case of Pascua Lama, Rol No. D2-2013. Judgment of 20 March 2015.

cles 9 and 9 ter of the 19.300 Act, it is worthy to underline that most of the environmental information in possession of the State's Administration comes from private (especially in respect of the project's assessment and execution), which is a risk for the impartiality and objectivity in the information used for decision-making. Thus, in sum, Chile complies partially with at least the first part of this provision of the Agreement.<sup>80</sup>

Next, I will revise the Chilean standards regarding the category of mechanisms for active transparency. The Escazú Agreement included them mainly in Article 6(3), however, there are some others in other provisions as well. Hence, as a means of organization, I will revise the Chilean standards concerning the category included in that provision first, and then I will continue with the others included in other provisions of Article 6.

### **3.1 The texts of treaties and international agreements, as well as environmental laws, regulations and administrative acts (Article 6(3)(a) Escazú Agreement)**

The Agreement included in its Article 6(3) an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities which may include: (a) 'the texts of treaties and international agreements, as well as environmental laws, regulations and administrative acts.' Also, the Escazú Agree-

80 Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', pp. 20-21.

ment in its Article 6(11) expressed that “Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.”

In Chile, the 19.300 in its Article 31 ter expressed that the Ministry of the Environment will administer the National System of Environmental Information, which is a mechanism of dissemination of environmental information, specifically, in the following letters were included ‘(a) texts of treaties, conventions and international agreements, as well as laws, regulations and other administrative acts on the environment or related to it; (f) the opinions of the General Comptroller of the Republic on environmental matters; (g) final sentences of the Tribunals of Justice in processes related to environmental matters; (h) any other decision or resolution with a general character from the authority in environmental matters.’

Also, Article 31 of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the National Supervision Information System administered by the Superintendency, which is of public access, will contain: ‘(e) the opinions of the Comptroller General of the Republic in environmental matters; (f) final judgments of tribunals in environmental processes; (g) any other general decision or resolution emanated from authorities in environmental matters.’

For instance, about administrative acts, Article 4(1) of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment has to annually report back on its management, at least through the publication of a memoir and institutional balance, to enable the public continuously and

permanently assess the progress and outcomes achieved by the Superintendency of the Environment, and therefore be accountable of its performance. Also, in its Article 3(s) of the same 20.417 Act, expressed that the Superintendency of the Environment is in charge of the dictation of general norms and instructions regarding its competencies, and this regulation, has to be systematized thus to facilitate access and acknowledgment of it.

### **3.2 Reports on the state of the environment (Article 6(3)(b) Escazú Agreement)**

In this regard, the Agreement in its Article 6(3) included an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities: '(b) reports on the state of the environment.'

As mentioned before, the 19.300 in its Article 31 ter expressed that the Ministry of the Environment will administer the National System of Environmental Information, which is a mechanism of dissemination of environmental information. This provision, specifically in Article 31 ter (b) included the reports on the state of the environment, pinpointed in Article 70 ñ); and also, Article 31 ter (c) included data or summaries of those reports, derived from the follow-ups of the activities that affect or may affect the environment.

Hence, for the purpose to make information publicly available, it must first be collected. Sometimes the obligation to collect information is implicit in other requirements, such as to publish, at other times it is explicitly set

out.<sup>81</sup> For instance, some international environmental instruments require the collection of relevant information to specific or general environmental obligations and the most frequent term to name this obligation is ‘monitoring’.<sup>82</sup> This obligation to gather information may be required for diverse purposes, however, it is most commonly required to conduct research or identify patterns and trends which reflect the state of the environment.<sup>83</sup>

The obligation of ‘monitoring’ was not defined in the Escazú Agreement, albeit just as a mean of reference, ‘monitoring’ was defined in Article 1 of Annex IV of the 1992 OSPAR Convention as “the repeated measurement of: (a) the quality of... environment and each of its components...; (b) activities or natural and anthropogenic inputs which may affect the quality of the... environment; (c) the effects of such activities.” In this regard, the obligation included in the Agreement in its Article 6(3) requires States to have in place up-to-date environmental information systems for the development of inventories of environmental resources and data and the strengthening of data collection activities concerning the state of the environment, requires monitoring of the environment to collect the required information.

This monitoring and further collection to make a report of the state of the environment, must be concerning the diverse elements of the environment such as air, wa-

81 Cfr. *op. cit.* Darbishire, Helen (2015), p. 24.

82 Cfr. *op. cit.* Sands, Philippe (2003), ‘Principles of International Environmental Law’, p. 847.

83 Cfr. *op. cit.* Sands, Philippe (2003), ‘Principles of International Environmental Law’, p. 847.

ter, and soil. Hence, in the Chilean legal order exist what is known as 'Continuous Monitoring Programs'. According to Article 33 of the 19.300 Act, the Ministry of the Environment is in charge of the administration of measurement and control programs of the environmental quality of air, water, and soil, to protect the right to live in an environment free of contamination, disaggregated regionally. Moreover, Article 70 u) of the 19.300 Act expressed that the Ministry of the Environment is in charge of the administration of information of the monitoring programs of the quality of air, water and soil, provided by the competent authorities.

Also, Article 6(7) of the Escazú Agreement expressed that "Each Party shall use its best endeavors to publish and disseminate at regular intervals, not exceeding five years, a national report on the state of the environment, which may contain: (a) information on the state of the environment and natural resources, including quantitative data, where possible; (b) national actions to fulfill environmental legal obligations; (c) advances in the implementation of access rights; and (d) collaboration agreements among the public, social and private sectors, Such reports shall be drafted in an easily comprehensible manner and accessible to the public in different formats and disseminated through appropriate means, taking into account cultural realities. Each Party may invite the public to make contributions to these reports."

In this regard, by virtue of Article 70(ñ) of the 19.300 Act, the Ministry of the Environment has to produce every four years, reports on the state of the environment at a national, regional, and local level, and also, it has to produce in a yearly basis, a consolidated report on the state of the environment at a national and regional level.

It is worthy to highlight that regarding the requirement included in Article 6(7) of the Escazú Agreement, about these reports having to be drafted in an easily comprehensible manner and accessible to the public, paragraph two of Article 70 (ñ) of the 19.300 Act, expressly referred to access to information in the sense that it mentioned these reports have to include data in respect of the state of the environment and an executive summary in a comprehensive manner so to be understandable by the public in general. However, in practice, they are drafted based on graphics and data difficult to understand for an average citizen that is not professional in that area and are available just in one format and one language. Thus, in sum, Chile complies with this provision of the Agreement, although imperfectly.<sup>84</sup>

### **3.3 List of public entities competent in environmental matters and, where possible, their respective areas of operation (Article 6(3)(c) Escazú Agreement)**

In this regard, the Agreement in its Article 6(3) included an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities: '(c) a list of entities competent in environmental matters and, where possible, their respective areas of operation.'

84 Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 27.

In Chile, Article 6 of the 20.285 Act on Access to Public Information expressed that acts and documents related to the functions, competencies, and responsibilities of the State's administrative bodies, must be at permanent disposal to the public and on the websites of these administrative bodies. Moreover, in its Article 7 related to active transparency, established that the State's administrative bodies must keep at permanent disposal to the public, through their respective websites, information updated at least every month, which has to include, among others, the organic structure; competencies of each of their units or internal bodies and regulatory framework applied to them.

Also, mentioned before, the 19.300 in its Article 31 ter expressed that the Ministry of the Environment will administer the National System of Environmental Information, which is a mechanism of dissemination of environmental information. This provision, specifically in Article 31 ter (e) the list of public authorities which hold the information of environmental content and that has to be publicly accessible.

In this regard, the Environmental Administration is built on multiple bodies, which possess diverse legal nature. The 20.417 Act re-distributed into different administrative bodies the former competencies held by the National Environmental Commission (CONAMA), and also, it deepened them and attributed some others to new bodies created by law.<sup>85</sup> Thus, to study the information related to public entities competent in environmental matters and their respective areas of operation, I will briefly revise the

85 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 81.



environmental regulation in respect of the State's Administration in environmental matters.

### 3.3.1 MINISTRY OF THE ENVIRONMENT

Environmental protection supposes a planification activity, and in that sense, it is necessary the creation and functioning of a Ministry of the Environment. Before its establishment, these competencies were held by the National Environmental Commission, which had a direct linkage to the President of the Republic, however, through the Ministry of General Secretary of the Presidency with total lack of environmental vocation. Such dispersion impeded a duly accomplishment of regulations, which by extent, influenced in a bad sense the assessment of projects and their supervision.<sup>86</sup>

Concerning the concept of 'Ministry of the Environment', Article 69 of the 19.300 Act created it as a State's secretary in charge of cooperating with the President of the Republic in the design and application of policies, plans and programs in environmental matters, as well as in the protection and conservation of biological biodiversity and renewable and hydric natural resources, promoting sustainable development, the integrity of environmental policy and its normative regulation. In respect of its competencies, it must be bear in mind that if the catalog included in Article 70 of the 19.300 is analyzed, it is not limited to just those competencies, as the provision used the expression 'would especially correspond to'. In consequence, this reference must be considered regarding the general competencies for this class of administrative

86 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 84-85.

bodies expressed in Article 22 of the 19.880 Act and with other dispositions that might confer other competencies as well. Thus, the catalog must be considered as an illustrative list which may vary in cases the legislator expresses so.<sup>87</sup>

Bermúdez classified the competencies of the Ministry of the Environment as the ones exclusively of its own or in cooperation with other bodies. In respect of the former, we could mention the education programs or environmental diffusion, or the dictation of some environmental instruments such as quality and emission norms. In respect to the latter, we could note for instance the drafting of reports on the state of the environment which require the implicit intervention of other bodies. In addition, he classified them as original or derived, in reference to a distinction between the ones derived from the National Environmental Commission and those which were specially created in respect of the Ministry of the Environment.<sup>88</sup>

As the aim of this work is to revise the competencies of the Administrative Bodies concerning access to information, the 20.500 Act on Associations and Public Participation in the Public Management which modified the 18.575 Act of the Organic Constitutional of the General Basis of the Administration of the State, is relevant inasmuch as it included a fourth title on Public Participation, which acknowledges the right of persons to participate in policies, plans, programs and actions of the State in its

87 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 88.

88 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 88-89.

Article 70.<sup>89</sup> This means that all State administrative bodies must guarantee institutionalized mechanisms through which persons are enabled to participate in the design, formulation, execution and assessment of public policies.

Hence, the Exempt Resolution No. 601 of 8 July 2005 which approved the Ministry of the Environment's general norm on the public participation which establishes the formal and specific modalities in the framework of the 20.500 Act, provided the grounds to establish mechanisms of public participation in the public management. Among them, is the right to access public information. It thus acknowledged, in its Article 2, that the public management of the Ministry has to be known by the society, especially the ones it is destined to, including access to institutional services and the control and transparency of the public functioning.

Paragraph two of this Exempt Resolution included access to relevant environmental information. Article 13 of the Exempt Resolution No. 601 expressed that the Ministry of the Environment will provide access to relevant information about its plans, policies, programs, norms, actions and budgets, in accordance with Article 8 of the Chilean Political Constitution of the Republic, the 20.285 Act on Transparency, Article 31 bis of the 19.300 Act and the institutional commitment letter Exempt Resolution No. 1035 of 11 December 2012, ensuring by that, timely, full, complete and broad access to information.

89 Cfr. Republic Of Chile, Ministry Of The Environment (2015). Exempt Resolution No. 601 which approves the Ministry of the Environment's general norm on public participation which establishes formal modalities and specific in the framework of the 20.500 Act, p. 1.

Article 15 of the Exempt Resolution No. 601 expressed that the institutional proceeding to accomplish the provisions included in the 20.285 Act on Transparency will be contained in an instructive dictated by the Subsecretary of the Environment, which will illustrate in this matter the public officials and the ones responsible for the duties that the 20.285 Act on Transparency provides.

Another relevant aspect of the Exempt Resolution No. 601, is that concerning the accountability of the Ministry of the Environment, established by Article 70 q) of the 19.300 Act in respect of the public system of information on the accomplishment and application of environmental regulation, Article 23 of the mentioned Exempt Resolution No. 601, expressed that the purpose of the public accountability is to inform the citizenry on the performed management and to get an opinion, commentaries, questions and suggestions regarding its management, promoting by that, the public control and social co-responsibility.

Additionally, Article 27 of the same Exempt Resolution No. 601 expressed that the process of public account will be performed in a presential and virtual manner, and Article 30 of the Exempt Resolution No. 601 expressed that the entire process of participative public account will have to be widely spread through all the channels considered convenient by the Ministry and that a record with all the pertinent information of the processes carried out by the Ministry shall exist.

### 3.3.2 ENVIRONMENTAL ASSESSMENT SERVICE

About the Environmental Assessment Service, 20.417 Act when divided the environmental competencies, formerly held by the National Environmental Commission,

assigned the management of the System of Environmental Impact Assessment to the Environmental Assessment Service, which is one of the administrative bodies incorporated by the 20.417 Act. Also, its concept, according to Article 80 of the 19.300 Act, the Environmental Assessment Services corresponds to a functionally decentralized public service, with legal personality and its own patrimony, subject to the supervision of the President of the Republic through the Ministry of the Environment. In addition, Article 82 of the 19.300 Act expressed that it is administrated and directed by an Executive Director, as the Superior Chief of the Service, in charge of the functions included in Article 83 of the 19.300 Act. The competencies of the Environmental Assessment Services can be classified according to the management instrument applied. In this sense, although the main instrument is the Environmental Impact Assessment Service, the Environmental Assessment Service possesses more competencies. These other competencies comprise matters related to environmental information and interpretative assignments.<sup>90</sup>

Concerning the evaluation assignment, the catalog of competencies of Article 81 a) of the 19.300 Act started with the administration of the Environmental Impact Assessment Service. However, there are others in relation to this system besides just to administer it, such as to administratively interpret Environmental Rating Resolutions (Article 81(g) of the 19.300 Act) or the administration of a public record of consultants (Article 81(f) of the 19.300 Act).

90 Cfr. *Op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 91-92.

Additionally, the Environmental Assessment Service possesses competencies regarding environmental information. Accordingly, the Escazú Agreement in its Article 6(11) expressed that “Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.”

So, in that regard, firstly, Article 81(b) of the 19.300 Act expressed that Environmental Assessment Service has to administer an information system related to permits and authorizations of environmental content, which will have to be publicly available on its website. Secondly, Article 81(c) of the 19.300 Act included the obligation to administer an information system regarding the baselines of projects submitted for assessment to the system, which has to be public and georeferenced. Thirdly, Article 81(f) of the 19.300 Act expressed that it has to administer a public list of certified consultants for the realization of Environmental Impact Studies or Declarations, for informative purposes. And according to Article 31 bis of the 19.300 Act, all of them are public and are subject to the guarantees established by the 20.285 Act on Transparency. Finally, the Environmental Assessment Services also possess interpretative competencies, which are stated in Article 81(g) of the 19.300 Act. Hence, as we can see, the respective areas of operation and competencies of the Environmental Assessment Services were well defined and cataloged in the 19.300 Act and 20.417 Act.

### 3.3.3 SUPERINTENDENCY OF THE ENVIRONMENT

The protection of the environments requires duties of result, and that is the reason for the importance of the

organization and functioning of an inspecting and sanctioning administrative body. Until the enactment of the 20.417 Act, the activities of inspection were exclusively carried out by public sectoral services. The competencies of the National Commission of the Environment (CONAMA) were related to communication and coordination, which implied multiple critics.<sup>91</sup> To improve the environmental administrative situation, the Superintendency of the Environment was created possessing exclusive assignments on inspection and imposition of sanctions.

About its concept, Article 1 of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that it is a functionally decentralized public service, endowed with legal personality and its own patrimony, subject to the supervision of the President of the Republic through the Ministry of the Environment. Its competencies, on the other hand, are not restricted to just one specific instrument. Unlike the Environmental Assessment Service, the competencies of the Superintendency of the Environment are extended to the environmental management instruments in general. This was expressed in Article 2 of the same 20.417 Act, which mentioned that the Superintendency of the Environment is established to carry out, organize and coordinate the tracing and inspection of the Environmental Rating Resolutions, measures of the prevention and decontamination plans, the content of environmental quality and emission norms and the management plans, and any other environmental instrument established by law. However, in practice,

91 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 94.

all the supervision efforts are centered on the Environmental Rating Resolutions.<sup>92</sup>

The specific competence of the Superintendency of the Environment corresponds to its sanctioning powers, as it is its reason for existence. Nevertheless, along with that competence, the Superintendency of the Environment also possesses competencies in matters related to supervision, information and even regulation, all of them focused on the purpose of environmental protection in its repressive phase. In brief, environmental supervision is an exclusive competence of the Superintendency of the Environment. Previous to the imposition of sanctions, the Superintendency of the Environment must exercise its competence of supervision in relation to the instruments referred to in Article 2 of the 20.417 Act. And this competence of supervision could be translated into assignments of inspection, control, measurement and analysis. These activities are the ones included in Article 3(c) of the 20.417 Act the organic law of the Superintendency of the Environment, which expressed that the Superintendency of the Environment is in charge of engaging labors of inspection, verification, measurement and analysis of the accomplishment of norms, conditions and measures provided by Environmental Rating Resolutions, prevention or decontamination plans, quality or emission norms and management plans to third duly certified parties.<sup>93</sup>

Just to mention, there are three categories of supervision divided into programed supervision directly per-

92 Cfr. Op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 96.

93 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 96-97.



formed by the Superintendency of the Environment; sub-programed supervision directly performed by sectoral bodies; or programed or sub-programed supervision performed by certified private entities. To establish efficacious supervision, programs and sub-programs were created as a means of planification of the environmental supervision and are basically mandatory orders by the Superintendency of the Environment to supervise determined instruments.<sup>94</sup> Also, Article 3(t) of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment has to supervise the fulfillment of any other environmental instrument that is not assigned to another competent authority to be supervised and controlled.

In respect to the sanctioning competencies, Article 35 of the 20.417 Act of the organic law of the Superintendency of the Environment, expressed that this is an exclusive competence of the Superintendency of the Environment. Hence, just the competence of supervision admits a classification between exclusive, sectoral or residual. The competence to impose sanctions is an exclusive competence of the Superintendency of the Environment, even regarding Article 35(n) of the 20.417 Act which expressed that the Superintendency is allowed to impose sanctions to environmental infractions not subject to the competence of other bodies.<sup>95</sup>

Along with the supervision and sanctioning competencies, the Superintendency of the Environment is in char-

94 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 99-100.

95 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 100.

ge of other assignments as well. Among them, in relation to access to information, according to Article 31 of the 20.417 Act of the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment is in charge to administer a public National System of Environmental Supervision Information. The provision continued to list the content of this system: (a) the Environmental Rating Resolutions, sectoral environmental permits associated with those resolutions; and the performed supervision actions and their outcomes, and measures, analysis and any other data provided by the applicants in accordance with the requirements established by these resolutions; (b) Prevention and Decontamination plans, the performed supervision actions and their outcomes, and measures, analysis and any other data provided by the applicants under supervision or sectoral bodies in accordance with the measures provided by every plan; (d) supervision processes of emission norms, environmental quality norms and any other environmental norms which are not under the supervision of another body of the State. Article transitory 1 of the 20.417 Act expressed that the National System of Environmental Supervision Information would come into force two years after the publication of this law –which was on 12 January 2010, thus the system came into force on 12 January 2012–.

Additionally, Article 32 of the 20.417 Act of the organic law of the Superintendency of the Environment, expressed that the National System of Environmental Supervision Information has to be updated in the Superintendency's website, to ensure expedited community access, and also, direct and free of charge digital access must be granted to every person in respect of that information. Moreover, to ensure effective access to the infor-

mation provided by this system of environmental information, Article 33 of the 20.417 Act of the organic law of the Superintendency of the Environment, expressed that the Superintendency has to have an electronic platform that enables the adequate administration of the National System of Environmental Supervision Information.

This platform has to provide and keep a systematized and updated record of the performed supervision actions in respect of every supervised subject and the outcomes, and the sanctioning processes and the outcomes, which enables the obtain of useful information for the prioritization of future audits and for the resolution of future sanctioning proceedings. Moreover, Article 22 of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment is in charge of the inspections, measurement and analysis performance required for the accomplishment of the supervision programs and sub-programs, when applicable.

Article 16 of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that in the context of the development of the supervision activities, the Superintendency of the Environment has to establish on a yearly basis, the following programs and sub-programs: (a) supervision programs of Environmental Rating Resolutions, for every region including the Metropolitan region; (b) sectoral supervision sub-programs of Environmental Rating Resolutions, including the identification of the supervision activities for every sectoral competent body; (c) supervision programs of prevention and decontamination plans for every region in which they are applied; (d) supervision sub-programs of prevention and decontamination plans, in which will be identified the su-

pervision activities for every sectoral competent body; (e) supervision programs of quality and emission norms for every region, including the Metropolitan region; (f) sectoral supervision sub-programs of emission norms, in which will be identified the supervision activities for every sectoral competent body; and (g) other programs and sub-programs in conformity with the instructions provided by the Superintendency, the 19.300 Act or any other legal regulation which imposes supervision activities in environmental matters, competence of the Superintendency.

Article 18 of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that at the end of every year, supervision programs and sub-programs will be published, with their individualized outcomes by supervised instrument and by the competent body which carried it out. The methodologies and guidelines for supervision approved by the Superintendency will be of public knowledge. Also, Article 64 of the 19.300 Act expressed that the Superintendency of the Environment is in charge of the permanent monitoring of the accomplishment of the norms and conditions which are the basis for the granting Environmental impact studies or declarations, measures and instruments which establish the prevention and decontamination plans, quality and emission norms and the management plans established by this law.

### 3.3.4 COUNCIL OF MINISTRIES FOR SUSTAINABILITY

Along with the establishment of active and supervision bodies, the 20.417 Act, also, incorporated consultive bodies such as the Council of Ministries for Sustainability established by Article 71 of the 19.300 Act. The creation of this consultive body responds to the need for a coordinated public administration. In this sense, the Council

ensures a ministerial representativity including diverse sectoral public areas. The main competencies of the Council have a deliberative nature. These competencies are developed principally with respect to the submission of policies and regulations, regarding natural resources, matters of protected areas and policies subject to strategic environmental assessment. However, the Council has other competencies as well, for instance, to propose criteria for sustainability which has to be incorporated in drafting of policies and processes by ministries and dependent or related bodies (Article 71 b) of the 19.300 Act) or to respond to consults from other administrative bodies, among others.<sup>96</sup>

### 3.3.5 ADVISOR COUNCIL

The Advisor Council belongs to the Ministry of the Environment, and according to Article 77 of the 19.300 Act, it was established to respond to consults from the Ministry of the Environment and the Ministries Council for Sustainability, to give opinions about the drafting of laws and supreme decrees which establish norms of environmental quality, preservation of the nature and conservation of the environmental heritage; prevention and decontamination plans, special regulations on emissions and emission norms, which are brought to its knowledge. It may also give opinions, *ex officio*, in respect of environmental matters of public interest, and any other assignments commended to it by the law.<sup>97</sup>

96 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 101-102.

97 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 103.

### 3.3.6 ENVIRONMENTAL ASSESSMENT COMMISSION

These regional Environmental Assessment Commissions have a technical and political nature. Their only competence, according to Article 86 of the 19.300 Act, is to rate projects submitted to the Environmental Impact Assessment System. This is relevant, because the assessment agreement adopted by it, is the one that will be included in the Environmental Rating Resolution.<sup>98</sup>

### 3.3.7 REGIONAL TECHNICAL COMMITTEE

Article 86 of the 19.300 Act created the Regional Technical Committee which is chaired by the Regional Ministerial Secretary of the Environment and integrated by the Regional Director of the Environmental Assessment Service and regional directors of public services which have competencies in environmental matters. This committee has to draft an evaluation act for every project. These acts are free of access to anyone interested. The purpose of these acts is to be included within the Environmental Impact Assessment System previously to the draft of the Consolidated Assessment Report and to the agreement of the regional Environmental Assessment Commission.<sup>99</sup>

In summary, at a national level, this standard is accomplished. As revised, the Chilean legal order, mainly through the 20.417 Act and 19.300 Act, included in a detailed manner all the competent authorities in environmental matters and listed their competent areas of functioning in

98 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 103.

99 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 103.

the most organized possible way, even though the catalog of competencies of these public bodies are complex and sometimes interlaced between public administrative bodies.

As can be imagined, legislation sometimes may imply some difficulties to the public to search specific information within provisions in extensive texts of legislation. Hence, the Ministry of the Environment's website provides a detailed list classified by competent body, competencies, legal source, a direct link to the publication or respective archive and date of the last modification, so people can easily find the information in this regard. Thus, in sum, Chile adequately complies with this provision of the Agreement.

### **3.4 List of polluted areas, by type of pollutant and location (Article 6(3)(d) Escazú Agreement)**

The Agreement included in its Article 6(3) an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities: '(d) a list of polluted areas, by type of pollutant and location.'

In this regard, in Chile, none of the revised systems of information –National System of Environmental Information in Article 31 ter of the 19.300 Act and the National System of Supervising Information in Article 31 of the 20.417 Act– considered a list of polluted areas, by type of pollutant and location. Thus, Chile does not comply with this provision of the Agreement.<sup>100</sup>

100 Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 24.

### **3.5 Information on the use and conservation of natural resources and ecosystem services (Article 6(3)(e) Escazú Agreement)**

The Agreement in its Article 6(3) included an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities: '(e) information on the use and conservation of natural resources and ecosystem services.'

Conservation and natural resources management is a complex area of the decision-making because it implies a wide set of unexpected or unwanted consequences. For instance, "maximizing profit from industrial production leads to negative impacts on air quality and human health. Maximizing agricultural production often leads to poor water quality and in some cases losses of productivity in downstream fisheries. Maximizing biodiversity conservation can come at the cost of local jobs, food, or other sources of income. Many of these consequences are the result of management decisions that overlook a wide set of ecosystem services... [such as] the goods and services ecosystems produce that are important for human well-being."<sup>101</sup>

A single-sector approach is just not viable because it ignores the multiple linkages among components in the ecosystem and social systems, and in the long run, implies

101 Tallis, Heather and Polasky, Stephen. (2009). 'Mapping and Valuing Ecosystem Services as an Approach for Conservation and Natural-Resource Management.' *The Year in Ecology and Conservation Biology*. New York Academy of Sciences, p. 265.



critical maintenance of sustainable development. Thus, a “growing recognition that single-sector management leads to socially and ecologically harmful ‘unintended consequences’ has motivated the development of ecosystem-based management (EBM) as an approach capable of incorporating effects of management on multiple ecosystem services in an integrated system approach... The EBM paradigm recognizes that human and ecological well-being are tightly coupled so that sustainability occurs when it is pursued in both arenas simultaneously.”<sup>102</sup>

Hence, as this ecosystem-based management could become a challenge in respect of applying efficacious models and information to bear at a local, national and regional level, due to the fact that there are no systematic tools that can be applied in general,<sup>103</sup> being especially acute inasmuch as in cases of ecosystem services that generate public goods, for instance, the value of the species or the economic cost of polluted water, for which there is no market price or any other signals of value, the decision-makers must face a problematic opposition of interests.

On one hand, investment and economic development can be measured in a precise manner and thus be able to consider the profits such activities may imply for the State, and on the other hand, the costs of conservation of natural resources and ecosystem which cannot be measured in equal terms, but we all know are so valuable they need

102 Op. cit. Tallis, Heather and Polasky, Stephen. (2009), ‘Mapping and Valuing Ecosystem Services as an Approach for Conservation and Natural-Resource Management,’ p. 266.

103 Cfr. op. cit. Tallis, Heather and Polasky, Stephen. (2009), ‘Mapping and Valuing Ecosystem Services as an Approach for Conservation and Natural-Resource Management,’ p. 267.

special protection. Thus, the decision-makers have to decide to what end the economic activities have to be limited to protect the ecosystem and the other way around as well.

Considering the relevance of these matters, the Escazú Agreement included this environmental aspect within the catalog of information to be held in an up-to-date environmental system in its Article 6(e), to ensure that States are taking measures to abandon the single-sector approach, towards a sustainable ecosystem-friendly approach, and thus, make States accountable of their performance through the dissemination of information related to conservation of natural resources and ecosystem services.

### 3.5.1 REGIME OF PROTECTED AREAS

At an international level, there are multiple international instruments that establish obligations of result in respect of specific matters of protected areas.<sup>104</sup> Nevertheless,

104 See, United Nations (1992). 'Convention on Biological Diversity (CBD)' Treaty Series, Vol. 1760. Ratified by Chile on 9 September 1994; Organization For American States (OAS) (1940). 'Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere' (Washington Convention) Treaty Series, No. 31. Ratified by Chile on 23 August 1967; United Nations Educational, Scientific And Cultural Organization (UNESCO) (1971). 'Convention on Wetlands of International Importance especially as Waterfowl Habitat,' (Ramsar Convention). Ratified by Chile on 27 November 1981; United Nations (1979). 'Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention; CMS). Ratified by Chile on 1 November 1983; and CCAMLR (1982). 'Text of the Convention for the Conservation of Antarctic Marine Living Resources. Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living.' Ratified by Chile on 4 July 1982.

the international common law on protected areas derives from the Convention on Biological Diversity (CBD), as the general legal body destined for the protection of biodiversity. It regulates its diverse aspects in an independent manner regarding every category of protection and requires the development of protection strategies for biological diversity.<sup>105</sup>

The Chilean policy on biodiversity is grounded, precisely, on these lineaments of environmental protection. In this regard, the protected areas have been considered as one of the main protection instruments for the National Biodiversity Strategy. This strategy constitutes the framework of the environmental policy designed to implement the protection goals of the CBD. Its regional application allowed the identification of 68 priority areas for conservation. Some of these priority areas have been formally declared as such, through specific protection categories, for instance, national parks, natural reserves, etc.<sup>106</sup>

In this regard, the regulation of environmental protection instruments is not uniform in its hierarchy. Although these mechanisms possess a shared legal basis, the density of their regulation varies in every case. This is particularly acute concerning protected areas. The 19.300 Act is brief in matters of protected areas, including disperse provisions. For example, Article 34 of the 19.300 Act established that the State is in charge of the administration and supervision through the Biodiversity and Protected Areas Service of a National System of Protected

105 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 348-349.

106 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 349.

Wild Areas, to ensure biological diversity, protect the preservation of nature and conserve environmental heritage. Article 70 of the 19.300 Act in its letter (b), expressed that the Ministry of the Environment is in charge of submitting policies, plans, programs, norms and supervise the National Protected Areas Service of the State. Also, this provision in its letter (c) expressed that the Ministry of the Environment has the same duty concerning coastal marine areas protected for multiple purposes. In this regard, is worthy to highlight that the coastal marine areas for multiple purposes do not have legal express provision, thus the legislator gave a legally empty competence to the Ministry of the Environment.<sup>107</sup>

However, that is not the only problem. The 18.362 Act which creates the National System of Protected Wild Areas protected by the State, in its Article 3 transitory makes its validity depends on the entry into force of the 18.348 Act which creates the public Forest National Corporation, which is pending until the dissolution decree foreseen by its Article 19 regarding the private Forest National Corporation is enacted (Article 19 of the 18.348 Act which creates the National Forest Corporation and the protection of renewable natural resources).<sup>108</sup> Accordingly, Article transitory 8 of the 20.417 Act expressed that within a year after the publication of the 20.417 Act—which was on 12 January 2010—the President of the Republic had to send to the National Congress, one or more projects of law through which a Service of Biodiversity and Protected

107 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 351.

108 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 350.

Areas would be established. However, almost ten years later, this Service has not been established yet.

In this regard, the Ministry of the Environment informed that the first project of law was submitted in March 2011; later on, a new project of law was submitted in June 2014, which was approved by the Commission of the Environment in October 2017 and by the finance commission in January 2019, then by the Senate in June 2019. Nowadays this project is in the Commission of the Environment and Natural Resources in the Chamber of Deputies.<sup>109</sup> In consequence, the administration of the System established by Article 34 of the 19.300 Act, in principle, does not produce any legal effect, due to the fact that the 18.362 Act that created the National System of Protected Wild Areas of the State has not entered into force.<sup>110</sup>

109 See Chilean Ministry Of The Environment's website. 'Servicio de Biodiversidad y Áreas Protegidas.' Available on <https://mma.gob.cl/biodiversidad/servicio-de-biodiversidad-y-areas-protegidas/> A remarkable milestone in respect of this process was that a consultation to indigenous peoples was carried out at a national level, which lasted eleven months and allowed relevant agreements to be considered and included within the actual project of law. Also, the process included the participation of diverse actors such as NGOs, academic actors, and public and private bodies.

110 See Chilean Constitutional Tribunal (2008). Decision No. 1024-2008, Judgment 1 July 2008, para. 24. The Chilean Constitutional Tribunal in this sense, highlighted the inconvenience of maintaining a constitutionally anomalous situation such as the ones described. It therefore exhorted the President of the Republic to regularize the legal nature of the Forest National Corporation, through the enactment of the Supreme Decree referred to in Article 19 of the 18.348 Act or through any other constitutionally suitable means that the government deemed appropriate.

Thus, as mentioned before, the Chilean regulation of protected areas is quite dispersed. Unlike the other environmental protection instruments, its main regulation does not come from the 19.300 Act. The 19.300 Act just limits itself to include pragmatic and incidental provisions, such as Article 10(p) and 11(d) of the 19.300 Act<sup>111</sup> in relation to the protected areas in the Environmental Impact Assessment System; or the provisions including competencies both for planification of protected areas, according to Article 71(a), and about their management, in Article 71(c) of the same 19.300 Act.<sup>112</sup> Therefore, not having a clear and systematized legal body which includes its main characteristics, is one of the main issues of the protected areas regime in the Chilean legal order. Bermúdez explained that in practice, the regime comes from national and international provisions included in several legal bodies,

111 Article 10(p) established that the execution of works, programs or activities in national parks, national reserves, natural monuments or in any other areas placed under official protection must be submitted to the Environmental Impact Assessment System; Article 11(d) added a requirement for the environmental impact study by saying that inasmuch as there exists a location in or next to populations, resources and protected areas, priority areas for the conservation, protected wetlands or glaciers, which might be affected, as well as the environmental value of the territory where it would be established.

112 Article 71 (a) expressed that in regard to the functions and attributions of the Ministers Council for Sustainability expressed that it is in charge of proposing to the President of the Republic policies for the management, use and sustainable exploitation of renewable natural resources; Article 71 (c), stated that it is in charge of proposing to the President of the Republic the creation of State's protected areas, which include nature sanctuaries and marine coasters areas protected for multiple purposes.

destined to regulate environmental elements with multiple purposes and not just environmental protection. National legislation in this matter is mainly from hunting, fishery, forest and aquaculture regulations, and the protection of artistic and historical heritage; international instruments, on the other hand, which have direct applicability in Chile such as the Washington Convention and Ramsar Convention or others that do not have self-executing although are relevant, such as the mentioned CBD.<sup>113</sup>

However, Bermúdez explained that this regulation from diverse legal sources, in general, contemplates and regulates species from these protected areas, although not their genre. Overall, this confusion arises due to international treaties, characterized for foreseeing a broad normative framework of protected areas, describing the structure very scarcely, due to the margin required to be transposed into the national systems, which in the Chilean case has barely occurred.<sup>114</sup>

In spite of the mentioned problematic legal situations, there are some provisions along with the 19.300 Act that are related to administrative competencies in protected areas in general, and also, associated with access to information. Firstly, Article 31 bis a) of 19.300 Act defined environmental information also as the state of protected areas. Then, Article 37 of the 19.300 Act established that there will be a classification of species regarding plants, algae, fungi and wild animals, based on scientific-technical background and according to their state of conservation, in the

113 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 352-353.

114 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 353.

categories recommended for such effects by the International Union for Conservation of Nature (IUCN) or any other international body that dictates guidelines on these matters. And Article 38 established that the Ministry of the Environment would supervise that competent bodies elaborate and keep updated an inventory regarding species of plants, algae, fungi and wild animals which need special protection, to adopt actions and measures to conserve biological diversity and preserve those species.

However, the provisions that relate protected areas to access to information the most, would be the mentioned provisions concerning the Environmental Impact Assessment System. As we will revise in the section dedicated to the Environmental Impact Assessment System, this system has been included as a preventive instrument to control determined projects, which may be traduced as both a limitation and a guarantee for the realization of economic activities. The 19.300 Act included in its Article 10(p) that the execution of works, programs or activities in national parks, national reserves, natural monuments or in any other areas placed under official protection must be submitted to the Environmental Impact Assessment System, and also, in Article 11(d) added a requirement for the environmental impact study by saying that inasmuch as there exists a location in or next to populations, resources and protected areas, priority areas for the conservation, protected wetlands or glaciers, which might be affected, as well as the environmental value of the territory where it would be established.

In this regard, Bermúdez classified the protected areas by areas with no limitations, without uses and with mul-



multiple uses.<sup>115</sup> Although they have significant conceptual, legal and practical issues related to the problems mentioned before, overall, they can all be subject to accountability from the public eye under certain conditions. Those conditions are particularly related to the Environmental Impact Assessment System which, as we will see in the section related to this management instrument, considers the participation and conjunct work of the owner of the project, the public authorities with competencies in environmental matters and the organized community, as well as the natural persons directly affected by the project.<sup>116</sup>

Thus, to participate properly, the Chilean environmental legal order establishes the right to access to information. To this end, as mentioned before, environmental information also includes the state of protected areas, and therefore public access to it is guaranteed. In this regard, the Ministry of the Environment's website, provides for a National Record of Protected Areas to ensure the public knowledge of them, so in cases of projects or activities which are in or next to protected areas, the public will know and will be aware in cases of submissions of them to the Environmental Impact Assessment System –which as we will see, are published through several platforms to ensure awareness and proper participation–, and in cases the owner of the project has not submitted the project or activity to the Environmental Impact Assessment System, be aware and able to inform the Superintendency of the Environment.

115 See, *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 359-368.

116 *Cfr. op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 267.

### 3.5.2 PROTECTED SPECIES REGULATION

Indiscriminate captures, overexploitation, pollution and biopiracy are the most common reasons for degradation. Following the actual tendency, about a third of the species will be under threat by 2050. From a legal perspective, this situation has justified the public involvement in environmental protection to ensure the identification, follow-up and conservation, both in international and national law.<sup>117</sup>

At a national level the protection is centered at a species level, however, both the 19.300 Act and the environmental law in general only protect partially this component. Thus, not all species are included in the protection. Moreover, the instruments to protect species, in general, must be considered exceptional. In fact, the specific protection instruments of the environmental law are commonly focused on determined species.<sup>118</sup> Moreover, these species are only protected in cases of probable threat of extinction. This is the reason why specific environmental protection is related only to those species qualified as 'protected', independently of the kingdom they belong to.<sup>119</sup>

Bermúdez explained that the protection of species is complemented with other mechanisms, such as the protected areas. Both are the grounds of the 'protection of

117 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 369.

118 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 369-370.

119 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 371.

natural law'.<sup>120</sup> In fact, the safeguarding of biodiversity is shared with other instruments, both sectoral and territorial. By that, mechanisms such as the classification of species or hunting prohibited areas are included. Considering that all these mechanisms may be applied territorially, it is necessary to delimit the purpose of environmental protection of these protected areas. In this sense, through the protection of determined areas, the general living elements in that area are being safeguarded as well.<sup>121</sup>

National legislation has been rather slow in this matter. The clearest proof is the classification of species protected in conformity with the 19.300 Act. It was foreseen back in 1994 along with the 19.300 Act's entry into force, however, the regulation of species classification was enacted eleven years later in 2005 and developed through classificatory processes only since 2007.<sup>122</sup> 19.300 Act included two related techniques in this class of protection: (1) the obligation to make an inventory of species (Article 38 of the 19.300 Act) and (2) classification according to the conservation state (Article 37 of the 19.300 Act).

About the former, Chile possesses a relatively low level of diversity of species. Nevertheless, there is an important number of species considered as typical from the country because they are unique, scarce or representative, according to the definition provided by Article 2(b) of the 19.300

<sup>120</sup> Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 371.

<sup>121</sup> Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 358.

<sup>122</sup> Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 371.

Act. That is the main reason for the importance in the inventory phase, as a previous stage of the classification of species. The collection of this information as an obligation has been included in Article 38 of the 19.300 Act, which expressed that the Ministry of the Environment will ensure that the State's competent bodies elaborate and keep updated an inventory on plants, algae, fungi and wild animals and will supervise the rules that impose restrictions on their cutting, capture, hunting, trade and transport, to adopt the actions and measures aimed to conserve biological diversity and preserving those species. This information, by virtue of Article 70(j) of the 19.300 Act, will be then used by the Ministry of the Environment in its duty to administer and update a database on biodiversity.

Concerning the latter, after the inventory has been made, Article 37 of the 19.300 Act expressed that a regulation will determine the proceeding to classify the species by plants, algae, fungi and wild animals, on the basis of scientific and technical information, according to the state of conservation, within the categories recommended to that end, by the International Union for Conservation of Nature (IUCN) or any other international institution which dictates guidelines in these matters. Then, based on those classifications, the Ministry of the Environment, according to Article 37 of the 19.300 Act, will be in charge of approving plans related to the recovery, conservation and management of those species. The regulation will define the proceeding of elaboration, the public information system and the content of each one of them.<sup>123</sup>

<sup>123</sup> See also, Chilean Ministry Of The Environment's website. 'Historia de la clasificación de especies según estado de con-

The classification stage is related to access to information in a direct sense. Regarding the proceeding of classification of wild species, Article 20 of Decree No. 29 which approves the regulation for the classification of wild species according to the conservation state, established that the Ministry of the Environment, before the initiation of the classification process of wild species, will open a previous information period, to receive the most amount of information possible about wild species susceptible to be classified. To that end, the Ministry will invite, through a publication on a newspaper of national circulation and on its website, any person interested, whether natural or legal, to submit suggestions for classification.

Once the resolution initiates the process of classification, the technical secretary will open a file for every process of classification. These files, according to Article 23 of Decree No. 29, are public and will be kept in the Ministry's offices. Also, according to Article 25 of the same Decree No. 29, any person, whether legal or natural, will be able to submit, within a month after the publication of the resolution that initiated the process, information related to the wild species that will be classified. Thereafter, once the drafting of classification has been made, according to Article 27 of Decree No. 29, the Subsecretary will dictate a resolution to submit it to public consultation. This resolution will have to be published both in the Official Newspaper and in one of national circulation, and also, on the Ministry of the Environment's website.

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servación en Chile y del Reglamento de clasificación de especies silvestres.' Available on <https://clasificacionespecies.mma.gob.cl/wp-content/uploads/2019/10/historiadelaClasificacion-deEspecieenChile.pdf>

Likewise, and as in the case of norms of environmental quality and emission, prevention and decontamination plans, the Exempt Resolution No. 601 of 8 July 2005 which approved the Ministry of the Environment's general norm on the public participation which establishes the formal and specific modalities in the framework of the 20.500 Act, provided in its Article 2, the grounds to establish mechanisms of public participation in the public management, and among them, the right to access to public information. It thus acknowledged that the public management of the Ministry has to be known by the society, especially the ones it is destined to, including access to institutional services and the control and transparency of the public functioning. In respect to the classification of wild species according to their state of conservation, Article 16(a) of the Exempt Resolution No. 601, expressly mentioned this classification as subject to public participation.

Thus, as can be noted, the proceeding was thought to gather and collect the most information available in this regard, so to draft would be the most complete public record of protected species. In this regard, Chile complies adequately with the provision of the Escazú Agreement.

### **3.6 Climate change sources aimed at building national capacities (Article 6(3)(g) Escazú Agreement)**

The Agreement included in its Article 6(3) an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activi-

ties: '(g) climate change sources aimed at building national capacities.'

In matters of Climate Change is relevant to allude to the UN Framework Convention on Climate Change, due to the fact that it imposed several commitments for signatory States (as Chile), to improve emissions of greenhouse gases emissions. In this regard, the Convention defined in its Article 1(2) climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."

In response to this definition, the Convention focused on the goal to stabilize the greenhouse gases emissions in the atmosphere to a level that impedes dangerous anthropogenic interferences to climate system. This level should be reached in a sufficient period to allow ecosystems to adapt naturally to the climate change, ensuring that food production is not threatened and allowing economic development in a sustainable manner.<sup>124</sup>

Thus, to accomplish that goal, all the States parties of the UN Framework Convention, according to its Article 4(1)(a), have to elaborate, periodically update, publish and facilitate national inventories of their greenhouse gases. Chile in this context of compliance with the UN Framework Convention on Climate Change—as well as the Kyoto Protocol and the Paris Agreement—, has gradually developed a system of information records concerning diverse ty-

124 Cfr. Republic Of Chile, Ministry Of The Environment (2019). 'Informe del Inventario Nacional de Gases de Efecto Invernadero de Chile', serie 1990-2016. Santiago, Chile, p. 36.

pes of pollutants. Accordingly, Article 70 p) of the 19.300 Act expressed that the Ministry of the Environment is in charge of the administration of emissions and pollutant transferring report, which has to be recorded and systematized, by source or groups of sources by the same establishment, its nature, flow and concentration of pollutant emissions subject to an emission norm, its nature, volume and destine of the generated solid wastes. Also, the same applies to pollutants that are not subject to an emission norm.

In this regard, the last report on the National Inventory on Greenhouse Gases in Chile elaborated by the Ministry of the Environment was made publicly available in 2019. This is the fifth National Inventory on Greenhouse Gases<sup>125</sup> submitted to the United Nations Framework Convention on Climate Change in the fulfillment of Article 4(1)(a) of the Convention –which established that “all Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall: (a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties”– and the Decision No. 1 of the COP16 held in Cancun.

125 Cfr. op. cit. Republic Of Chile, Ministry Of The Environment (2019). ‘Informe del Inventario Nacional de Gases de Efecto Invernadero de Chile’, p. 22.



The report has been drafted following the Guidelines of the Intergovernmental Panel on Climate Change (IPCC) for the national inventories of greenhouse gases,<sup>126</sup> which includes the entire national territory. And since 2012, the Area of Inventories of Greenhouse Gases of the Climate Change Office of the Ministry of the Environment has designed, implemented and maintained the Chilean National System of Inventories of Greenhouse Gases, which contains the institutional and legal measures and the proceeding established for an update every two years of this national system of information.<sup>127</sup>

The existence of this National System of Inventories of Greenhouse Gases makes clear the will to transparent the information related to emissions in Chile, which means a starting point for the decision-making to face climate change.<sup>128</sup> In addition, this report is a manifestation of the cooperation principle included in Article 6(1) of the Escazú Agreement, inasmuch as it was implemented

126 Cfr. op. cit. Republic Of Chile, Ministry Of The Environment (2019). 'Informe del Inventario Nacional de Gases de Efecto Invernadero de Chile', p. 27.

127 United Nations (2011). 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010.' FCCC/CP/2010/7/Add.1. Part Two: Action taken by the Conference of the Parties at its sixteenth session. Contents: Decisions adopted by the Conference of the Parties. Decision 1/CP.16. The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention. 15 March 2011.

128 Cfr. Lucas, Andrea (2018). 'Más de una década de cambio climático en Chile: análisis de las políticas domésticas.' Mexican Bulletin of Compared Law, Vol. 51 No. 153. Mexico.

with the coordinated work of the Ministry of Energy, Ministry of Agriculture and the Ministry of the Environment through their diverse divisions. Also, once the report has been drafted, it goes through a national and international revision.<sup>129</sup>

For instance, this report highlighted that in 2016, the overall emissions of the greenhouse effect in Chile, increased by 114,7% since 1990 and by 7,1% since 2013. Also, that the Energy sector is the main emitter, representing the 78% of overall emissions in 2016, mostly due to carbon and diesel consumption for the electricity generation and the consumption of liquid fuels for land transport.<sup>130</sup> In this regard, in the context of the international regime, the Chilean main goal by 2030 is to reduce its emissions of carbon dioxide for each unit of gross domestic product (in Chile known as PIB) by 30% with respect to the level reached in 2007, considering a future economic development which enables the implementation of adequate measures to fulfill this goal.<sup>131</sup> This voluntary commitment gave rise to the Chilean National Tentative Contribution to Paris Agreement, submitted

129 Cfr. op. cit. Republic Of Chile, Ministry Of The Environment (2019). 'Informe del Inventario Nacional de Gases de Efecto Invernadero de Chile', p. 22.

130 Cfr. op. cit. Republic Of Chile, Ministry Of The Environment (2019). 'Informe del Inventario Nacional de Gases de Efecto Invernadero de Chile', p. 22.

131 Cfr. Republic Of Chile, Ministry Of The Environment (2016). Second Biennial Report on the Chilean update., p. 21. In this regard, the decrease of 30% could be 45% with international support, and also, Chile committed itself to develop sustainable management and to recover 100.000 hectares of native forest to remove carbon dioxide by sink.

on 29 September 2015 to the Secretary of the UN Framework Convention on Climate Change.<sup>132</sup>

At a national level, by virtue of the 19.300 Act and its modifications introduced by the 20.417 Act in 2014, with the creation of a new environmental institutionality headed by the Ministry of the Environment, Chile stepped forward by elevating the status of the environment at a ministerial level. Expressly, according to Article 70(h) of the 19.300 Act in conjunction with Article 50 of the Exempt Resolution 269 of the Subsecretary of the Environment which establishes the structure and organization of the offices under the direct dependence of the Subsecretary of the Environment, by creating the Climate Change Office in the Ministry of the Environment in charge of proposing policies and the draft of plans, programs and action plans in matters of climate change.

Thereafter, in 2015 the Department of Climate Change was modified, although keeping its functions, but now integrated by the Division of Air Quality and Climate Change. Then, in March 2017, the Division of Climate Change was created to replace the Department of Climate Change, including three sub-departments with a maximum administrative hierarchy.<sup>133</sup> The chief of this division, Fernando Farías, explained that the focus of this unit is to work at a local level in matters of adaptation to climate change. Also, he explained that the drafting of the National Action Plan on Climate Change for the period 2017-2022 is

132 Republic Of Chile, Council Of Ministers For Sustainability And Climate Change (2015). Chilean National Tentative Contribution to Paris Agreement. September 2015.

133 Cfr. op. cit. Lucas, Andrea (2018). 'Más de una década de cambio climático en Chile: análisis de las políticas domésticas.'

a high priority, which will be better positioned regarding the performing of inter-ministerial coordinated work, involving as well other groups from the community interested in climate change, including the private sector.<sup>134</sup>

However, climate change management is not just competence of the Division of Climate Change, it is interlaced with the rest of the institutionality. For instance, Article 71 b) of the 19.300 Act about the functions and attributions of the Ministers Council for Sustainability expressed that it has to propose to the President of the Republic the sustainability criteria that has to be incorporated in the drafting of policies and planification processes of the ministries and their dependent and related services.

At the same time, Article 70 h) of the 19.300 Act expressed that the Ministry of the Environment is in charge of proposing policies and submitting plans, programs and plans concerning actions matter of climate change, having to work in a coordinated manner with other administrative bodies at a national, regional and local level, so to be able to determine its effects and the establishment of necessary adaptation and mitigation measures. Into the bargain, as part of the Ministry of the Environment, there is Inter-sectoral Climate Change Team, conformed by public officials from different Ministries, and this Team is coordinated through the Department of Climate Change, which its specific competencies are related to other public bodies, such as the Technical Advisor

134 Cfr. Ministry Of The Environment's website. 'Ministerio del Medio Ambiente crea nueva división dedicada al cambio climático.' Available on <https://mma.gob.cl/ministerio-del-medio-ambiente-crea-nueva-division-dedicada-al-fenomeno-del-cambio-climatico/>

of the International Negotiation Committee, the authorities for the Fund of Adaptation, and the Clean Development Mechanism, among others.<sup>135</sup>

Also, the regional committees for climate change were created, in which diverse public regional authorities along the country participate, to promote regional climate policies according to the National Strategy and the developing regional strategies, and to become as well, a mechanism for joint work with the public and private sectors to face a common threat. Moreover, since January 2017, the Agency on Sustainability and Climate Change started to function,<sup>136</sup> which has assigned diverse tasks, particularly the agreements on clean production, which have been used to incorporate a clean production system

135 Cfr. op. cit. Lucas, Andrea (2018) 'Más de una década de cambio climático en Chile: análisis de las políticas domésticas.' For the accomplishment of the Clean Development Mechanism foreseen by the Kyoto Protocol, at a national level was created a technical committee to revise and assess the information of every project for the granting of a letter of approval. This committee is headed by the Ministry of the Environment, coordinated by the Office of Climate Change and permanently integrated by a representative from the Ministry of Foreign Affairs, Ministry of Agriculture, Ministry of Energy and the Clean Production Council. See, the Chilean Ministry Of The Environment's website. 'Autoridad nacional designada para el mecanismo de desarrollo limpio (MDL) del Protocolo de Kioto.' Available on <https://mma.gob.cl/cambio-climatico/autoridad-nacional-designada-para-el-mecanismo-de-desarrollo-limpio-mdl-del-protocolo-de-kioto/>

136 See Cambio Climático Chile's website. 'Chile: Agencia de Cambio Climático y Sustentabilidad comenzará a operar el 1 de enero de 2017.' Available on <https://www.cambioclimaticochile.cl/2016/11/agencia-de-cambio-climatico-y-sustentabilidad-comenzara-a-operar-el-1-de-enero-de-2017/>

and measures for emissions mitigation. The relevance of these agreements is that they were considered for the international regime on climate change as the first National Appropriate Mitigation Action developed by Chile.<sup>137 138</sup>

Also, regarding the building of national capacities, the National System of Inventories of Greenhouse Gases has been relevant, inasmuch as it conditionate the elaboration of environmental management instruments,<sup>139</sup> due

137 See datos.gob's website. 'Agencia de Sustentabilidad y Cambio Climático.' Available on <https://datos.gob.cl/organization/agencia-de-sustentabilidad-y-cambio-climatico> and 4E's website (Programa de Energías Renovables y Eficiencia Energética en Chile, Deutsche Gessellschaft für Internationale Zusammenarbeit (GIZ) GmbH and NAMA Facility). 'Proyecto de Apoyo a la NAMA "Energías Renovables para Autoconsumo"'. Available on <https://www.4echile.cl/proyectos/nama/>

138 Cfr. op. cit. Lucas, Andrea (2018) 'Más de una década de cambio climático en Chile: análisis de las políticas domésticas.'

139 For example, in regard to plans of prevention or decontamination, Article 45 of the 19.300 expressed that the content of the prevention and decontamination plans would include at least: a) the relationship between the levels of the overall emissions and the pollutants to be regulated; b) the timeframe in which it is expected to decrease the emissions subject matter of the plan; the individualization of the ones responsible for compliance; d) the identification of the competent authorities in charge of its control; the environmental management instruments that would be used to accomplish the goals; f) the proportion to which the emissions of the responsible activities for those emission of pollutants must decrease referred to in the plan, which has to be equal to all of them; g) the economic and social costs estimation; and h) the proportion, when possible, of the mechanism of compensation of emissions.<sup>139</sup> Also, Article 45 para. 2 of the 19.300 expressed that the pollutant activities located within the affected zones by prevention or decontami-

to the fact that in practice, the strategies of mitigation and adaptation are the basic strategies to face climate change.<sup>140</sup> In this sense, mitigation is described as the policies and actions focused on reducing greenhouse gases or potential removals by sink, such as wetlands, forests or oceans, which catch the carbon dioxide dispersed in the atmosphere, to reduce the magnitude and haste of climate change and its adverse effects. Adaptation, on the other hand, is referred to the responses to reduce the negative consequences of climate change or to take advantage of its possible benefits.<sup>141</sup>

Therefore, about mitigation, the main Chilean measure was the enactment of the 20.698 Act which enables the expansion of the energy matrix through non-conventional renewable sources, in its Article 2 established that by 2025 the 20% of the produced energy in Chile will come from renewable sources. To that end, Chile committed to implementing mitigation actions, which go further than the ones established by the UN Framework Convention for developing countries in Annex 1. Within the principal early mitigation actions, there is the Energetic Efficiency

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nation plans, are obliged to decrease their emissions to levels that would enable the accomplishment of the goals established by the plan.

140 See, Sánchez, Luis and Reyes, Orlando (2015). 'Medidas de adaptación y mitigación frente al cambio climático en América Latina y el Caribe. Una revisión general.' LC/W.675. Santiago, Chile. ECLAC, p. 33.

141 See, Ministry Of The Environment's website. 'Ministerio del Medio Ambiente crea nueva división dedicada al cambio climático.' Available on <https://mma.gob.cl/ministerio-del-medio-ambiente-crea-nueva-division-dedicada-al-fenomeno-del-cambio-climatico/>

Program and the enactment of the 20.257 Act which introduces modifications to the general law of electric services in respect of the generation of electric energy with sources of renewable non-conventional energies.

Also, in the energy sector, the Ministry of Energy is moving towards a Plan of Mitigation of Greenhouse Gases for the Energy Sector, in which the mitigation actions included in the Paris Agreement were associated with the National Energetic Policy 2050.<sup>142</sup> This plan was submitted for public consultation and approved in December 2017. In addition, the initiative called ‘Chilean Footprint Program’ was voluntarily implemented in 2013 among the Ministry of the Environment and other public and private sectors, to promote the management of greenhouse gases in public and private organizations for the mitigation of the overall emissions.<sup>143 144</sup>

In relation to adaptation, along with the National Action Plan of Climate Change, Chile has developed specific plans focused on adaptation. The most important one is the National Plan for Adaptation to Climate Change which gathered several sectoral plans, and also, included

142 See, Republic Of Chile, Ministry Of Energy (2017). ‘Plan de Mitigación de Gases de Efecto Invernadero para el Sector de la Energía’. December 2017.

143 See, Chilean Ministry Of The Environment’s website. ‘Huella Chile. Programa de Gestión de Carbono’. Available on <https://huellachile.mma.gob.cl/objetivo/> and <https://huellachile.mma.gob.cl/historia/>

144 Cfr. op. cit. Lucas, Andrea (2018) ‘Más de una década de cambio climático en Chile: análisis de las políticas domésticas.’



public participation.<sup>145</sup> Another interesting instrument is the National Strategy on Climate Change and Vegetable Resources managed by the National Forest Corporation focused on the management of vegetable resources and naturally associated components. This plan relates to the issues of desertification, land degradation and drought, forest fires and such.<sup>146</sup> Nevertheless, it has the problem revised concerning the Regime of Protected Areas (supra-3.5.1) about the legal nature of this corporation, which might imply problems in the future.

Additionally, in Chile, the process for the enactment of a Framework Law on Climate Change which considers phases of dialogue and regional public consultations for the drafting of the law, was submitted to the National Congress in July 2019. Thereafter, in January of 2020, the project of the Framework Law on Climate Change<sup>147</sup> began its process for revision by the Senate. The Framework Law on Climate Change establishes, among other matters, the goal of reaching carbon neutrality by 2050. On August 25, 2020, by a unanimous vote, the Senate appro-

145 See, Chilean Ministry Of The Environment (2014). 'Plan Nacional de Adaptación al Cambio Climático' Tercera Comunicación Nacional sobre Cambio Climático. Cooperación Alemana, p. 33 and 39-42. This plan was approved by the Council of Ministries for Sustainability on 1 December 2014.

146 Republic Of Chile. National Forest Corporation And Ministry Of Agriculture (2016). National Strategy on Climate Change and Vegetable Resources 2017-2025, prologue. This strategy was approved by the Council of Ministries for Sustainability on 14 November 2016.

147 Republic Of Chile. Project of Law, which establishes the Framework Law on Climate Change. Message No. 574-367. Bulletin No. 13.191-12.

ved the idea to legislate, and therefore, ended the phase of general discussion in the Environmental and National Assets Commissions, where it was discussed in audiences to which the Commission invited several actors from social, academic, private, public and international spheres.<sup>148</sup> More recently, on 11 January 2021 the Commission approved the indications to the project.<sup>149</sup>

In brief, as can be noted, Chile has the will to keep a coherent behavior at an international and national level. In this regard, and in line with the access to information, it is worthy to highlight the will to strengthen transpa-

148 See a summary of the general discussion matters in regard to the Framework Law on Climate Change on the Observatory Of The Climate Change Law For Chile's website. Center for Climate and Resilience Research. Faculty of Law, University of Chile. Center of Environmental Law., <http://leycambioclimatico.cl/policy-brief-de-que-se-hablo-durante-la-discusion-en-general-del-proyecto-de-ley-marco-de-cambio-climatico-en-la-comision-de-medio-ambiente-y-bienes-nacionales-del-senado/>

149 Cfr. Observatory Of The Climate Change Law For Chile's website. Center for Climate and Resilience Research. Faculty of Law, University of Chile. Center of Environmental Law. Available on <http://leycambioclimatico.cl/leyccchile/> Also, in a way to cooperate in the process, the Observatory of the Climate Change Law for Chile, an academic Center for Climate and Resilience Research part of the Law Faculty of the University of Chile was created. This initiative gathers specialists from diverse areas such as law, sociology, economy, climatology and engineers, which purpose is to establish channels of scientific and decision-making knowledge. See Observatory Of The Climate Change Law For Chile's website. Center for Climate and Resilience Research. Faculty of Law, University of Chile. Center of Environmental Law. Available on <http://leycambioclimatico.cl/quienes-somos/>

rency in the elaboration of policies, plans, programs and measures. The information related to climate change has been made publicly available for non-state actors such as NGOs, corporations, etc. This transparency can be noted, as well, at an international level, for instance, the exchange of information in the context of the international regime on climate change and the provision of information on the national building of capacities in climate change. However, still, there are some lagoons regarding the climate change sources aimed at building national capacities, for example, the fact that the technical norms being used by the new Agency on Sustainability and Climate Change are not updated, they are norms from 2003 and 2009 drafted when the ISO did not even exist on mitigation of greenhouse gases.<sup>150</sup> Thus, Chile complies with the provision of the Escazú Agreement, although incompletely.

**3.7 Information on environmental impact assessment processes and on other environmental management instruments, where applicable, and environmental licences or permits granted by the public authorities (Article 6(3)(h) Escazú Agreement)**

In this regard, the Agreement included in its Article 6(3)(g) an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities, on one hand, Environmental Management instruments, mainly Environmental Impact Assessment Sys-

<sup>150</sup> Cfr. op. cit. Lucas, Andrea (2018) 'Más de una década de cambio climático en Chile: análisis de las políticas domésticas.'

tem, and secondly, the environmental licenses or permits granted by public authorities. Hence, I will revise them separately, although the last ones are directly related to Environmental Impact Assessment System.

### 3.7.1 ENVIRONMENTAL MANAGEMENT INSTRUMENTS

Management instruments are the conjunct of measures of varied sources (legal, economic, planner, etc.) destined to the accomplishment of goals regarding the protection and improvement of the environment. Modern environmental management instruments have been amplified due to the inclusion of the principle of cooperation in the administrative sphere, as included in Article 6(1) of the Escazú Agreement. By virtue of this principle, public participation has been included in the performing of assignments that have been commonly considered as public, for instance, the ones regarding environmental certification.<sup>151</sup>

As the 6(3)(h) included environmental management instruments in general and there is no an absolute consensus on how many are they or on a systematization criterion,<sup>152</sup> I will refer to the principal ones included in the 19.300 Act.

#### 3.7.1.1 *Strategic Environmental Assessment*

The Strategic Environmental Assessment is a technic of coordinated planification to accomplish determined objectives on the protection of the environment in plans, policies and programs, at a national, regional and local

151 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 192.

152 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 189.

level. The Environmental Impact Assessment System to work efficiently, requires the design of previous and ad hoc policies, plans and programs. Hence the Strategic Environmental Assessment is an instrument focused on ensuring coherence between instruments for environmental protection.

Article 8 of the 19.300 Act expressed that the projects or activities submitted to the Environmental Impact Assessment System have to always consider the policies and plans strategically assessed. Like the Environmental Impact Assessment System, the Strategic Environmental Assessment is an approach of the precautionary principle, due to the fact that it includes elements of the environmental protection in policies and plans of general normative character. Hence, as this instrument has been incorporated within the instruments of territorial planning, it includes the environmental perspective in the use of the territory, which, by extent, should decrease environmental conflicts at the time projects apply the content of the territorial planning instrument.<sup>153</sup>

Article 2(i) bis of the 19.300 Act has defined the Strategic Environmental Assessment as the proceeding performed by the respective sectoral Ministry, to include environmental aspects of sustainable development into the process of drafting policies and plans of a general normative character, which may cause impacts on the environment or sustainability, it to be integrated into the dictation of policies and plans, and its substantial modifications.

153 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 197.

In spite of the practical or conceptual problems of this instrument,<sup>154</sup> it is a relevant management instrument concerning access to information and public participation, inasmuch as public participation was included as a stage in the process of the elaboration of the policies or plans and the environmental report. Article 7 bis of the 19.300 Act expressed that public consultation has to be carried out by the Ministry or Administrative body of the State performing the assessment process, once it has received the observations from the Ministry of the Environment. And, according to Article 7 quáter of the 19.300 Act, it must be included in the resolution which approves the policy or plan of general normative character submitted to Strategic Environmental Assessment.

However, the basic aspects related to this were not foreseen or specified by the 19.300 Act, because according to Article 7 ter (c) and (d) of the same 19.300 Act, it just limited itself to express that the determination of aspects such as the publicity of the policies or plans or the manners of public participation, would correspond to the regulation of the public participation of the Strategic Environmental Assessment. Thus, the scarce density of this remission impedes the determination of fundamental aspects, such as the timeframe for the public consultation process or the concrete subjects to be consulted.<sup>155</sup>

Also, the OECD Environmental Performance Review of Chile, expressly highlighted that “however, contrary to good international practice (represented by the EU Di-

154 See op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 197 et. seq.

155 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 205.

rective on strategic environmental assessment 2001/42/EC), there is no established list of sectoral policies and plans that must undergo SEA. While the application of SEA has substantially increased since 2011, only 95 of 235 spatial plans elaborated in 2011-15 have undergone this assessment.”<sup>156</sup>

### *3.7.1.2 Norms of Environmental Quality and Norms of Emission*

The norms of environmental quality are technical norms through which are established tolerable pollution levels in a determined environment. These norms are usually applied in respect of atmospheric, smell and noise pollution. The purpose of these norms is to protect the environment through the establishment of a target standard. The relevance of these norms is focused on the fact that through these norms, it is possible to determine the meaning of an environment free of pollution. This last concept as defined by Article 2(m) of the 19.300 Act, is centered on the concentration and levels of pollution in the environment. In consequence, there is a direct linkage between norms of environmental quality and an environment free of contamination, because inasmuch as those levels of contamination established by the former are not reached, the latter will be protected. As it is not possible, in practice, to reach a zero level of pollution, the adequate level of contamination is established by these norms, depending on the quality of life of the population on the adopted standard of acceptable pollution.<sup>157</sup>

156 Op. cit. Organization For Economic Co-Operation And Development (OECD) (2016). ‘OECD Environmental Performance Reviews: Chile 2016’.

157 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 207.

The 19.300 Act established two categories of norms of environmental quality: primary and secondary norms. The differences can be subclassified regarding a material distinction related to the legally protected object and a formal distinction regarding the competent ministry for its enactment. In brief, the primary norm of environmental quality is contemplated in Article 2(n) of the 19.300 Act as the one that establishes the levels of contamination on which it is understood that there is a risk to the life or health of the population.<sup>158</sup> About the secondary norm of environmental quality, Article 2(ñ) of the 19.300 Act defined it as the one that establishes the levels of contamination on which it is understood that there is a risk to the protection or conservation of the environment and the preservation of nature.<sup>159</sup>

A relevant distinction that is worth highlighting between them both, is that the primary norms establish the pollution levels which give rise to the situations of environmental emergency. The grounds of an environmental emergency are the fact that these norms protect the health and life of the population. On the contrary, this possibility is not foreseen concerning secondary norms.<sup>160</sup>

On the other hand, the norms of emission establish the admissible levels of pollution in relation to every source of contamination. These norms are focused on the con-

158 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 207-208.

159 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 209.

160 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 214.



trol along with the execution of the pollutant activities and enable the continuous monitoring of that source of emission. This instrument is highly efficient because it allows direct supervision by the authority, being able to determine if the emission of pollution is in or out of the determined standards established by the norm.<sup>161</sup>

About its concept, Article 2(o) of the 19.300 Act defined them as the ones that establish the maximum quantity allowed for a contaminant measured in the effluent from the emitting source. Bermúdez classified these norms as norms of emission in respect of (1) still sources (g.e. a factory); (2) mobile sources (the ones related to vehicles); (3) establishment of standards for products (related to the commonly known as ‘footprints’ g.e. carbon footprint); (4) according to the pollutant regulated (g.e. methane, carbon dioxide, etc.); (5) according to the environmental element the pollution ends in (e.g. water, soil or atmospheric).<sup>162</sup> Also, it is worthy to mention that Article 32 of the 19.300 Act expressed that norms of environmental quality must be evaluated at least every five years by the Ministry of the Environment, however, there is no such norm in respect of norms of emission.

There are several interesting conceptual and practical issues in respect of these two instruments, as explained by Bermúdez,<sup>163</sup> however, as this revision is intended to

161 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 227.

162 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, pp. 228-229.

163 See, op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, pp. 207-214, 228-241.

be in respect of access to information, I will not delve into that. What is relevant to us, is the involvement of the citizenry through informed participation in the context of norms of environmental quality and norms of emission.

In this context, as mentioned before, the 20.500 Act which modified the 18.575 Act, is relevant inasmuch as it included a fourth title on Public Participation, which acknowledges the right of persons to participate in policies, plans, programs and actions of the State (Article 70 of the 18.575 Act, Decree with legal force 19.653 which establishes the refunded, coordinated and systematized text of the 18.575 Act).<sup>164</sup> This means that all State's administrative bodies, according to Article 3(ñ) of the 20.417 Act, must guarantee institutionalized mechanisms through which persons are enabled to participate in the design, formulation, execution and assessment of public policies.

Hence, the Exempt Resolution No. 601 of 8 July 2005 which approved the Ministry of the Environment's general norm on the public participation which establishes the formal and specific modalities in the framework of the 20.500 Act, provided the grounds to establish mechanisms of public participation in the public management, and among them, the right to access to public information. It thus acknowledged in its Article 2, that the public management of the Ministry has to be known by the society, especially the ones it is destined to, including access to institutional services and the control and transparency of the public functioning.

164 Cfr. op. cit. Republic Of Chile, Ministry Of The Environment (2015). Exempt Resolution No. 601, p. 1.

In respect to the elaboration of norms of environmental quality and emission, Article 16(a) of the Exempt Resolution No. 601, expressly mentioned the dictation of these norms as subject to public participation. To ensure public involvement and informed participation, Article 17 of the Exempt Resolution No. 601 expressed that it will make known, ex-officio or by request, matters of public interest and of environmental relevance, in which it is required to know the opinion of the public.

Also, Article 18 of the Exempt Resolution No. 601 established that concerning those matters for consultation, the Ministry will publish through its website, in a timely manner, at least: the matter for consultation, the timeline for consultation, technical information for the basis of the consulting process, a draft document of the instrument to be consulted, modality of participation, the response of the observations made by the public and final document approved by the competent authority. Also, Article 19 of the Exempt Resolution No. 601 expressed that the Ministry in no more than 45 business days since the end of the consultation process, will publish on its website the response to the observations made by the public.

So, as can be noted, about these two environmental instruments, the Chilean environmental legal order has considered the access to public environmental information as a relevant aspect in the enactment of these regulations.

### *3.7.1.3. Declaration of Latent and Saturated Zone*

Article 2(t) of the 19.300 Act defined latent zone as the one in which the measurement of the concentration of pollutants in the air, water or soil is between 80% and 100% of the value provided by the respective norm of environmental quality. In addition, Article 2(u) of the 19.300

Act defined a saturated zone as the one in which one or more norms of environmental quality are exceeded.

About the environmental information, although the access to information is not as evident as revised regarding the norms of environmental quality and emission, it has a direct linkage to this right. The declaration of latent and saturated zones is an environmental management instrument of certification. By virtue of these declarations can be officially verified the level of contamination in the environment. Thus, these certifications are a means through which the right to access to environmental information is updated, inasmuch as the declaration itself states a determined environmental condition and the direct and essential information taken into account for its dictation is of public access.<sup>165</sup>

Accordingly, the Escazú Agreement in its Article 6(11) expressed that “Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.” Also, the Agreement concerning the environmental information systems, expressed in Article 6(3) that “Each Party shall guarantee that environmental information systems are duly organized, accessible to all persons and made progressively available through information technology and georeferenced media, where appropriate.”

In the case of Chile, a detailed list of saturated and latent zones has been made publicly available on the web-

165 Cfr. *op. cit.* Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 242.

site of the ‘Chilean Georeferenced Data Infrastructure.’<sup>166</sup> It is worthy to mention that it is curious that the matters related to the latent and saturated zones were not expressly included in Decree No. 28 which created the National System of coordination of territorial information in charge of the Ministry of National Assets (the Chilean Georeferenced Data Infrastructure is part of it). Nevertheless, Article 3 of Decree No. 28 expressed that the System of Interinstitutional Coordination will be applied for every State’s administrative body that generates or use public territorial information in the country, thus as the information related to saturated and latent zones is territorial information, it was included.

#### *3.7.1.4 Prevention and Decontamination Plans*

Unlike the previous instruments of environmental management, Article 2 of the 19.300 Act did not include a definition of prevention and decontamination plans. Nevertheless, the Ministry of the Environment on its website defined them as: ‘plan of decontamination’ is an environmental management instrument which aim is to recover the levels indicated in the primary and/or secondary norm of environmental quality of an area declared as saturated, that is, that the territory in which one or more norms of environmental quality are exceeded; the ‘plan

166 See Chilean Ministry Of National Assets’ website. Chilean Georeferenced Data Infrastructure. ‘Zonas saturadas y latentes.’ Available on <http://www.ide.cl/index.php/medio-ambiente/item/1963-zonas-saturadas-latentes> See also, Economic Commission For Latin America And The Caribbean’s webstie. ‘Sistema Nacional de Coordinación de Información Territorial – SNIT Infraestructura de Datos Geoespaciales de Chile IDE-Chile’. Available on <https://www.cepal.org/sites/default/files/presentations/chile-infraestructura-datos-geoespaciales.pdf>

of prevention' is an environmental management instrument whose purpose is to avoid exceeding one or more primary or secondary norms of environmental quality in a zone declared as latent, that is, the one in which the measure of the concentration of pollutants in the air, water or soil is between 80% and 100% of the value indicated by the respective norm of environmental quality.<sup>167</sup>

These environmental management instruments are the direct consequence of the declaration of latent or saturated zones. Through these plans, the Administration points out the required measures aimed for returning to the accepted levels of contamination established by the primary or secondary norms of environmental quality.<sup>168</sup> According to Article 47 of the 19.300 Act these plans may use regulation or economic instruments such as: (a) emission norms; (b) tradable emission permits; (c) taxes on emissions or user fees, in which the environmental implicit costs in the production or use of certain goods or services are considered; (d) other instruments to stimulate actions towards environmental improvement and environmental repair.

Concerning their supervision, Article 3(b) of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment has to ensure the fulfillment of the measures

167 See Chilean Ministry Of The Environment's website. '¿Qué son los planes de prevención y descontaminación?' Available on <http://epac.mma.gob.cl/Pages/Home/respuestas.aspx?IdEducativo=3#:~:text=El%20PLAN%20DE%20DESCONTAMINACI%C3%93N%20es,calidad%20ambiental%20se%20encuentran%20sobrepasadas>.

168 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 244-245.

and instruments established by the prevention or decontamination plans, based on inspections, controls, measurement and analysis performed. In practice, prevention and decontamination plans are quite hard to be revised because of their broadness, on the other hand, emission plans are rather easier due to their narrow and focalized aim.

In respect to its relationship with information, the 20.417 Act in its article 31(b) expressed that within the National System of Supervision Information, the Superintendency of the Environment must include the Plans of Prevention and Decontamination, all the associated information; the supervision actions performed regarding these plans, the outcomes, and its measures, analysis and any other data which according to the measures of each plan, must be provided by the supervised subjects or by the sectoral competent bodies.

Also, as access to information is directly related to participation, is worthy to highlight that, as mentioned concerning the norms of environmental quality and emission, Article 16(a) of the Exempt Resolution No. 601, also mentioned the proceeding and stages for the dictation of plans of decontamination and prevention as subject to public participation. In addition, Article 3(3) and 10 of the Supreme Decree No. 39 which approves the regulation for the dictation of plans or prevention and decontamination, included these plans as subjects of public participation, and expressed that once the project has been drafted, the Minister would elaborate a resolution approving it and to submit it for consultation. This resolution has to be published in the Official Newspaper, and it will contain at least the impacted zone, the proposed measures by the plan, a summary of its arguments and the timeframe to submit observations and consults will be informed as well.

This goes in line with Article 18 of the Exempt Resolution No. 601 which established that regarding those matters for consultation, the Ministry will publish through its website, in a timely manner, at least: the matter for consultation, timeline for consultation, technical information for the basis of the consulting process, a draft document of the instrument to be consulted, modality of participation, the response of the observations made by the public and final document approved by the competent authority.

About the administrative file, Article 6 of the Supreme Decree No. 39 expressed that is of public access. Also, the access to these files, including their documents, will be ruled by the 20.285 Act on Transparency, and the Ministry will elaborate a public record updated every month with the information related to the state of these files, the drafting of plans, its timelines and pending assignments. A copy of this record will be published on the Ministry's website (Article 6 of Supreme Decree No. 39). This goes in line as well with Article 17 of the Exempt Resolution No. 601 which expressed that the Ministry would make known, ex-office or by request, matters of public interest and of environmental relevance, in which it is required to know the opinion of the public.

The reason underneath the public consultation, is that according to Article 9 of the Supreme Decree No. 39, in the process of drafting the plan, a general analysis of economic and social impacts must be performed and has to be available before the public consultation process begins. Thus, during the public consultation, the public already has the information related to social impacts and is enabled to participate well informed so as to make their observations properly in the decision-making.



### 3.7.1.5 *Management Plan*

Unlike the previous environmental management instruments, the management plan is strictly economic. The planification instruments are directly related to the way an environmental resource can be used, accomplishing its best potential and ensuring sustainable development.<sup>169</sup> Fernández Bitterlich defined them as the most important instruments of environmental management-focused not on solving a problem of contamination or to avoid it, but to accomplish a rational use of renewable natural resources.<sup>170</sup>

By virtue of the management plans, the principle of sustainable development is materialized. This was expressly mentioned by Article 41 of the 19.300 Act, which expressed that the use and exploitation of renewable natural resources will be carried out ensuring the regeneration capacity and biological diversity associated with them, in special regarding those species classified according to Article 37 of the 19.300 Act.

In relation to its content, Article 42 of the 19.300 Act expressed that the management plans of natural resources have to include the following environmental aspects: (a) maintenance of water flows and soil conservation; (b) maintenance of the landscape value; c) the protection of classified species according to Article 37 of the 19.300 Act. Although this provision anticipates that the management plan has to contain environmental considerations, it did not mention the most important aspect of

169 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 252.

170 Fernández Bitterlich, Pedro (2004). 'Manual de Derecho Ambiental', Second Edition. Editorial Jurídica de Chile. Santiago, Chile, p. 147.

the plan, which is the determination of the manner these natural resources will be used in a sustainable way. The use of an environmental element, considered in isolation, implies an economic valuation of it, however, sustainable use or as the norm expressed 'ensuring its regeneration capacity', is an environmental aspect that each management plan has to include, but the legislator did not foresee this in respect of this class of instruments.<sup>171</sup>

In the case of this environmental management instrument, unlike the recent instruments, there is no express provision in the 19.300 Act which establishes an obligation to inform the public to participate. Nevertheless, Article 49 of the Exempt Resolution No. 601 expressed that the Ministry of the Environment may voluntarily establish the Early Public Participation Program, which corresponds to a conjunct of mechanisms or initiatives of public participation in the early stages of the drafting of plans, policies, programs, norms or actions, and its principal aim is to make known the information related to the instrument that gave rise to an elaboration process, and to incorporate the observations made by the public. To ensure effective participation, Article 51 of the Exempt Resolution No. 601 established that all of these programs must be diffused through the Ministry's website and any other means the Ministry considers convenient to ensure public knowledge.

### *3.7.1.6 Tradable Emission Permits*

The relevance of the climate change problem has provoked that the equivalent carbon dioxide emissions mar-

171 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 253.

ket, contemplated by the Kyoto Protocol, is now the most important economic instrument.<sup>172</sup> The Ministry of the Environment explained that the ‘Clean Development Mechanism’, is an agreement under Article 12 of the Kyoto Protocol, which purpose is that developed countries comply with their commitments on the reduction of greenhouse gases, and that developing countries could benefit from the activities of projects that generate carbon certificates. Developed and developing States may voluntarily participate if ratified the Kyoto Protocol. Although the second period of the Kyoto Protocol ended last year, the idea of the emissions market remains. In Chile, an owner of a project may voluntarily participate in this clean development mechanism, and through the designated national authority, the owner would receive a letter of approval which certifies that the project complies with the national sustainable criteria.<sup>173</sup>

This instrument of tradable emission permits has been called indistinctly ‘decontamination vouchers’, ‘emission licenses’, etc. Tradable emission permits are part of the group of administrative acts which authorize the emission of a maximum and determined quantity of pollution to the environment along with the performing of a determined activity, and in parallel, to be able to dispose of all or part of that quantity when it is not used. Therefore, it is an economic environmental management instrument that substitutes others of its kind, however, on the contrary sense, such as

172 Cfr. *op. cit.* Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 259.

173 Chilean Ministry Of The Environment’s website. ‘Preguntas Frecuentes 8.3.1 ¿Qué es el mecanismo de desarrollo limpio?’ Available on <https://mma.gob.cl/cambio-climatico/preguntas-frecuentes/>

the emission taxes. The idea behind this instrument is that through an economic indirect incentive, such as the possibility to dispose of in a market of emissions the remnant of allowed emissions not used by an activity, the owner of a project will see the reduction of contamination as an economic benefit, and in a long term, it means the protection of the environment by reducing the overall emissions of a determined pollutant.<sup>174</sup>

Accordingly, the Escazú Agreement in its Article 6(11) expressed that “Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.” In this regard, the UN Framework Convention on Climate Change in its Article (4)(1)(a), which was ratified by Chile in 1994, established that the signatory States must periodically report their improvements on the implementation of the goals established by the international instrument at a local level, and considering that one of the fundamental components of these reports is the national report of greenhouse gases, Chile included in the 19.300 Act to collect information in this respect.

As I will mention later, Article 70(p) of the 19.300 Act expressed that the Ministry of the Environment is in charge of the administration of an Emission and Transference Record which will be registered and systematized by source or group of sources in respect of their establishment, nature, flow and concentration of pollutant emissions which are object to a norm of emission, and the nature, volume and destine of the generated solid waste mentio-

174 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 260.

ned by the regulation. Also, Article 48 of the 19.300 Act expressed that a law would establish the nature and the manners of assignation, division, transference, duration and other characteristics of the tradable emission permits.

This instrument is directly related to the reports on the state of the environment, the list of polluted areas, norms of emissions and environmental quality mentioned before, inasmuch as to determine the quantity of emissions in respect of a determined pollutant, the contamination in the elements of the environment and emission sources must have been already measured, and also, a norm of environmental quality must have had established a tolerable level for that pollutant.<sup>175</sup> Also, Article 47 of the 19.300 Act included them as one of the economic instruments that may be used concerning the plans of prevention and decontamination previously revised.

It is worthy to mention that, as confirmed by the Ministry of the Environment, in Chile does not exist any regulation that obliges industries to measure their carbon footprint. Thus, the tradable emission permits are seen as an additional incentive to make industries measure their pollution footprints to access to this economic incentive. In this sense, this instrument is related to the information inasmuch as the industry to access to these permits, has to implement efficacious measures to their production processes, which is translated into money-saving because of this mechanism, and also, making public reports of this reduction of emissions and disseminating them, the enterprise will be showing its responsible and ethical be-

175 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 261.

havior towards the environment, which means an improvement of its reputation.<sup>176</sup>

### 3.7.1.7 *Environmental Impact Assessment System*

The Environmental Impact Assessment System is the preventive instrument for the protection of the environment most used and disseminated in compared law.<sup>177</sup> For instance, it has been included in international instruments such as the Rio Declaration in its principle 17 which expressed that “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

Although this instrument is a proceeding of environmental impact assessment to predict environmental impacts concerning any measure or activity, whether political or legislative, administrative or private, is in respect of the economic activities by citizens that it is more commonly used, due to the fact that it is a way to limit economic freedom. On the contrary, when the activity comes from the State, through policies or general plans, the Strategic Environmental Assessment is the instrument used to revise the environmental impacts.<sup>178</sup>

176 Chilean Ministry Of The Environment’s website. ‘Preguntas Frecuentes 8.3.3 ¿Qué es la huella de carbono?’ Available on <https://mma.gob.cl/cambio-climatico/preguntas-frecuentes/>

177 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 263.

178 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 263.

In the Chilean legal order, this system has been included as a preventive instrument to control determined projects, which may be traduced as both a limitation and a guarantee for the realization of economic activities. Article 10 of the 19.300 Act included projects that are overall economic activities, both public and privates without distinction. Even further, Article 22 of the 19.300 Act expressed that projects from the public sector will have to be submitted to the environmental impact assessment system in the same conditions as the privates.

Concerning its concept, Article 2(j) of the 19.300 Act defined it as the proceeding managed by the Environmental Assessment Service, which, based on an Environmental Impact Declaration or Study, will determine if the environmental impacts produced by an activity or project is in conformity to the norms in force. The proceeding ends with the Environmental Resolution and in cases of activities or projects listed in Article 10 of the 19.300 Act its submission is mandatory. Even more, if the project is carried out anyway without submitting it to the environmental impact assessment system, the Superintendency of the Environment may oblige the owner of the project to submit it, through the requirement of submission and sanctioning (Article 3 (i), (j), (k) and (o); Article 35 b); and Article 36(1)(f), 36(2)(d) of the 20.417 Act). Additionally, Article 3 of Decree No. 40 listed the projects or activities susceptible of causing an environmental impact in any of their phases, which must be submitted to the Environmental Impact Assessment System.

In respect to its relationship with information, the 20.417 Act in its article 31 (a) expressed that within the National System of Supervision Information, the Superintendency of the Environment must include Environ-

mental Rating Resolutions, the sectoral environmental permits associated with each one of them; the supervision actions performed regarding these Environmental Rating Resolutions, the outcomes, and its measures, analysis and any other data provided by the owners of the projects, in conformity to the requirements established by these resolutions.

This instrument is relevant concerning active transparency and access to information because, as we know, access to information has a direct link with participation, and through the environmental impact assessment system, the principle of cooperation included in Article 6(1) of the Escazú Agreement is materialized. In fact, the administrative proceeding considers participation and conjunct work of the owner of the project, the public authorities with competencies in environmental matters and the organized community, as well as the natural persons directly affected by the project. Moreover, Article 14(d) of the 19.300 Act expressed that among the aspects to be considered within the administrative proceeding of the environmental impact assessment system, the participation of citizenry's organizations is included. In this regard, Articles 26 to 31 of the 19.300 Act establish the manner to verify the public participation in the proceeding, which includes the mentioned organizations and legal or natural persons as well.<sup>179</sup>

Public participation in the environmental impact assessment system –and in general– is based on access to information, because as acknowledged by Article 30 bis of the 19.300 Act, it includes the right to access to in-

179 Cfr. *op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 267.



formation, and in this case, the physical or electronic assessment file. The right to access to information in this context, was established in specific terms by Article 27 of the 19.300 Act, which expressed that any person, natural or legal, will be able to access the content of the project and the accompanying documents. Moreover, the access to information is relevant, inasmuch as by application of the general rules of the administrative procedures, according to Article 21 of the 19.880 Act, he/she/they will be considered as an interested party and will be able to intervene in the proceeding of the environmental impact assessment system.<sup>180</sup>

However, it must be bear in mind that participation in the environmental impact Study assessment does not require being an interested person in a formal sense. Given the environmental relevance that a project or activity has when submitted to the environmental impact study, the law understands that any person, legal or natural, might have an interest in it and has the right to make observations.<sup>181</sup>

In respect of the environmental impact declaration, by application of Article 30 bis of the 19.300 Act, public participation is not mandatory and has to be requested, to ensure that the public is well informed of the submission of a project or activity through an environmental impact declaration, and therefore be able to request the public participation, Article 30 of the 19.300 Act expressed that the Assessment Commission or the Executive

180 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 269.

181 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 270.

Director must publish a list of Environmental Impact Declarations submitted to assessment every month, with the express purpose to keep the citizenry duly informed. Also, Article 93 of Decree No. 40 established that the Environmental Assessment Service has the duty, as the administrator of the environmental impact assessment system, to publish every month in the Official Newspaper and in a regional or national newspaper, a list of projects submitted for assessment through environmental impact declarations.

### *3.7.1.8 Environmental Certificate*

Environmental protection depends on the efficacy of the environmental management instruments. Nevertheless, it will not be successful without adequate supervision of them. The supervision of the environmental regulation is complicated due to the deficiencies of the environmental Administration itself and due to the technical, geographical and climatical complexities in the supervision of the environmental regulation. In light of this situation, an alternative option came up, promoted by the public environmental Administration and by international organizations, the possibility to apply conformity assessment instruments and certification of environmental regulation accomplishment.<sup>182</sup>

This alternative option is a manifestation of the cooperation principle included in Article 6(1) of the Escazú Agreement. Through this environmental management instrument, the State recognizes the technical competence, and independent and moral suitability of a private en-

182 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 325.

tity (natural or legal person), so it could give faith of the accomplishment of certain environmental conditions by a product, process or establishment. In Chile, this act of acknowledgment by the State is known as ‘accreditation’, although the legislator sometimes confuses it with the certification itself. This accreditation is mainly carried out by the ‘National Institution of Normalization’.<sup>183</sup>

Certification, on the other hand, is a declaration contained in a document, in which it is pointed out that a determined product, enterprise or establishment complies with the requirements defined by the determined technical norm. Certification may be classified as general certification and environmental certification. About the former, the certification may correspond to the verification of any quality of a product, process or establishment. However, in environmental certification, the declaration will be focused on the accomplishment of environmental regulation and the sustainable or less harmful character of that product, process or establishment, for the environment.<sup>184</sup>

Also, concerning the environmental certification, it may be sub-classified as voluntary or obligatory. Regarding the voluntary environmental classification, it is related to information because normally, under these voluntary instruments, the economic benefit of an enterprise to obtain an environmental certification is that it may be appraised as an improvement of its position in the market, and therefore, certification is transformed into an instrument that corrects the information asymmetries between produ-

183 Cfr. *op. cit.* Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 325.

184 Cfr. *op. cit.* Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 325.

cers and consumers, allowing informed decision-making by the public.<sup>185</sup>

#### *3.7.1.8.1 Eco-labeling*

Into the bargain, I consider relevant to allude to the labeling of environmental aspects of goods and services or ‘eco-labeling’.<sup>186</sup> To contextualize, eco-labeling emerged from trade. The prospect of long-term and irreversible damages to the environment by certain economic activities, made States explore possibilities to create economic incentives for industries to promote more environmentally friendly patterns of production. In 1978, Germany launched the first program of its kind to include the concept of eco-labels for consumer products. Afterward, as the oldest and perhaps most developed system, it has

185 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 326.

186 “Ecolabelling is a voluntary method of environmental performance certification and labelling that is practised around the world. An ecolabel identifies products or services proven to be environmentally preferable within a specific category.” Definition available on Global Ecolabelling Network’s website. ‘What is Ecolabelling?’. Available on <https://globalecolabelling.net/what-is-eco-labelling/#:~:text=Ecolabelling%20is%20a%20voluntary%20method,preferable%20within%20a%20specific%20category>.

served as a model for other countries to follow and eco-labeling has become increasingly popular.<sup>187</sup>

The potential usefulness of this mechanism was acknowledged by a growing number of states and as well by Agenda 21.<sup>188</sup> Subedi explained that “since the labels provide consumers with an easily recognizable symbol indicating that a product’s environmental friendliness has been assessed and approved by a credible body of experts, the label should improve the sales or image of a labeled product. It is hoped that by creating consumer awareness of less environmentally damaging products and helping the so-called ‘green consumers’ to make informed purchasing

187 In 1988 Canada launched a similar program; Japan in 1989; Norway, Sweden and Finland under the Nordic Council Program in 1991, and also Austria, Portugal and France in the same year; and the European Union launched a unified scheme in 1992. Among developing countries, India, Korea and Singapore have launched eco-labeling programs. See Subedi, Surya P. (1999). ‘Balancing International Trade with Environmental Protection: International Legal Aspects of Eco-Labels.’ *Brooklyn Journal of International Law*, Vol. 25, Issue 2, Article 26, p. 376.

188 Agenda 21 highlighted the importance of eco-labeling by expressing that “Governments, in cooperation with industry and other relevant groups, should encourage expansion of environmental labeling and other environmentally related product information programs designed to assist consumers to make informed choices”, United Nations Sustainable Development (1992). ‘United Nations Conference on Environment and Development. Agenda 21.’ Rio de Janeiro, Brazil. 3-14 June 1992, para 4(21). See also op. cit. Subedi, Surya P. (1999), ‘Balancing International Trade with Environmental Protection: International Legal Aspects of Eco-Labels.’ p. 373-374, and United Nations Food And Agriculture Organization’s website. ‘2. Why Label for Sustainability?’. Available on <http://www.fao.org/3/y2789e/y2789e05.htm#fn2>

decisions, labeling schemes will eventually encourage manufacturers to change their entire product development process into a more environmentally friendly process.”<sup>189</sup>

The Escazú Agreement included eco-labeling in article 6(10) and mentioned that States should ‘ensure that consumers and users have official, relevant and clear information on the environmental qualities of goods and services and their effects on health, favoring sustainable production and consumption patterns.’ This obligation may be really useful to accomplish well-informed consumers, as noted by the WTO Committee on Trade and Environment when said that “well-designed eco-labeling schemes/programs can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer public [and it went on to say that] increased transparency can help deal with trade concerns regarding eco-labelling schemes/programmes while it can also help to meet environmental objectives by providing accurate and comprehensive information to consumers.”<sup>190</sup> However, the Escazú Agreement did not refer to the implementation of eco-labeling whatsoever.

189 Op. cit. Subedi, Surya (1999), ‘Balancing International Trade with Environmental Protection: International Legal Aspects of Eco-Labels.’ p. 375. Also, eco-labeling programs that have trade implications, are also likely to run the risk to violate GATT rules. See for example, GATT Panel Report (1993). Report on United States – Restriction on Imports of Tuna (DS29/R). 18 February 1992.

190 WTO Committee on Trade and Environment (1996). Report ‘Trade and the Environment, News and View from the WTO’ (Doc. PRESS/TE 014), 18 November 1996, para 183-184.

Concerning the environmental information contained in eco-labeling, in Chile exists the ‘Clean Production Agreements’, celebrated by the industrial sector or enterprises and the public competent bodies in matters of the agreement, which purpose is to establish specific goals and actions to implement an environmental-friendly production process. The general purpose of these agreements is to be a management instrument that enables the improvement of the conditions of production, environment, hygiene labor security, energetic efficiency, efficiency on the use of water and other matters included in these agreements. Also, it seeks to improve productive efficiency, and as said before, to improve competitiveness in the market.<sup>191</sup>

The most recent improvement about this environmental management instrument is that in the context of the 20.920 Act which establishes the framework for the waste management and responsibility of the producer and promotion of recycling, last year, the government announced along with the creation of a website to obtain information related to recycling,<sup>192</sup> the eco-label named as #ElijoReciclar [#IChooseToRecycle], as the eco-label that will provide information to consumers on the recyclability of hundreds of containers and packaging of massive consumption. And by entering the mentioned website, the citizenry will be able to know the lineaments of eco-labeling and its purposes. Also, the website provides information related to how and where to recycle, the require-

191 Chilean Agricultural And Livestock Service’s website. ‘Acuerdos de producción limpia (APL).’ Available on <https://www.sag.gob.cl/ambitos-de-accion/acuerdos-de-produccion-limpia-apl>

192 Chilean Ministry Of The Environment’s website. ‘#ElijoReciclar’. Available on [www.elijoreciclar.cl](http://www.elijoreciclar.cl)

ments for the containers and packaging to get the green certificate, the containers that already have a certificate, among other matters of interest.<sup>193</sup>

In sum, as can be noted, eco-labels related to recycling is a great case of an environmental certificate. It shows the evolving market behavior in respect of consumers' decision-making through access to environmental information in an active transparency mechanism. This has been noted and considered by enterprises, having a clear example concerning the commented 'Clean Production Agreement', to which international enterprises such as Coca-cola, L'Oreal, Nestlé and Walmart have joined.<sup>194</sup>

Also, about information related to health in eco-labeling, in the context of food in general, Article 2 of the 20.606 Act on the nutritional composition of food and their publicity, and Decree No. 977 of the Ministry of Health which approves the sanitary regulation of food, in Arti-

193 Chilean Ministry Of The Environment's website. 'Sello informará a los consumidores sobre la reciclabilidad de los envases de los productos.' Available on <https://mma.gob.cl/sello-informara-a-los-consumidores-sobre-la-reciclabilidad-de-los-envases-de-los-productos/>

194 Enterprises actually participating in the Chilean initiative are: Agrosuper, Beirsdorf, Capel, Carozzi, Casa Ideas, CCU, Cencosud, Cervecería AB Inbev Chile, Coca Cola, Colmenares San Cristobal, Concha y Toro, Davis, Gourmet, Empresas Iansa, ICB, L'Oreal, Natura, Nestlé, Procter & Gamble, Rhein/Argos, SMU, Softys, Tottus, Tresmontes Lucchetti, Tucapel, Unilever, Virutex/Ilko, Walmart y Watt's. See Chilean Ministry Of The Environment's website. 'Sello informará a los consumidores sobre la reciclabilidad de los envases de los productos.' Available on <https://mma.gob.cl/sello-informara-a-los-consumidores-sobre-la-reciclabilidad-de-los-envases-de-los-productos/>



cles 107-121, promotes de inclusion of information on ingredients, production and duration date, information related to the producer, language, among others, however, it does not refer to the environmental qualities of those goods and services and their effects on health.

However, in the particular cases of organic, biological or ecological products, in accordance with the 20.089 Act which creates the National Certification System for Agricultural Products, as a voluntary system for those who wish to participate, in any way, in the internal and external market of organic products, and that only them will be able to use labels with expressions such as ‘ecological product’, ‘biological product’, etc., and use the official label (Article 3 of the 20.089 Act). Also, it expressed in Article 2 that organic agricultural products are those produced in holistic management systems of production, which promotes and improves the ecosystem’s health, and in particular, biodiversity, biological cycles and biological activity of soil.

Additionally, there is an energy efficiency labeling, in the case of products that consume energy, in accordance with Article 3(14) of the 18.410 Act which creates de Superintendency of Electricity and Fuels, and according to the provisions included in Circular No. 16.621 of the Ministry of Energy, which communicates the obligation to keep linked to online selling products, visible to the public, the certification labeling (SEC label) and the energetic efficiency label if it corresponds. However, as the cited cases are not applied to the generality of products, Chile complies with this provision of the Agreement, although partially.<sup>195</sup>

195 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 29.

### 3.7.1.8.2 *Eco-Auditing*

Traditionally, the use of the environment or natural resources has been considered to be for free. All the costs related to clean-up or cure diseases have been endured by the environment and the entire population, and not by the producers or polluting agent as negative externalities. The environmental goods that belong to the population as a whole (or no-one in particular, depending upon one's perspective), have to be considered as a valuable asset, and its damage must be internalized as one of the costs of the production in trade and services. In this sense, the environmental economy provides for principles, procedures and institutions that allow to consider these environmental goods as scarce, they give them value and treat them as a market instrument.<sup>196</sup>

Although the term 'audit' comes from the financial sector, eco-auditing does not fit into common financial auditing. Traditional accounting does not include the full costs of production, such as the 'green assets', does not monitor their use and does not measure environmental liabilities. Instead, eco-auditing includes procedures, methodologies and scopes of application with environmental variables that are not foreseen in the traditional financial audits performed by internal or independent consultants.<sup>197</sup> Accounting is the management of the records of a company or a state and the report of their state of affairs; and environmental auditing or 'eco-auditing', on the other hand, revises those accounting records to determine if the in-

196 Cfr. op. cit. Bermúdez, Jorge (2014). 'Fundamentos de Derecho Ambiental', pp. 32-33.

197 Cfr. op. cit. Sands, Philippe (2003), 'Principles of International Environmental Law', pp. 864-865.

formation contained in them is legitimate and accurate. These procedures are because “since sustainable development includes economic and environmental dimensions, it is essential that national accounts reflect the use of natural assets in addition to produced capital consumption.”<sup>198</sup>

Eco-auditing should not be confounded with environmental impact assessment, because although both of them are procedures of measuring environmental performance and might share terminologies such as ‘impact’ or ‘effect’, there are substantial differences between them both. On one hand, EIA is an anticipative procedure that takes place before an activity is carried out and it “ensures that the environment implications of decisions are taken into account before the decisions are made... [it] can be undertaken for individual projects... or for public plans or programs”<sup>199</sup> Therefore, it is a predictive tool for impacts on the environment of future activities and provides relevant information to the competent authorities to decide whether a project should be authorized. On the other hand, eco-auditing is performed when the activities have

198 United Nations Department Of Economic And Social Affairs And United Nations Environment Programme (2000). ‘Handbook of National Accounting. Integrated Environmental and Economic Accounting. An Operational Manual’, Series F, No. 78 (ST/ESA/STAT/SER.F/78). New York, p. I (Preface).

199 European Commission’s website. ‘Environmental Assessment.’ Available on [https://ec.europa.eu/environment/eia/index\\_en.htm](https://ec.europa.eu/environment/eia/index_en.htm)

been already authorized and carried out, and its aim is to revise environmental effects of current activities.<sup>200</sup>

Eco-auditing could be considered as a management technique to evaluate and revise the performance of an activity to ensure that environmental externalities, which are mostly treated as ‘zero-priced’ resources, are accurately reflected in accounting and subsequent balances of a company or the national accounts of a state.<sup>201</sup> It was reflected in Principle 16 of Rio Declaration, which calls national authorities to promote the internalization of environmental costs, by expressing that ‘National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.’

Eco-auditing also helps to ensure that information related to the use of environmental resources is effectively disclosed, so stakeholders such as shareholders, customers and the local communities could be able to make the best uses of natural resources. The information could be in respect of environmental policies or programs, environmental improvements or the financial impacts that envi-

200 Cfr. Sheate, William. Unit 1 ‘Introduction to Environmental Auditing and Management’ 2.1 ‘What is environmental auditing?’. University of London, International Programmes. Center for Development, Environment and Policy. Available on [https://www.soas.ac.uk/cedep-demos/000\\_P508\\_EAEMS\\_K3736-Demo/unit1/page\\_14.htm](https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm)

201 Cfr. op. cit. Sands, Philippe (2003), ‘Principles of International Environmental Law’, p. 863.

ronmental measures may have, as well as the responsibilities for environmental clean-up or associated measures.<sup>202</sup>

The Escazú Agreement included eco-auditing and accounting in article 6(8) when expressed: ‘Each Party shall encourage independent environmental performance reviews that take into account nationally or internationally agreed criteria and guides and common indicators, with a view to evaluating the efficacy, effectiveness and progress of its national and international commitments. The reviews shall include participation by the various stakeholders.’

Hence, as noted, the Agreement included both aims of eco-auditing. Firstly, it promotes the revision of the accounting carried out by States, to check the inclusion of these externalities and environmental related policies, for the fulfillment of national and international commitments, such as the Paris Agreement.<sup>203</sup> Secondly, it promotes eco-auditing as a means of access to information, because it expressly included the participation of the various stakeholders, which need to be informed to participate. Allowing, therefore, independent environmental performance reviews to be carried out by non-governmental organizations, international organizations and so on and does not limit the reviews, leaving the door open for States to promote and receive as many as

202 Cfr. *op. cit.* Sands, Philippe (2003), ‘Principles of International Environmental Law’, p. 863.

203 For example, the commitments made by States to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.” United Nations (2015) Paris Agreement, article 2(a).

they are. Also, to facilitate these reviews, article 6(9) went on to say that 'Each Party shall promote access to environmental information contained in concessions, contracts, agreements or authorizations granted, which involve the use of public goods, services or resources in accordance with domestic legislation.'

As mentioned before, there are several complications the Administration faces in respect of the supervision of environmental regulation. This situation was highlighted on the report made by ECLAC and OECD in respect of the environmental performance of Chile. Along the report, the emphasis was constantly placed on the development and strengthening of the environmental institutionality, the report highlighted as well, that a policy of supervision of environmental regulation on the basis of coordination with sectoral supervisor and control bodies is neither the best nor the most efficacious institutional solution for ensuring its accomplishment.<sup>204</sup>

With that diagnosis in mind, the legislator considered the relevance of environmental certification and included it in our environmental legal order, as can be noted in Article 3(p) 20.147 Act, which gave the Superintendency of the Environment the competence to administer an assessment mechanism and conformity certificate in respect to the applicable environmental regulation and the accomplishment of the conditions of an environmental authorization for functioning.

204 Cfr. *op. cit.* Organization For Economic Co-Operation And Development (OECD) (2016). 'OECD Environmental Performance Reviews: Chile 2016'. p. 18 *apud. op. cit.* Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 327.

In this regard, Supreme Decree No. 39 which approves the regulation for technical entities of environmental certification of the Superintendency of the Environment, defined, in its Article 1(g), the environmental conformity assessment as the conjunct of technical proceedings through which the authorized Environmental Conformity Evaluator, assesses the accomplishment of the applicable environmental regulation and/or the conditions regarding an environmental authorization for functioning. In respect of environmental conformity certification, it was defined in the same provision as the conformity declaration on the accomplishment of the applicable environmental regulation and/or the conditions regarding an environmental authorization for functioning, through the elaboration of an environmental conformity certificate granted by the Technical Entity of Environmental Certification.

In sum, the main objective of an environmental certificate is to assess the applicable environmental regulation by a private entity previously accredited by the Superintendency of the Environment, which like the other certification systems, is a private entity specialized in supervision and assessment activities and conformity certification (audit enterprise or conformity certification entity, which may be a natural or legal person), which at the end of the assessment proceeding, will elaborate a certificate of the accomplishment of the applicable environmental regulation.<sup>205</sup> Article 18 ter and 18 quáter of the 19.300 Act and Articles 42 and 43 of the 20.417 Act establish the passive subjects to which this certification may be applied, and most of them, are just voluntary submissions.

205 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', pp. 327-328.

### 3.7.1.9 *Environmental Education*

The requirement to improve public education and awareness on environmental matters and to give due publicity to the importance of environmental matters has been included in some international environmental agreements.<sup>206</sup>

206 For example, in relation to public awareness: United Nations (1987). 'Montreal Protocol on Substances that Deplete the Ozone Layer,' 16 September 1987, article 9(2); United Nations (1989). 'Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted by the Conference on the Plenipotentiaries,' 22 March 1989, article 10(4); United Nations (1992) Convention on Biological Diversity, article 13; United Nations (1992). 'United Nations Framework Convention on Climate Change,' article 4(1) (i); United Nations Economic Commission For Europe (UNECE) (1998). 'Protocol (POP) to the 1979 Convention on Long-range Transboundary Air Pollution on Persistent Organic Pollutants (LRTAP), article 6; United Nations Economic Commission For Europe (UNECE) (1999). 'Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone (Gothenburg)', article 5(1) and 5(2); United Nations Economic Commission For Europe (UNECE) (1999). 'Protocol on Water and Health to the 1992 Watercourses Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Volume 2331, A- 33207, article 9(1); United Nations (2000). 'Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Montreal, article 23; and United Nations Environment Programme (2001). 'Stockholm Convention on Persistent Organic Pollutants (POPs Convention), article 10(1)(c) and 10(1)(f).



<sup>207</sup> Furthermore, principle 10 of Rio Declaration synthesized some of the Convention's Outreach Programme 1999-2002. Actions to promote communication, education and public awareness to support implementation of the Convention on Wetlands (Ramsar commitments that had been adopted in some of those international treaties. <sup>208</sup> For instance, it acknowledged the relevance of public education and provided that 'States shall facilitate and encourage public awareness and participation by making information widely available.'<sup>209</sup>

The obligation to educate the public is relevant inasmuch as generally "open government laws focus solely on maximizing the release of 'government information'... do not focus on improving the 'knowledge' of an understanding, participatory, competent public."<sup>210</sup> Because "the cli-

207 For example, in relation to education and training: Association Of South East Asian Nations (1985). 'ASEAN Agreement on the Conservation of Nature and Natural Resources.' Article 16(1) and 16(3). See also, United Nations (1992). 'United Nations Framework Convention on Climate Change,' articles 12 and 13; United Nations Educational, Scientific And Cultural Organization (UNESCO) (1999) Convention) Res. VII.9; and op. cit. United Nations Environment Programme (2001). 'Stockholm Convention on Persistent Organic Pollutants (POPs Convention), article 10(1)(e) and 10(1)(g).

208 Cfr. op. cit. Sands, Philippe (2003), 'Principles of International Environmental Law', p. 860.

209 Furthermore, Chapter 36 of Agenda 21 concerning the promotion of education, public awareness and training, created upon Principle 10, three program areas to reorientate education towards sustainable development, increase public awareness and promote training.

210 Op. cit. Fenster, Mark (2006), "The Opacity of Transparency", p. 935.

ché is not quite right: information by itself is not power,”<sup>211</sup> it must be accompanied with education to ensure the public understands the information.

Additionally, the IACHR named this obligation as ‘culture of transparency’ and explained that “the State has the obligation to promote, within a reasonable period of time, a true culture of transparency. This involves systematic campaigns to inform the general public about the existence of the right of access to information and ways of exercising that right.”<sup>212</sup>

To avoid information laws that would simply require the availability of information and not necessarily be useful and understandable to the public, the Escazú Agreement included the obligation to educate and raise public awareness both separately and also in a combined manner. Regarding education alone, the Agreement within the recommendation of activities mechanisms States could apply in respect of the particular consideration that States should give to least developed countries, landlocked developing countries and small island developing States, expressly included ‘education’ in article 11(3)(a).

211 Op. cit. Florini, Ann. (2007), ‘Introduction: The Battle Over Transparency,’ p. 3.

212 Op. cit. Inter-American Commission On Human Rights (IACHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 302. See also, Inter-American Juridical Committee (2008). ‘Principles on the Right of Access to Information.’ Resolution 147 OEA/Ser. Q, CJI/RES. 147 (LXXIII-O/08) of the 73<sup>o</sup> regular period of sessions. 7 August 2008. Principle 10.

Additionally, to strengthen national capacities to contribute to the implementation of the Agreement, Article 10(2) pointed out some of the measures States could apply to this end, including: (a) to “train authorities and civil officials on environmental rights.’ Then, about awareness-raising alone as a mechanism, article 10(3) in letter (b) included to ‘develop and strengthen environmental law and access rights awareness-raising and capacity-building programs for, inter alia, the public, judicial and administrative officials, national human rights institutions and jurists”.

On the other hand, the Agreement also included both mechanisms in a combined manner in article 11(3) (b), which reads: “developing, sharing and implementing educational, training and awareness-raising materials and programs”; and in article 10(2)(d): to “promote education and training on, and raise public awareness of, environmental matters, through inter alia, basic educational modules on access rights for students at all levels of education” to contribute the implementation of the Agreement. Finally, this provision highlighted the importance of some actors concerning the accomplishment of these mechanisms and expressed within the measures: (f) to ‘acknowledge the importance of associations, organizations or groups that train the public on or raise public awareness of access rights.

In Chile, the Ministry of the Environment has expressed that environmental education is a management instrument, which purpose is to educate the citizenry on the protection of our natural surroundings and the fundamental importance of environmental protection, so as to build consciousness and changes of behavior concerning the environmental problems of our country, including values and providing tools to prevent or solve

them.<sup>213</sup> Into the bargain, Article 6 of the 19.300 Act expressed that the educative process, in its diverse levels, by transmitting knowledge and teaching modern concepts of environmental protection focused on the comprehension and to become aware of the environmental problems, will have to integrate values and the development of habits and behavior towards the prevention and solution of those problems.

Accordingly, the Ministry of the Environment in 2015 created the Environmental Training Academy Adriana Hoffmann, to respond to the high public demands on education regarding environmental matters and sustainable development. This institution is thought to be a means for constant updated academic training at different levels on environmental issues.<sup>214</sup>

In this regard, Article 4 of the 19.300 Act imposed a generic mandate to the Administration of the State, to consider environmental education within their teaching

213 The Ministry of the Environment has explained on its website the meaning of environmental education as: “Se trata de un proceso a través del cual buscamos transmitir conocimientos y enseñanzas a la ciudadanía, respecto a la protección de nuestro entorno natural, la importancia fundamental sobre resguardar el medio ambiente, con el fin de generar hábitos y conductas en la población, que le permitan a todas las personas tomar conciencia de los problemas ambientales en nuestro país, incorporando valores y entregando herramientas para que tiendan a prevenirlos y resolverlos.” Chilean Ministry Of The Environment’s website. Available on <https://educacion.mma.gob.cl/que-es-educacion-ambiental/>

214 Cfr. Chilean Ministry Of The Environment’s website. Environmental Training Academy Adriana Hoffmann. Available on <https://mma.gob.cl/academia/>

programs, and expressed that it is the duty of the State to promote educational campaigns focused on the protection of the environment. Thus, this instrument responds to a political decision, therefore, its intensity would depend on the emphasis given by the educational Administration of a determined moment.<sup>215</sup> However, the Ministry of the Environment has given this instrument a high priority within its political directives.<sup>216</sup>

This, in the accomplishment of the assignment conferred to it by Article 70(m) of the 19.300 Act, which expressly said the Ministry of the Environment has to cooperate with the competent authorities at a national, regional and local level in the drafting, approval and development of educational programs, and environmental promotion and diffusion, to build a national consciousness on the protection of the environment, sustainable development, preservation of nature and conservation of the environmental heritage, and to promote responsible public participation in these matters.

This function is developed through diverse instruments. The financials are the most used in this regard.<sup>217</sup> Article 70(v) expressed that the Ministry of the Environ-

215 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 194.

216 See Chilean Ministry Of The Environment's website. Division of Environmental Education and Public Participation (2018). 'Educación Ambiental. Una mirada desde la institucionalidad ambiental chilena'. Santiago, Chile. Available on [https://mma.gob.cl/wp-content/uploads/2018/08/LIBRO-EDUCACION-AMBIENTAL-final\\_web.pdf](https://mma.gob.cl/wp-content/uploads/2018/08/LIBRO-EDUCACION-AMBIENTAL-final_web.pdf)

217 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 194.

ment is in charge of financing projects and activities focused on the protection of the environment, sustainable development, preservation of nature, conservation of the environmental heritage, environmental education and public participation. One of those financing instruments is the Environmental Protection Funds included by Article 66 of the 19.300 Act. In parallel, according to Article 33(g) of the 20.285, established that the Council for Transparency is the entity responsible for providing training to public employees and the general public, through the implementation, directly or through third parties, of activities to train public officials in transparency and access to information, and also, Article 33(h) of the 20.285, to implement activities related to information outreach regarding matters in its jurisdiction.

About awareness of the public, article 28 of the 19.300 Act imposes an obligation to the owner of the project to publish in the Official Newspaper and in a regional newspaper or of national circulation, a signed extract of the environmental impact study, so the public can be aware a project is under assessment and therefore be informed and participate. Hence, although the general mandate to promote environmental education, as said, depends on the political will of the government, there is a strong legal basis for the development of environmental education so the population can obtain information related to national environmental problems and thus be able to participate in an informed manner.

### *3.7.2 Environmental licenses or permits granted by the public authorities*

The most relevant permits granted by public authorities, are in the context of the Environmental Impact Assessment System. According to Article 2 (f) and (j) of

the 19.300 Act, this administrative proceeding is focused on ensuring that the assessed activity or project is in line with the environmental regulations in force. Those regulations in force are the ones in environmental matters associated with a determined sectoral environmental permit granted for the development of an activity submitted to assessment.

This can be concluded from Article 8 of the 19.300 Act, inasmuch as it orders that all the sectoral environmental pronouncements or permits included in the national legislation in force, must be obtained through the Environmental Impact Assessment System, which is also reiterated by Article 107 of Decree No. 40.<sup>218</sup> This way of obtaining sectoral environmental pronouncements or permits has been called a ‘unique environmental window’, because all of the administrative authorizations have to be requested through the proceeding of the Environmental Impact Assessment System.

Articles 107-161 of Decree No. 40 established a list of sectoral environmental pronouncements or permits that have to be requested through the administrative proceeding. The relevance of this list is that it establishes the requirements for their granting and the formal and technical contents to certify the accomplishment. In consequence, the State’s administrative bodies with environmental competencies are not allowed to add new requirements or conditions for the granting of these sectoral environmental pronouncements or permits. There are two classes of sectoral environmental pronounce-

218 Cfr. *op. cit.* Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 276.

ments or permits: (1) the ones purely environmental and (2) of a mixed nature.<sup>219</sup>

Concerning the former, they are regulated in Articles 111 to 130 of Decree No. 40. In this case, according to Article 108 of Decree No. 40, the favorable Environmental Rating Resolution will establish the granting by the State's administrative body with environmental competence, under the conditions or requirements that the same resolution will impose. This means that the content of the sectoral environmental pronouncements or permits will be completely determined on the basis of the assessment proceeding's outcomes. This comes from the same provision which expressed that to this end, it will be enough for the owner of the project to exhibit the Environmental Rating Resolution to make the competent body grant the sectoral environmental permit, without further do.<sup>220</sup>

Regarding the latter, they are regulated in Articles 131 to 160 of Decree No. 40. In the case of a favorable Environmental Rating Resolution, this will certify the accomplishment of the environmental requirements of these sectoral environmental pronouncements or permits. However, unlike the sectoral environmental pronouncements or permits which are purely environmental, in the case of the ones with mixed nature, they have to be in line with the outcomes of the environmental assessment proceeding, but also, the sectoral competent authority keeps its technical competencies concerning the technical and non-environmental content of the secto-

219 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 277.

220 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 277.



ral environmental pronouncements or permits. Therefore, the sectoral administrative authority may refuse to grant the sectoral environmental permit on the basis of sectoral non-environmental arguments. However, according to Article 108 of Decree No. 40 if the Environmental Rating Resolution is not favorable, the sectoral administrative authority is obliged to refuse the granting of sectoral environmental pronouncements or permits, even in cases of the fulfillment of the other requirements.<sup>221</sup>

Accordingly, the Escazú Agreement in its Article 6(11) expressed that “Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.” In this respect, the Environmental Assessment Service’s website provides for a list of regulations in force associated with sectoral environmental pronouncements or permits is available.<sup>222</sup> Also, the Environmental Assessment Service explained that the System of Information on sectoral environmental pronouncements or permits is focused on facilitating the identification of the environmental regulation and sectoral environmental permits applicable to projects and activities submitted to the Environmental Impact Assessment System.<sup>223</sup> Thus,

221 Cfr. op. cit. Bermúdez, Jorge (2014), ‘Fundamentos de Derecho Ambiental’, p. 277.

222 Chilean Environmental Assessment Service’s website. Available on <https://www.sea.gob.cl/documentacion/guias-evaluacion-impacto-ambiental/permisos-ambientales-sectoriales>

223 Chilean Environmental Assessment Service’s website. Available on <https://www.sea.gob.cl/documentacion/permisos-autORIZACIONES-ambientales>

as can be noted, the environmental regulation detailed in a precise manner the projects and activities obliged to be submitted to the Environmental Impact Assessment System to obtain a sectoral environmental pronouncement or permit, and the requirements for that.

Nevertheless, as noted, there is just one statal integrated system of permits and environmental licenses and only in the context of the Environmental Impact Assessment System, excluding other permits and licenses outside that environmental management instrument. Thus, Chile complies with this provision of the Agreement, although imperfectly.<sup>224</sup>

### **3.8 Estimated list of waste by type and, when possible, by volume, location and year (Article 6(3)(i) Escazú Agreement)**

The Agreement included in its Article 6(3) an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities: '(i) an estimated list of waste by type and, when possible, by volume, location and year.'

In this regard, none of the revised systems of information –National System of Environmental Information in Article 31 ter) of the 19.300 Act and the National System of Supervising Information in Article 31 of the 20.417 Act– considered an estimated list of waste by type and,

224 Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 24.

when possible, by volume, location and year. Thus, Chile does not comply with this provision of the Agreement.<sup>225</sup>

### **3.9 Information on the imposition of administrative sanctions in environmental matters (Article 6(3)(j) Escazú Agreement)**

The Agreement included in its Article 6(3) an obligation that requires States to have in place up-to-date environmental information systems which may include for the development of inventories of environmental resources and data and the strengthening of data collection activities: '(j) information on the imposition of administrative sanctions in environmental matters.' So firstly, an administrative sanction can be defined as negative retribution foreseen by the legal order and imposed by a public administration due to the commission of an administrative breach.<sup>226</sup> Thus, administrative sanctions are thought of as an institutional mechanism to guide the behavior of the administrated individuals towards the objectives sought by the regulation.<sup>227</sup> In this regard, information on the imposition of administrative sanctions in

<sup>225</sup> Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 24.

<sup>226</sup> Cfr. Bermúdez, Jorge (1998). 'Elementos para definir las sanciones administrativas'. In *Revista Chilena de Derecho*, No. Especial, p. 326.

<sup>227</sup> Baldwin, R., Cave, M. and Lodge, M. (2012). 'Understanding Regulation', Second Edition. Oxford University Press, p. 227 onwards. apud. Soto, Pablo (2016). 'Sanciones Administrativas como medidas de cumplimiento del Derecho: un enfoque funcional y responsivo aplicado al régimen sancionatorio ambiental'. *Ius et Praxis*, Vol. 22 No. 2. Talca, Chile.

environmental matters includes two aspects. On one hand, all the requirements, proceeding, levels of sanctions and such, have to be determined in a systematized manner and publicly available. Secondly, concerning the administrative sanctions that have been imposed so far.

About the first aspect, in the Chilean case, the exclusive administrative body competent to impose sanctions in environmental matters is the Superintendency of the Environment, which as is common to Superintendencies in the Chilean legal order, has competencies to supervise and sanction. In this sense, Article 3(o) of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment is the competent body in charge to impose sanctions in accordance with the dispositions included in the 20.417 Act. In the same line, Article 4(h) of the 20.417 Act expressed that it also the competent authority to apply those sanctions.

In this sense, Article 7 of the 20.417 Act expressed that the Superintendent has the exclusive and non-delegable competence to apply the sanctions included in this law. So, in order for the Superintendency of the Environment to be able to make sure the environmental laws are complied with, has a range of mechanisms in its monopoly of sanctioning competencies in respect to the diverse infractions included in Article 35 of the 20.417 Act. However, not all of them are punitive.<sup>228</sup>

228 Concerning the non-punitive mechanisms the Superintendency use to supervise compliance of the environmental laws, they can be classified in: (1) the supervision of norms, conditions and measures compliance established in Environmental Rating Resolutions, on the basis of inspections, controls, measurements, analysis and adopting measures (Articles 3 a), n) and t); and pa-

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ragraph I of Title II of the 20.417 Act.); (2) require information and data related to norms, measures and conditions defined in Environmental Rating Resolutions or applicable Plans of Prevention or Decontamination, as well as the ones necessary for the accomplishment of the Superintendency's competencies, being able to establish general norms on the form and way to present documents (Articles 3 d), e) and f) of the 20.417 Act); (3) require that subjects to the regulation submit their activities or projects to the Environmental Impact Assessment System (Articles 3 i), j) and k) of the 20.417 Act, and Articles 10 and 11 of the 19.300 Act.); (4) establish general and obligatory technical guidelines, defining protocols, proceedings and analysis methods for the supervisor bodies, certified entities and subjects to supervision, which will have to be applied in the assessment, control and measurement of the compliance of Norms of Environmental Quality and Emission (Article 3 ñ) of the 20.417 Act); (5) provide norms and instructions of general character in the performing of its competencies given by the 20.417 Act, which will have to be systematized to facilitate access and acknowledgement (Article 3 s) of the 20.417 Act); (6) Guide subjects to regulation in the comprehension of the obligations established in the environmental management instruments (Article 3 (u) of the 20.417 Act); (7) Help the subjects to regulation in the plans of repair and compliance (Article 3 u) of the 20.417 Act also Supreme Decree No. 30 of 20 August 2012, Article 3); (8) approve gradual programs which consist on a progressive compliance of the requirements established by the environmental regulation (Article 2 h) of the Supreme Decree No. 30 of 20 August 2012); (9) approve, prior pronouncement of the Environmental Assessment Service, plans of repair (Article 43 of the 20.417 Act and Article 2 (f) and Title III of the Supreme Decree No. 30 of 20 August 2012); (10) approve compliance programs submitted by the offender (Article 42 of the 20.417 Act and Article 2 f) and Paragraph 1 of the Title II of the Supreme Decree No. 30 of 20 August 2012); (11) exempt from fine in cases of self-denounces (Article 41 of the 20.417 Act and Article 2 (a) and paragraph 2 of the Title II of the Supreme Decree No. 30 of 20 August 2012).

Regarding the sanctions, they are established in relation to the seriousness of the infractions. According to Article 39 of the 20.417 Act, they are classified as: (1) very serious infractions, which may be subject to revocation of the Environmental Rating Resolution, closure or fine up to ten thousand annual tax units;<sup>229</sup> (2) grave infrac-

229 Some examples of serious faults are: in cases the Environmental Impact Assessment System was eluded (at all), Article 3 (i) of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment is allowed to require, prior a report by the Environmental Assessment Service, to owners of projects that had to submit their projects or activities to the Environmental Impact Assessment System and did not submit it, thus do not have an Environmental Rating Resolution, to submit it to the System as an environmental impact study or declaration. Non-compliance of this order implies a very serious fault and would carry the associated sanction. Also, in cases the Environmental Impact Assessment System was eluded concerning modifications of a project or activity, Article 3 j) of the 20.417 Act, expressed that the Superintendency of the Environment is allowed to require, prior a report by the Environmental Assessment Service, to owners of projects that have an Environmental Rating Resolution, to submit to the Environmental Impact Assessment System the modifications or enlargement of their projects or activities which are required to have a new Environmental Rating Resolution, in accordance to Article 10 of the 19.300 Act. Non-compliance of this order implies a serious fault and would carry the associated sanction. Also, in cases a project or activity is knowingly and on purpose broken-up to elude or vary the way to enter to the Environmental Impact Assessment System, Article 3 i) of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the Superintendency of the Environment is allowed to oblige applicants, prior a report by the Environmental Assessment Service. This breaching implies a serious fault and would carry the associated sanction. Also, Article 28

tions may be subject to revocation of the Environmental Rating Resolution, closure or fine up to five thousand annual tax units; (3) minor infractions which may be subject to written admonition or fine from one to one thousand annual tax units.

Thus, as can be noted, the possibilities of the Superintendency to decide are diverse. Firstly, it may choose the type of sanction, due to the options given by the legislator in relation to the seriousness of infractions. Secondly, the legislator gave the Superintendency the possibility to choose the amount of the fine by establishing just the limits. The environmental institutionality gave a margin of discretion to the Superintendency to consider some other circumstances that may change the scenario when determining the sanction. Those circumstances may be classified in: (1) the ones referred to the previous behavior of the offender (Article 40 (e) of the 20.417 Act); (2) the ones related to performing a compliance program (Article 40 (g) of the 20.417 Act); and (3) any other criteria that in a founded judgment of the Superintendency is relevant for the determination of the sanction (Article 40 (i) of the 20.417 Act). As can be seen, in the last two scenarios, the focus will be on the cooperative behavior of the offender is required for their applicability.<sup>230</sup>

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of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the refusal to accomplish the requirements during the supervision actions will be considered a very serious infraction.

230 Cfr. *op. cit.* Soto, Pablo (2016) 'Sanciones Administrativas como medidas de cumplimiento del Derecho: un enfoque funcional y responsivo aplicado al régimen sancionatorio ambiental'.

On the other hand, in respect to the access to information regarding the administrative supervision procedures that have been performed, Article 31(c) of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the National Supervision Information System administered by the Superintendency, which is of public access, will contain the initiated sanctioning processes by every supervised activity, project and subject and their outcomes.

In addition, Article 31(d) of the 20.417 Act expressed that the supervision processes in respect of norms of emission, environmental quality and the other environmental norms which are not subject to control and supervision by other State's bodies, have to be included. Also, Article 26 of the 20.417 Act as the organic law of the Superintendency of the Environment, expressed that the outcomes from the inspections, measurements and analysis performed by the Superintendency, certified technical entities and sectoral bodies, along with the technical report and its conclusions, will have to be remitted to the National System of Environmental Supervision Information.

About the sanctions, Article 58 of the 20.417 Act expressed that the Superintendency has to register the applied sanctions in a public record, including the individualization of the responsible persons, whether natural or legal, the class of infraction and sanctions. This record has to be available for any person who requires it and be available for consulting electronically as well.

Finally, it is worthy to mention that concerning the idea that access to information is not all if the information is not actually understood by the public, I consider it worthy to mention that Article 3(u) of the 20.417 Act



the organic law of the Superintendency of the Environment establishes as one of the obligations of the Superintendency of the Environment, to provide assistance to the citizens regulated by it, to ensure that the obligations contained in environmental instruments were indeed understood.

### **3.10 Access to environmental information in possession of private entities and sustainability report (Articles 6(12) and 6(13) of the Escazú Agreement)**

About the information held by privates, Bovens underlined that the citizenry's concern is "first and foremost the social functioning of citizens, not only in relation to the public authorities but also in their mutual relations and their relations with private legal entities."<sup>231</sup> Also, Florini underlined that "to demonstrate compliance [with codes of good conduct expected from them], corporations are pressured to release activities to the Environmental Impact Assessment System and did not submit it, thus do not have an Environmental Rating Resolution, to submit it to the System as an environmental impact study or declaration. Non-compliance of this order implies a very serious fault and would carry the associated sanction. Also, in cases the Environmental Impact Assessment System was eluded concerning modifications of a project or activity, Article 3 j) of the 20.417 Act, expressed that the Superintendency of the Environment is allowed to

231 Bovens, Mark (2002). 'Information Rights: Citizenship in the Information Society.' *The Journal of Political Philosophy*: Volume 10, Number 3. Law & Public Administration, Utrecht University, p. 327.

require, prior a report by the Environmental Assessment Service, to owners of projects that have an Environmental Rating Resolution, to submit to the Environmental Impact Assessment System the modifications or enlargement of their projects or activities which are required to have a new Environmental Rating Resolution, in accordance to Article 10 of the 19.300 Act. Non-compliance of this order implies a serious fault and would carry the associated sanction. Also, in cases a project or activity is knowingly and on purpose broken-up to elude or vary the way to enter to the Environmental Impact Assessment information on their practices. And because privatization is moving the provision of public goods into private hands, serious questions arise about when business-held information falls under the heading of proprietary secrets, and when the release of that information is essential for public accountability.”<sup>232</sup>

Thus, the private sector was also targeted under the Escazú Agreement, although through the State. The Agreement expressed in its Article 6(12) that “Each Party shall take the necessary measures, through legal or administrative frameworks, among others, to promote access to environmental information in the possession of private entities, in particular information on their operations and the possible risks and effects on human health and the environment.” In its Article 6(13) expressed that “In accordance with its capacities, each Party shall encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance.”

<sup>232</sup> Op. cit. Florini, Ann. (2007), ‘Introduction: The Battle Over Transparency’, pp. 10-11.

In Chile, however, there is no regulation that considers drafting sustainability reports from public and private companies. The exception could be the Norm of General Character of the Superintendency of Securities and Insurance No. 30 of 1989, which has been modified by the Norm of General Character of the Superintendency of Securities and Insurance No. 386 of 2015, which through the Commission for Finance Market requires that public offer societies in the market of securities, report on the information related to social responsibility and sustainable development. Nevertheless, the scope of the norm is too limited and just applicable in that restricted context. Thus, Chile scarcely complies with this provision of the Agreement.<sup>233</sup>

### **3.11 Pollutant Release and Transfer Register**

The Agreement included the obligation to establish a pollutant release and transfer register ('PRTR') or as some others call 'Toxic Release Inventory' (TRI), in its Article 6(4), and expressed that "Each Party shall take steps to establish a pollutant release and transfer register covering air, water, soil and subsoil pollutants, as well as materials and waste in its jurisdiction. This register will be establis-

<sup>233</sup> Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', pp. 30-31.

hed progressively and updated periodically.”<sup>234</sup> Also, the Agreement in its Article 6(7)(a) included the obligation to collect and monitor the state of the environment and natural resources to make them. The wording of the article implies its focus on cases of countries where much environmental information of the kind required to maintain a PRTR has been poorly collected or just not at all.

Concerning PRTR or TRI, there have been several critics. For instance, “the fact that information released under the law is difficult to understand; that the collection and publication of such information impose significant financial burdens on the industry (which are passed on to consumers); and that the release of such information may reveal sensitive business secrets among competitors (thus expanding the possibility that industrial sabotage may occur). Further, critics charge that while the TRI provides information on the total volume of chemicals released by industry, information is not provided on the toxicity of these releases and the specific risks they pose to human health; as a result, people may not be able to use this information to make choices that will protect their health. Finally, critics argue that the TRI discloses information only on emissions from point sources, which are only one

234 It is note-worthy to mention that in the context of the Aarhus Convention, the Kiev Protocol on Pollute Release and Transfer Register was established. This protocol is the only legally binding international instrument on the matter, and its aim is to promote the access to information through the establishment of inventories of pollution from industrial sites and other sources at a national level. See United Nations Economic Commission For Europe (UNECE)’s website. ‘Introduction to the Kyiv Protocol on Pollutant Release and Transfer Registers. Available on <https://unece.org/environment-policy/public-participation/introduction-kyiv-protocol-pollutant-release-and-transfer>

among several types of emission sources. Supporters of the disclosure-based regulatory approaches argue that nongovernmental organizations and other groups can assist citizens in understanding the information provided through the TRI. Further, supporters argue that while TRIs are not comprehensive catalogs of all chemicals released into the environment, the information contained in them covers major polluting industries, and the TRIs are the first steps in active disclosure processes that can eventually be expanded to cover other pollution sources.”<sup>235</sup>

Accordingly, the Escazú Agreement in its Article 6(11) expressed that “Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.”

In Chile in the context of compliance with international instruments such as the UN Framework Convention on Climate Change, the State has gradually developed a system of information records concerning diverse types of pollutants. Article 70(p) of the 19.300 Act expressed that the Ministry of the Environment is in charge of the administration of emissions and pollutant transferring report, in which has to be recorded and systematized, by source or groups of sources by the same establishment, its nature, flow and concentration of pollutant emissions subject to an emission norm, its nature, volume and destiny of the generated solid wastes. Also, the same applies to pollutants that are not subject to an emission norm.

<sup>235</sup> Op. cit. Ramkumar, V. and Petkova, E. (2007), ‘Transparency and Environmental Governance’, p. 281.

In this regard, the Supreme Decree No. 1 of the Ministry of the Environment with the aim to facilitate equal, timely and expeditious access to available information on emissions, wastes and transferences of pollutants to the public and institutions,<sup>236</sup> and acknowledging that having information related to the amount of generated wastes, as well as the level of emissions, will contribute to the design of public policies and implement measures focused on achieving better management and control of them,<sup>237</sup> approved the regulation of the PRTR. This decree defined in its Article 1, PRTR as the publicly accessible database, destined to capture, compile, systematize, conservation, analyze and disseminate information on emissions, wastes and transfer of pollutants potentially harmful to human health and environment which are released to the environment due to industrial and non-industrial activities, as well as transferred for its valorization or elimination.

However, pollutant enterprises still do not elaborate the required reports, and there is not enough supervision in this respect. Thus, this register complies insufficiently its purpose. In fact, the update and completeness of the information included in the PRTR was recently questioned, due to the constant episodes of contamina-

236 Cfr. Republic Of Chile, Ministry Of The Environment (2013) Supreme Decree No. 1 which approves the regulation of the Emissions and Transfer Register, PRTR. 2 May 2013, para. 6.

237 Cfr. op. cit. Republic Of Chile. Ministry Of The Environment (2013). Supreme Decree No. 1 which approves the regulation of the Emissions and Transfer Register, PRTR, para. 8.

tion in Puchuncaví-Quinteros in Chile, which was confirmed by the Supreme Court.<sup>238</sup>

Nevertheless, if the requested information is not available or collected, the agreement does not impose any obligations to do so within a period of time, it just mentions the requester has the right to be informed about the lack of data within a period no longer than 30 business days extendible for 10 more days. Article 5(16) says “when the requested information does not exist or has not yet been generated, the applicant shall be so informed, with explanation, within the periods established in paragraphs 12 and 13 of the present Article.” In other words, if the information is not available or collected, the right of information in the agreement is of little use to citizens. Requests are after all, restricted to the availability of information, and as said, it is possible that much of the environmental data of the kind required for this register has not even been collected.

In this respect, Florini highlighted that “the extent of humanity’s impact on the planet, due both to population growth and to increasingly intense use of natural resources, threatens to overwhelm the absorptive capacity of the natural environment. But because information revealing the extent of the problem is often not even collected, much less widely distributed, the effects are often ignored until after massive –perhaps irreparable–

238 Chilean Supreme Court Of Justice (2019). Case of Quintero-Puchuncaví. Rol No. 5888-2019. 28 May 2019, para. 19. Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 24.

damage has already been done.”<sup>239</sup> Thus, in sum, Chile complies with this provision of the Agreement although just partially.<sup>240</sup>

### **3.12 Notification of Emergency Situations (Article 6(5) of the Escazú Agreement)**

In cases of an imminent threat to public health or the environment, article 6(5) of the Agreement imposes an obligation to competent authorities to immediately disclose and disseminate to the public through the most effective means all relevant information to decrease menaces to public health or the environment and to be able to establish an early warning system.<sup>241</sup> As the Agreement used the

239 Op. cit. Florini, Ann. (2007), ‘Introduction: The Battle Over Transparency,’ pp. 11-12.

240 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, pp. 24-25.

241 This obligation was included in similar terms in Article 5(1) (c) Aarhus Convention. The notification of emergency situations was included as well, although only at a State-State level, in article 19 of Rio Declaration, which recognized the need to allow other States and members of the international community to face an emergency situation and to take the necessary measures to minimize the damages, by providing them with all the relevant information. This obligation arises from due diligence. See Ila Study Group On Due Diligence In International Law (2014) ‘First Report’. Tim Stephens (Rapporteur) and Duncan French (Chair). 7 March 2014. and Ila Study Group On Due Diligence In International Law (2016) ‘Second Report’. Tim Stephens (Rapporteur) and Duncan French (Chair). July 2016. In this regard, the ICJ in the Nicaragua case, noted that the failure to give any warning or notification would imply a breach of the principles of humanitarian law. See, International Court Of Justice (ICJ) (1986). Case concerning mili-



word ‘public’, it must be understood in the sense of the definition of Article 3 of the same Agreement and not regarding other States, for instance regarding transboundary damage. Also, the provision expressed that it was to permit the public to take measures to prevent or limit the potential damage. In this sense, when citizens get access to information, they can take measures to protect themselves from health menaces and threats.

This issue was highlighted by the IACtHR when expressed that “the European Court of Human Rights has indicated that authorities who engage in hazardous activities that could involve consequences to the health of the individual have the positive obligation to establish an effective and accessible procedure so that the members of the

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tary and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) (Merits). Judgment of 27 June 1986, para 215. Also, despite the different historical backgrounds and normative specificities, Humanitarian Law and Human Rights Law share the same fundamental ethical values. Both of them derived from the same source: the laws of humanity and human dignity. Even further, Humanitarian Law can be regarded as a specie of broader genus of Human Rights Law, “based on the context of application of rules designed to protect human beings in different circumstances.” Chetail, Vincent (2003). ‘The Contribution of the International Court of Justice to International Humanitarian Law.’ *International Review of the Red Cross*, Vol. 85, No. 4. 16 July 2003, p. 240-241. Although judicial decisions as such do not constitute a source of law, the dicta by the ICJ have been unanimously considered as the best articulation of the content of international law in force. Lauterpacht, H. (1958) ‘The Development of International Law by the International Court.’ Stevens & Sons, London, pp. 6-22, and pp. 61-71. apud. op. cit. CHETAIL, Vincent (2003), ‘The Contribution of the International Court of Justice to International Humanitarian Law’ p. 235.

public can access all relevant and appropriate information and are enabled to assess the danger to which they are exposed. The African Commission on Human and Peoples' Rights has also recognized the obligation to provide access to information on activities that are hazardous to health and the environment, in the understanding that this gives communities exposed to a specific risk the opportunity to take part in the decision-making that affects them."<sup>242</sup>

In this regard, the IACtHR in the Advisory Opinion Oc-23/17 explained that the duty to notify requires official and public knowledge to be provided "relating to work to be carried out by States within their national jurisdiction, with a view to avoiding significant harm that may occur in the environment of the adjacent area"<sup>243</sup> and went on to say that "notification is usually the first step towards facilitating cooperation and also permits compliance with

<sup>242</sup> Op. cit. Inter-American Commission On Human Rights (IACHR) (2017). 'Advisory Opinion OC-23/17,' para. 215. See also, op. cit. European Court Of Human Rights (ECtHR) (1998). 'Case of Guerra and Others v. Italy,' para 60; European Court Of Human Rights (ECtHR) (1998). 'Case of McGinley and Egan v. The United Kingdom,' No. 21825/93 and 23414/94, Judgment of 9 July 1998, para. 101; European Court Of Human Rights (ECtHR) (2004). 'Case of Taskin and Others v. Turkey,' No. 46117/99. Judgment of 10 November 2004, para. 119; and European Court Of Human Rights (ECtHR) (2005). 'Case of Roche v. The United Kingdom,' No. 32555/96. Judgment of 19 October 2005, para. 162. See also, African Commission On Human And Peoples' Rights (2001). 'Social and Economic Rights Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria.' Communication 155/96. Decision of 27 October 2001, para. 53 and operative paras.

<sup>243</sup> Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). 'Advisory Opinion OC-23/17,' para. 187.

the duty of prevention.”<sup>244</sup> Also, the IACtHR highlighted that the obligation of notification exists in cases of environmental emergencies and explained the meaning of environmental emergency as “those situations which produce or entail a sudden and imminent risk of negative or adverse environmental effects, due either to natural causes or human conduct. In cases of environmental emergencies, notification must be given promptly.”<sup>245</sup>

In respect of the content of the notification of emergency situations, the IACtHR explained in the same Advisory Opinion that “numerous international instruments require the notification to be accompanied by ‘pertinent information.’ Although this frequently refers to technical data, the Court understands that it refers to sufficient and adequate information for the potentially affected States to study and evaluate the possible effect of the planned activities; thus, the purpose of the notification is met. In other words, the notification should be accompanied by elements that facilitate an informed determination of the effects of the planned activities.”<sup>246</sup> About the obligation to inform the public, the IACtHR expressed that it “is particularly important in cases of environmental emergencies that require relevant and necessary information to

244 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). ‘Advisory Opinion OC-23/17,’ para. 189.

245 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). ‘Advisory Opinion OC-23/17,’ para. 190.

246 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). ‘Advisory Opinion OC-23/17,’ para. 194.

be disseminated immediately and without delay to comply with the duty of prevention.”<sup>247</sup>

Moreover, the UNDRR expressed that this obligation of notification of emergency situations “may include four interrelated key elements: (1) disaster risk knowledge based on the systematic collection of data and disaster risk assessments; (2) detection, monitoring, analysis and forecasting of the hazards and possible consequences; (3) dissemination and communication, by an official source, of authoritative, timely, accurate and actionable warnings and associated information on likelihood and impact; and (4) preparedness at all levels to respond to the warnings received. These four interrelated components need to be

247 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). ‘Advisory Opinion OC-23/17,’ para. 223. Also, in paras. 192-193, the IACtHR explained that the obligation to notify is related to the environmental impact assessment inasmuch as “the duty of notification clearly arises as soon as an environmental impact assessment concludes or indicates that there is a risk of significant... harm and must be complied with before the State... takes a decision on the environmental viability of the project, and prior to execution of the planned activities... In some cases, this will be before an environmental impact assessment has been made; for example, as the result of a preliminary study or owing to the type of activity and, in other cases, it will only occur following a determination made by an environmental assessment.” And in para. 195 expressed that however, “this does not signify that there is an obligation to attach the documentation relating to the environmental assessment in cases the notification is prior to the assessment. In this regard, the ICJ has indicated that, prior to the environmental impact assessment, the information provided with the notification ‘will not necessarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources.”

coordinated within and across sectors and multiple levels for the system to work effectively and to include a feedback mechanism for continuous improvement. Failure in one component or a lack of coordination across them could lead to the failure of the whole system.”<sup>248</sup>

On the other hand, the Escazú Agreement in the same provision included the obligation to develop and implement an early warning system (hereafter ‘EWS’). The UN explained that an EWS “is an adaptative measure for climate change, using integrated communication systems to help communities prepare for hazardous climate-related events... EWS will assist public officials and administrators in their planning, saving money in the long run and protecting economies.”<sup>249</sup>

In the case of Chile, the early warning systems focus, mainly, on human health. In this sense, Article 36 of the Sanitary Code in conjunct with Article 9 of the Ministry of Health’s regulation Decree No. 136/04, allow the Ministry of Health to decree a health alert in cases of threat of a pandemic or a notorious increase of a disease or emergencies that pose a serious risk to the health of life of the inhabitants.

In addition, Article 1 of Decree-Law No. 369 which created the National Emergency Office dependent on the Mi-

248 United Nations Office For Disaster Risk Reduction (UNDRR)’s website. ‘Early warning system.’ Available on <https://www.undrr.org/terminology/early-warning-system>

249 United Nations’ Website On Climate Change. ‘Cities and Local Action. Early Warning Systems.’ available on <https://www.un.org/en/climatechange/climate-solutions/early-warning-systems>

nistry of the Interior, and established that it is in charge of the planification, coordination and execution of the activities destined to prevent or solve the problems derived from earthquakes and catastrophes; and to fulfill its assignments, must watch over as well, for the compliance of the National Plan on Civil Protection created by Decree No. 156/2002, in which is considered a warning phase in cases of these catastrophes or natural emergencies such as droughts, snowfalls, floods, earthquakes and tidal waves, or anthropic emergencies such as fires, accidents, explosions and spills.

This protection is exercised through a system integrated by organisms, services and institutions, both from the public and private sector, including volunteering entities and the organized community, under the coordination of the National Emergency Office of the Ministry of the Interior, according to Decree No. 156/2002, which approves the National Plan on Civil Protection, Part IV (1).

Decree No. 156/2002 in Section VII.2.1(d) referred to a 'report to the population' as messages delivered by the authorities to provide information to the population on the seriousness of an emergency situation in its just measure, to decrease uncertainty, anxiety and natural shock. And expressed that in situations of emergency and disaster, the centralized generation of timely, sober and truthful information disseminated through social communication means, is the most direct and immediate resource to avoid the proliferation of unfounded rumors. Also, Annex 4(1) defined warning as in its early stage, it is a state of permanent vigilance and attention; at the same time, it becomes a declared state when the probable and near occurrence of an adverse event is noticed, to take specific precautions. The alert declaration must be

clear and understandable, accessible, that is, disseminated through the maximum of means; immediate, without delay, since any delay may suggest that the event is neither probable nor close; coherent, without contradictions; official, from authorized sources.

Although, in spite of these norms and the duty of transparency of the State's Administration, the standard is not complied regarding cases of imminent threats to public health or the environment. In fact, cases such as the massive series of intoxication events that took place in Quintero-Puchuncaví districts in Chile in 2018, due to the content levels of harmful elements in the environment.<sup>250</sup> If inhabitants had known this by an earlier time of the intoxication events happened or at least when the first event happened, measures to protect health and the environment could have been taken.

In this sense, Ezio Costa explained that still today there is no certainty on how the poisoning events happened (since 2018). He believes it is one of the pivotal issues and a revision of the carried out of the activities must be held

<sup>250</sup> “The area of the incident is Puchuncavi-Quintero, but the region is better known as one of Chile’s four ‘sacrifice zones.’ It earned this dubious title because several industries have been operating without public monitoring since 1964, dumping different types of toxic chemicals in unknown quantities. The term is used by socio-ecological movements in Chile to characterize geographical areas where industry and waste are so heavy that the whole area and the people living in it are considered sacrificed on the altar of economic growth.” Manuschevich, D. and Meynen, D. (2018). Chilean Union Leader found dead one day after anti-pollution demo. 16 October 2018. Available on <https://www.commondreams.org/views/2018/10/16/chilean-union-leader-found-dead-one-day-after-anti-pollution-demo>

to determine how this affected the inhabitants' health. An analysis of every pollutant emitted should have been accomplished in the first place, although it has not been done yet. There are highly pollutant industries, mainly known to be thermoelectric plants and the Codelco smelter, however, no effective determination of pollutants has been achieved, much less a measure to decrease the pollution.<sup>251</sup>

Bermúdez underlined that the ignorance on the environmental state of the place one inhabits –as he called ‘state of environmental ignorance’– implies the adoption of unintended and unwanted wrong decisions, which have a direct impact on health and the quality of life of the population.<sup>252</sup> Hence, based on that idea, is that the environmental and sanitarian competent authorities should declare health warnings, for example, in cases of exceeding the environmental quality norms. Thus, in sum, Chile complies with this provision of the Agreement although just partially.<sup>253</sup>

251 Costa, Ezio (2020). In Aliaga, R. and Bustos, A. ‘El sacrificio es el mismo: Quintero y Puchuncaví a un año del fallo de la Corte Suprema’. *Diario Uchile*, 27 May 2020. Available on <https://radio.uchile.cl/2020/05/27/el-sacrificio-es-el-mismo-quintero-y-puchuncavi-a-un-ano-del-fallo-de-la-corte-suprema/> See also, Chilean Supreme Court (2019). Case of Quintero-Puchuncaví, Decision No. 5.888-2019. Judgment of 28 May 2019.

252 Cfr. Bermúdez, Jorge. (2010). ‘El acceso a la información pública y la justicia ambiental.’ *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso XXXIV*. Valparaíso, Chile. 1° Semester 2010, p. 574.

253 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 25.



### **3.13 People in vulnerable situations and access to information (Article 6(6) of the Escazú Agreement)**

The Escazú Agreement's aim is not to leave anyone behind, thus the Agreement tried to grant protection in an explicit or implicit way to everyone, and in particular, peoples in vulnerable situations. The Escazú Agreement in its Article 6(6) expressed that "In order to facilitate access by persons or groups in vulnerable situations to information that particularly affects them, each Party shall endeavor, where applicable, to ensure that the competent authorities disseminate environmental information in the various languages used in the country and prepare alternative formats that are comprehensible to those groups, using suitable channels of communication." Also, in its Article 4(5) the Agreement included peoples in vulnerable situations when expressed that "Each Party shall ensure that guidance and assistance is provided to the public –particularly those persons or groups in vulnerable situations– in order to facilitate the exercise of their access rights."

Also, the Escazú Agreement in Article 5(3) established that "Each Party shall facilitate access to environmental information for persons or groups in vulnerable situations, establishing procedures for the provision of assistance, from the formulation of requests through to the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions." And Article 5(4), "Each Party shall guarantee that the above-mentioned persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response."

The importance of these special obligations is that, as highlighted by the UN Security Council, “democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the Charter. It requires as well a deeper understanding and respect for the rights of minorities and respect for the needs of the more vulnerable groups of society, especially women and children. This is not only a political matter. The social stability needed for productive growth is nurtured by conditions in which people can readily express their will. For this, strong domestic institutions of participation are essential. Promoting such institutions means promoting the empowerment of the unorganized, the poor, the marginalized.”<sup>254</sup>

As it may be known, in a region like LAC, the indigenous communities are perhaps the most vulnerable, because as highlighted by the UN Commission on Human Rights, “it has been widely recognized the profound interlinkage indigenous communities have with their lands and natural resources, these peoples have been and still are constantly

254 United Nations Security Council (1992). ‘An Agenda for Peace, preventive diplomacy, peacemaking and peace-keeping.’ Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 (A/47/277-S/24111). 17 June 1992, para. 81.

deprived of their lands, territories and resources.<sup>255</sup> In this regard, Gilbert and Doyle pinpointed that “driven by the demands of an increasingly globalized economy and the opening up markets in developing countries to foreign direct investment, activities such as mining, logging, dam construction and mono-cropping are becoming synonymous with violations of indigenous peoples’ rights, resulting in ongoing tensions and conflicts between indigenous peoples, states and transnational corporations.”<sup>256</sup>

255 See United Nations Commission On Human Rights (2001). ‘Prevention of Discrimination and Protection of Indigenous Peoples and Minorities. Indigenous peoples and their relationship to land’ (E/CN.4/Sub.2/2001/21). Final working paper prepared by the Special Rapporteur, Mrs. Erika-Irene A. Daes. 11 June 2001. See also, United Nations General Assembly (2007). 61/295 Declaration on the Rights of Indigenous Peoples (UNDRIP) (A/61/L.67 and Add.1). Resolution adopted on 13 September 2007, preamble.

256 Gilbert, J. and Doyle, C. (2011). ‘A new dawn over the land: Shedding Light on Collective Ownership and Consent’. In Allen, S. and Xanthaki, A. (Eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Hart Publishing, p. 1 (in the online document). In addition, the UN Permanent Forum on Indigenous Issues (PFII) observed that “land rights, access to land and control over it and its resources are central to indigenous peoples throughout the world, and they depend on such rights and access for their material and cultural survival. To survive as distinct peoples, indigenous peoples and their communities need to be able to own, conserve and manage their territories, lands and resources. See, United Nations Permanent Forum On Indigenous Issues (2007). *Economic and Social Council Official Records Supplement No. 23 (E/2007/43, E/C.19/2007/12) Report on the sixth session, 14–25 May 2007*. Para. 6.

At an international level, the rights of indigenous peoples have been recognized in several instruments, and by international tribunals as well, particularly relevant to us, the Inter-American Court of Human Rights.<sup>257</sup> In the context of relations between indigenous peoples and the State, “there are now requirements for consultation that are expected to be applied whenever the state makes decisions that may affect indigenous peoples,”<sup>258</sup> because of international instruments such as the Indigenous and Tribal Peoples Convention (Convention No. 169) and the 61/295 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

In this regard, it could have been expected that the text of the Escazú Agreement could have encompassed specific references to land rights, cultural rights or free, prior and informed consent (‘FPIC’), the or the 2016 UN Declaration on the Rights of Indigenous Peoples (‘DRIP’), however, the Escazú Agreement somehow made an indirect reference to these aspects in article 7(15), by

257 See Inter-American Court Of Human Rights (IACtHR) (2001). Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Series C No. 79). Judgment of 31 August 2001 (Merits, Reparations and Costs). See also, Inter-American Court Of Human Rights (IACtHR) (2005). Case of Yakyé Axa Indigenous Community v. Paraguay (Series C No. 125). Judgment of 17 June 2005 (Merits, Reparations, and Costs); Inter-American Court Of Human Rights (IACtHR) (2007). Case of the Saramaka People v. Suriname (Series C No 172). Judgment of 28 November 2007 (Preliminary Objections, Merits, Reparations, and Costs).

258 Anaya, S.J. (2004). ‘International Human Rights and Indigenous Peoples: The move toward the multicultural state.’ *Arizona Journal of International and Comparative Law*, Vol. 21, No. 1, p. 54.

invoking States' international obligations in respect of the rights of indigenous communities.

In Chile, the 19.300 Act in its Article 4 expressed that it is an obligation of the State to facilitate access to environmental information, and to that end, the State's bodies, in the performing of their environmental competencies and the application of environmental management instruments, will have to tend to the conservation, developing and strengthening of the identity, languages, institutions and social and cultural traditions of the peoples, communities and indigenous persons, in conformity with the law and international conventions ratified by Chile and in force.

Hence, as the provision made an express reference to international conventions, the Convention No. 169, ratified by Chile in March 2008, is relevant inasmuch as it is the only international treaty specifically focused on indigenous peoples, and it imposes specific obligations concerning the treatment indigenous people must receive, and it is a binding instrument for Chile. Convention No. 169 in its Article 4(1) imposed the obligation to adopt special measures to safeguard the persons, institutions, property, labor, cultures and environment of the peoples concerned. Particularly, Convention No. 169 in its Article 30 established that "(1) Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties... (2) If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples." About this obligation, the Escazú Agreement also referred to it in Article 10(2), when expressed that "Each Party, in line with its capacities, may take, inter alia, the following measures: (e) develop

specific measures for persons or groups in vulnerable situations, such as providing interpreters or translators in languages other than official languages when necessary.”

Nevertheless, in spite of these international and national obligations, in practice, there are no facilities or promotion of access to environmental information for groups in vulnerable situations, except for people with disabilities. The latter by virtue of the General Instruction No. 10 on Administrative Proceeding for Access to Information from the Council of Transparency, which establishes a universal principle of accessibility for people with disabilities included in 20.422 Act, in accordance with which the exercise of the right of access to information by people with disabilities requires to make the necessary adjustments for the submission of applications, developing of proceedings and provision of information, based on the specific deficiencies of these people, to promote access and participation in equal conditions with the rest of the citizens.<sup>259</sup>

The Council of Transparency went on to say that special consideration must be given to the regulations issued by the competent bodies in this matter, to guarantee universal accessibility. In particular, regarding the electronic information access systems, the Accessibility Guide for People with Disabilities of the Committee of Standards for Electronic Documents of December 2006 and subsequent editions will be used as a reference in these websites.<sup>260</sup>

259 Cfr. Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information. 28 October 2011, p. 6.

260 Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2011). General Instruction No. 10, pp. 22-23.

In addition, this General Instruction No. 10 expressly considered as a good practice the applications forms to be available in different languages. In this regard, it made an express reference to Convention No. 169 and said that in areas of a high density of indigenous communities, the public bodies must provide applications in indigenous languages referred to in the 19.253 Act which establishes norms on the protection, promotion and development of the indigenous peoples. Which in practice, does not happen. The only exception to this could be the existence of application forms in other languages provided by the Council for Transparency.<sup>261</sup>

Also, regarding the obligation contained in Article 5(4) of the Escazú Agreement, which says that “Each Party shall guarantee that the above-mentioned persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response”, in Chile, the same Supreme Decree No. 680 in its Article 1, created the information offices for the public users, to assist the administered in the right to file requests, suggestions or complaints before the State’s Administration. Among other competencies, article 2(b) of this Supreme Decree No. 680 expressed that these offices must inform on the requirements, formalities and timeframes of applications and requests directed to public bodies, the documentation that must be accompanied in them, proceedings and any other necessary information to ensure expeditious and timely ac-

261 Republic Of Chile. Council For Transparency’s website. ‘CPLT refuerza campaña de acceso a información pública con formularios en distintos idiomas’. Available on <https://www.consejotransparencia.cl/cplt-refuerza-campana-de-acceso-a-informacion-publica-con-formularios-en-distintos-idiomas/>

cess to their functions. Thus, in sum, Chile complies with this provision of the Agreement although just partially.<sup>262</sup>

<sup>262</sup> Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 27.



## CHAPTER IV: PASSIVE TRANSPARENCY (THE RIGHT TO ACCESS TO INFORMATION)

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The right to access to information goes beyond the obligations revised in the previous section.<sup>263</sup> And as mentioned earlier, the Escazú Agreement included several positive obligations on States to provide environmental information to the public (active transparency), but it also created a citizen's rights of access to information (passive transparency) which will be studied in this section. Into the bargain, the Agreement in Article 5(1) expressed that "Each party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure."

In Chile, the advances in Administrative Law, and Environmental Law as part of Administrative Law, experienced in matters of access right are evident, and the entry into force of the 20.285 Act on access to public information (Law on Transparency) confirmed that the development of the rule of law has to pass through the availability of infor-

263 Cfr. *op. cit.* Sands, Philippe (2003), 'Principles of International Environmental Law', p. 852.

mation to the public.<sup>264</sup> Accordingly, the right to access to environmental information has been included in Article 31 bis of the 19.300 Act, which by making an express reference to the 20.285 Act on Access to Public Information, recognized the principle of publicity and transparency in Article 5 of the 20.285, whose have been acknowledged as well, by Article 8 of the Chilean Political Constitution of the Republic.

In this respect, access to public information implies that all persons can obtain information held by the State's Administration. The recognition of this right was included in Article 10 of the 20.285 Act, in very wide terms, as the right of every person to request and receive information from any State's administrative body. The acknowledgment of this right gave efficacy to the principles of transparency and publicity recognized at a constitutional level. In fact, Article 8 of the Chilean Political Constitution only established transparency and publicity as principles that would govern the State's bodies' performance. It did not include them as a public right to access to information or as a protective action of such guarantee.<sup>265</sup>

#### **4.1 Environmental information that may be sought**

The first aspect that has to be determined to understand the scope of this right is what exactly one can expect to receive when exercising this right. Hence, what is public in-

264 Cfr. op. cit. Bermúdez (2014), 'Fundamentos de Derecho Ambiental,' p. 330.

265 Cfr. op. cit. Bermúdez, Jorge. (2010). 'El acceso a la información pública y la justicia ambiental,' pp. 586-587.

formation precisely? The UN Human Rights Committee elaborated a concept of information to which this right applies in the following terms: “includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.”<sup>266</sup>

This broad definition is useful in the modern information era like ours in which information is stored in a wide variety of sources, such as photos, videos, emails, handwritten documents and so on and so forth. Whilst some jurisdictions still hold on to their historical roots and refer to a right of access to ‘documents’ rather than to ‘information’,<sup>267</sup> the right to access to information provided for in Article 3(a) of the Escazú Agreement is unli-

266 United Nations Human Rights Committee (2011). General Comment 34 (CCPR/C/GC/34). 102nd session. Geneva. 11-29 July 2011, para. 18. See also, *op. cit.* Inter-American Commission On Human Rights (IACHR) (2011) “The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,” para. 149: “The right of access to information covers information that is in the State’s custody, administration, or possession; information the State produces or is legally obligated to produce; information in the control of those who perform or administer public functions, services or funds, solely with respect to those services, functions and funds; and information that the State collects and is required to collect in the fulfillment of its functions.” See also, Organization Of American States (OAS) (2009). ‘The Inter-American Legal Framework Regarding the Right to Freedom of Expression.’ Office of the Special Rapporteur for Freedom of Expression. Inter-American Commission on Human Rights, OEA/Ser.L/V/II CIDH/RELE/INF. 1/09. 30 December 2009,09 para. 21.

267 *Cfr. op. cit.* Darbshire, Helen (2015), ‘Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,’ pp. 15-16.

mitted in terms of the nature of environmental information to which the right applies.

As can be noted it applies to “*any* information that is written, visual, audio, and electronic, or recorded in *any* other format, regarding the environment and its elements and natural resources, *including* information related to environmental risks, and *any possible* adverse impacts affecting or *likely* to affect the environment and health, as well as to environmental protection and management.” Hence, the definition provided by using the words ‘any’, ‘including’, ‘any possible’ or ‘likely’ is so wide it leaves open the possibility to include other categories not explicitly mentioned by the definition. Therefore, the Agreement according to Article 5(1), requires that States guarantee the access to information in its “possession, control or custody” which may concern environmental information, even in cases the information is not in principle labeled as such.<sup>268</sup>

However, this broad range of information does not appear to be absolute. Although this matter will be analyzed in the next chapter related to the refusal of access to information, it is noteworthy to say that the Escazú Agreement imposes the obligation to balance two categories of interests when determining the applicability of an exception –interests safeguarded under exceptions and public interests in the disclosure of information–. The inclusion of this exam in the agreement, makes the infor-

268 Cfr. Olmos, Belén (2019), ‘Fostering environmental democracy in Latin America and the Caribbean: An analysis of the Regional Agreement on Environmental Access Rights.’ Wiley Reel Review of European, Comparative and International Environmental Law 2019;28:136-151. Oxford, USA, p. 142.

mation to which the right to access to information apply to pass through a sort of public interest qualitative test.

About the scope of information that may be sought under the Escazú Agreement, it extended the scope beyond information from administrative bodies. The inclusion of Article 4(4) by which States have to provide access to information to facilitate the acquisition of knowledge on access rights, implies that the information may be also related to legislative and judicial branches as well.<sup>269</sup>

In Chile, the Political Constitution of the Republic, in its Article 8 establishes that the acts and resolutions of State bodies shall be public, as well as the fundamentals on which they are based and any procedures used. And according to this provision, only a qualified quorum law may establish reservation or secrecy, in cases publicity affects the duly accomplishment of the Administration's functions. The 20.285 Act, on the other hand, in its Article 10 broadened this scope by declaring that disclosure also extends to all records, files, contracts and agreements, and in general any information produced with public funding, regardless of the medium or format in which it is stored.<sup>270</sup>

269 See *op. cit.* Darbishire, Helen (2015), 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,' p. 17.

270 Also, Article 11 included the principle of relevance, which presumes that all State information held by public entities is important, independent of its date of creation, origin, classification, or handling, for interpreting the object of the right of access to information. See also, *op. cit.* Inter-American Commission On Human Rights (IACHR) (2011). "The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,' para 152.

On the other hand, the Aarhus Convention, in its Article 2(3) included a definition of environmental information, which can be summarized in three big groups of information: (1) information related to the environment and its elements; (2) information related to emissions and immissions; (3) information related to human health based on the quality of the environment.<sup>271</sup>

This provision was used as base for the definition introduced by the 20.417 Act in the new Article 31 bis of the 19.300 Act,<sup>272</sup> which defined environmental information as all the information written, visual, sound, electronic or recorded in any other way that is in possession of the Administration and that is related to the following matters: (a) the state of the environmental elements, such as air and atmosphere, water, soil, landscapes, protected areas, biological diversity and its components, including the genetically modified organisms, and the interaction between these elements; (b) the factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, that affect or may affect the elements of the environment indicated in the previous number; (c) the administrative acts related to environmental matters, or that affect or may affect the elements and factors indicated in letters (a) and (b), and measures, policies, norms, plans and programs used as their basis; (d) reports on the compliance of environmental legislation; (e) economic and social analyzes, as well as other studies used in decision-makings re-

271 Cfr. op. cit. Bermúdez (2014), 'Fundamentos de Derecho Ambiental', p. 333.

272 Cfr. op. cit. Bermúdez (2014), 'Fundamentos de Derecho Ambiental', p. 333.

garding administrative acts and their fundamentals, indicated in letter (c); (f) the state of health and safety of people, human living conditions, cultural heritage assets, when they are or may be affected by the state the environmental elements mentioned in letter (a) or by any of the factors and measures indicated in letters (b) and (c); (g) any other information related on the environment or on its elements, components or concepts defined in Article 2 of this Law.

Regarding this definition, Bermúdez highlighted that establishing content of access to information as the one exposed, implies some issues. This definition is susceptible to a restrictive interpretation, which means that all the information not expressly included in Article 31 bis of the 19.300 Act, would stay outside the scope of the law. However, this interpretation would imply, as well, that the environmental information, in practice, has a smaller scope of the right of access to information than general administrative information ruled by 20.285 Act. In that state of affairs, an argument against restrictive interpretation would be letter (g) of that provision, which includes as an objective of the law, any other information on environment, on its elements, components and concepts defined in Article 2 ll) of the 19.300 Act. In fact, by relating the scope of access to environmental information with the environment concept provided for all legal purposes, an expansion is produced concerning the scope of the law to everything that falls within environment, including even cultural and artificial environment.<sup>273</sup>

However, it must be bear in mind that with the entry into force of the 20.285 Act on Access to Public Informa-

273 Cfr. op. cit. Bermúdez (2014), 'Fundamentos de Derecho Ambiental,' p. 334.

tion, all the information in possession of the State's Administration is public, and therefore, susceptible to being required by the public when exercising the right to access to information. Nevertheless, the question of Article 31 bis of the 19.300 Act in fact implies a different or deeper obligation for the environmental Administration than the ones already established to the public Administration remains. The answer would have been affirmative if in respect to each one of the elements of the concept of environmental information included in Article 31 bis of the 19.300 Act would have been established along with a correlative obligation to generate such information.<sup>274</sup>

Although that is not the case, because the obligation to provide information is just in respect to the information effectively possessed by the Administration, being that obligation to elaborate environmental information thus restricted in conformity with Articles 31 ter (b) and 70 of the 19.300 Act. The above means that the elaboration of environmental information is limited to the reports on the state of the environment. In any case, this conclusion is justified on the grounds that if in respect to any environmental element, the Administration would have been obliged to generate the information, that would imply a standstill of the administrative activity, because it would be focused on just elaborating those reports.<sup>275</sup>

274 Cfr. *op. cit.* Bermúdez (2014), 'Fundamentos de Derecho Ambiental', p. 334.

275 Cfr. *op. cit.* Bermúdez (2014), 'Fundamentos de Derecho Ambiental', pp. 334-335.



#### **4.2 The class of requester who may invoke the right and purpose for which access may be sought**

About the accessibility of environmental information, as mentioned, the Escazú Agreement established in its Article 5(1) that “each Party shall ensure the public’s right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure.” Hence, the agreement by using the word “public”, did not distinguish between types of requester enabled to invoke the right and did not restrict it only to citizens (that is, the voting members of the public), but it may be extended to corporations and non-govern organizations as well; suggesting the rationale extends beyond enhancing democratic representation to something else. Nevertheless, as mentioned in chapter 1, it cannot be extended to foreign citizens in a broad sense because the Agreement expressly excluded them by using the phrase “nationals or that are subject to the national jurisdiction of the State Party” in its Article 2(d).

Additionally, the Agreement is unlimited in terms of the purpose for which access to information may be sought, in so far as no requirements to give reasons why access to information is sought are imposed in the Agreement.<sup>276</sup> The irrelevance of a purpose to exercise this access right is supported by the inclusion in the Agreement of an express prohibition on the imposition on requesters of obligations to give motivations for accessing requested information –article 5(2)(a) which expressly established that

<sup>276</sup> The Escazú Agreement shared the approach of the Aarhus Convention, which in its article 4(1)(a) expressly indicated that no interest to seek information has to be stated.

the requester does not need to mention any special interest or explain any reason for the request—This provision is lined with one of the basic principles of information access laws:<sup>277</sup> the access rights accrue to everyone, regardless of their capability to establish any concrete interest in accessing the requested information.<sup>278</sup> The public administration does not have any reason to previously sus-

277 See for example, Australian Government (1982). 'Freedom of Information Act 1982'. No. 3, 1982. Compilation No. 98. Part III (Access to documents) Section 11 (Right of access)(2): "Subject to this Act, a person's right of access is not affected by: (a) any reasons the person gives for seeking access." See also, Irish Government (2014). 'Freedom of Information Act 2014' Number 30 of 2014. Chapter 2. Decisions of FOI requests and notification of decisions 13(4) "Subject to this Act, in deciding whether to grant or refuse to grant an FOI request – (a) any reason that the requester gives for the request, and (b) any belief or opinion of the head as to what are the reasons of the requester for the request, shall be disregarded."

278 Ackerman, J. and Sandoval-Ballesteros, I. (2006). 'The Global Explosion of Freedom of Information Laws. Administrative Law Review', p. 93. apud. op. cit. McDonagh, M. (2013), 'The Right to Know Information in International Human Rights Law,' p. 50. See also, op. cit. Inter-American Commission On Human Rights (IACHR) (2011) "The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,' para. 100.; op. cit. Inter-American Court Of Human Rights (IACtHR) (2006) 'Case Claude Reyes et. al. v. Chile' para. 77.; Organization Of American States (Oas) General Assembly (2010). 'Model Inter-American Law on Access to Public Information' AG/RES. 2607 (XL-O/10). Adopted at the fourth plenary session, held on 8 June 2010: "any person making a request for information to any public authority [can have the right] to make an anonymous request for information [and] to make a request without providing justifications for why the information is requested."

pect *mala fide* concerning the citizen or organization interested in acquiring knowledge about the environment.<sup>279</sup>

Hence, motivation for seeking access to information should be disregarded, inasmuch as it would otherwise constitute a barrier of access to information in disguise. As Professor McDonagh has pointed out “a requirement that requests for access to information have a political or public interest dimension focuses undue attention on the motives of the requester thus undermining this principle (...) In particular, requesters may wish to use the right to information to secure access to information in circumstances where the gaining of access to the requested information might not immediately be seen as serving broad public interest, but it is nonetheless of huge importance to other who may find themselves in a similar position.”<sup>280</sup> He went on to say “locating the right to information within the orbit of the right to freedom of ex-

279 Cfr. Leme Machado, Paulo (1984), *Direito à Informação Ambiental*. Revista de Informação Legislativa. Brasília: Senado Federal. A. 21, n° 84, out./dez, p. 226. apud Leme Machado, Paulo (2020), ‘El Derecho de acceso a la información ambiental en el Acuerdo de Escazú,’ p. 192. See also op. cit. Inter-American Court Of Human Rights (IACtHR) (2006). Case of Claude Reyes et al. v. Chile, para. 77: “under this obligation, information must be handed over without the need to prove direct interest or personal involvement to obtain it, except in cases in which a legitimate restriction is applied”; and Inter-American Court Of Human Rights (IACtHR) (2015). Case of the Kaliña and Lokono Peoples v. Suriname (Merits, reparations and costs), Judgment of November 25, 2015, para. 261. apud. cit. op. Inter-American Court Of Human Rights (IACtHR) (2018). Advisory Opinion OC-23/17, para. 219.

280 Op. cit. Mcdonagh, M. (2013), ‘The Right to Information in International Human Rights Law,’ p. 50.

pression or the right to take part in public affairs or any of the other rights that have on occasion yielded a right to information in particular circumstances means that many of those who seek information for these purposes may fail to meet the threshold for protection of their right to information.”<sup>281</sup>

This may not seem so important, however, the scope of Article 5(1) of the Escazú Agreement as the underpinning of the right to information, has been undermined by interpretations of other similar provisions by Human Rights treaty bodies, in which the purposes of access to information the applicants have had, have been taken into account in arriving to their decisions. For instance, regarding the right to freedom of expression, in *Claude Reyes et. al. v. Chile*, the Inter-American Court of Human Rights associated the right to access to information grounded on the right to freedom of expression with the applicants’ motivation to use the requested information to “assess the commercial, economic and social elements of the... 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 project”,<sup>282</sup> along with the monitoring of “possible indiscriminate felling of indigenous forests in the extreme south of Chile.”<sup>283</sup>

281 Op. cit. McDonagh, M. (2013), ‘The Right to Information in International Human Rights Law,’ p. 51.

282 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2006), ‘Case of Claude Reyes et. al. v Chile’, para. 99.

283 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2006), ‘Case of Claude Reyes et. al. v Chile’, para. 99.

Also, the Human Rights Committee in the 2009 Case of *S.B. v. Kyrgyzstan*<sup>284</sup> underlined that the applicant had not explained its motivation for requesting the information and just merely contended it was a matter of public interest. Under those circumstances, the Committee went on to say it considered the complaint as an *actio popularis* and therefore, inadmissible.

These points of view suggest that the motivation for which access to information is sought is an element taken into account by international human rights treaty bodies as important for the determination as to whether or not there is a right of access to information at stake. Such purpose would also seem to be political in character or be concerned with controlling or monitoring steering activities.<sup>285</sup> Hence, the fact that the Escazú agreement in its Article 5(2)(a) expressly enables an individual to request information without needing to mention any interest, broadened the scope of active legitimacy further beyond the one considered by these bodies. In other words, the right to access to information under the agreement is unlimited concerning the class of requester that may invoke the right to access to information in so far as the agreement

284 United Nations Human Rights Committee (2009). Case of *S.B. v. Kyrgyzstan*. UN Doc. CCPR/C/96/D/1877/2009, Communication No. 1877/2009. 30 July 2009, para 4.2: “It notes that the author has not explained why exactly he, personally, needed the information in question; rather, he contended that this was a “matter of public interest”. Under these circumstances, and in the absence of any other pertinent information, the Committee considers that the present communication constitutes an *actio popularis* and that therefore it is inadmissible”.

285 Cfr. op. cit. McDonagh, Maeve (2013), ‘The Right to Information in International Human Rights Law’, p. 49.

also considered that States when implementing the agreement had to be guided by the principle of equality and non-discrimination.

Chile, in line with the Escazú Agreement, established several provisions in which it reaffirms the irrelevance of a purpose to exercise this access right. Firstly, regarding the principle of non-discrimination, Article 11(g) of the 20.285 Act on Access to Public Information established that the State's Administration bodies must turn over information to anyone who requests it, under equal conditions, without making arbitrary distinctions and without requiring a statement of cause or motivation for the request. Also, about the principle of transparency, Article 4 of the 19.300 Act stated that the principle of transparency of public function means to respect and safeguard the publicity of the acts, resolutions, proceedings and documents of the Administration, as well as their fundamentals, and to facilitate access to that information by any person, through the means and proceedings established by the law.

Moreover, Article 10 of the 20.285 Act on Access to Public Information expressed that any person has the right to request and receive information from any State's administrative body, in form and conditions established by law. In addition, concerning the requirement of access to information, Article 12 of the same 20. 285 Act did not establish any conditions on having to mention a special interest or to justify the reasons to request information. And in this regard, the Council of Transparency expressed through its General Instruction No. 10 that the administrative bodies of the State must not require in the applications or in the requests of access to information, as obligatory, any information not contem-

plated by the 20.285 Act or its regulation for submitting applications or along the proceeding. Only for statistical purposes and in a voluntary manner, personal information not required by Article 12 of the 20.285 Act, may be required, however, the administrative body must inform the applicants the voluntary character of the provision of that information. To that end, in the application form must be indicated if the requested information is obligatory or voluntary.<sup>286</sup>

An exception to this broad accessibility of the right might be the 19.880 Act, which could be potentially relevant because it establishes the basis for the administrative procedures that govern the acts by the State's administrative bodies and is applied subsidiarily in matters not regulated by *lex specialis*. Accordingly, Article 17 of the 19.880 Act in respect of the rights of persons in their relations with the Administration, provided that they have the right to know, at any time, the state of the processing of the procedures in which they are involved, receive an authorized copy of the documents in the file; also, to access to administrative acts and its documents; and to obtain information concerning the legal or technical requirements imposed by legislation in force, regarding projects, acts or requests.

As can be noted, the provision is focused on interested requesters as an intervenient in an administrative procedure. Thus, the 19.880 Act is more restrictive about the class of requester entitled to access the right to access to information, because for instance, Article 18 of the

286 Cfr. op. cit. Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information, p. 7.

19.880 Act concerning the basic norms, expressly established that although permanent access to information is provided, it is only accessible regarding an interested person, and by interested it meant intervenient in the administrative procedure. Hence, it is not a wide right to access to information, compared to the 19.300 Act which luckily is the main regulation for environmental information and makes a direct reference to the 20.285 Act (Law on Transparency) which is more flexible than the 19.880 Act concerning the conditions for the requester as well. Thus, as it is not necessary to express a cause or interest to exercise this right, Chile complies adequately with this standard.<sup>287</sup>

### **4.3 Subject with obligations under the Right of Access to Information**

In this regard, the IACHR expressed that “the right of access to information creates obligations for all public authorities of all branches of government and autonomous agencies, at all levels of government. This right is also binding on those who carry out public functions, provide public services, or execute public resources on behalf of the State. With respect to the latter, the right of access establishes the obligation to provide information exclusively with respect to managing public resources, carrying out the services under their purview, and fulfilling the aforementioned public functions.”<sup>288</sup>

287 Cfr. op. cit. NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 12.

288 Op. cit. Inter-American Commission On Human Rights (IACHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 119.



Furthermore, the Inter-American Judicial Committee clarified even more that “the right of access applies to all public bodies, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by the government, and organizations which operate with public funds or which perform public functions.”<sup>289</sup>

The Escazú Agreement mentioned in its Article 5(2)(a) that the right of access to information included “requesting and receiving information from competent authorities.” In this regard, the Agreement also defined what had to be understood for ‘competent authorities’ specifically in respect of the obligations regarding the right of access to information and generation and dissemination of information. The agreement expressed in its Article 2(b) that “competent authority means, for the purposes of articles 5 and 6 of the present Agreement, any public body that exercises the powers, authority and functions for access to information, including independent and autonomous bodies, organizations or entities owned or controlled by the government, whether by virtue of powers granted by the constitution or other laws, and, when appropriate, private organizations that receive public funds or benefits (directly or indirectly) or that perform public functions and services, but only with respect to the public funds or benefits received or to the public functions and services performed.”

289 Op. cit. Inter-American Judicial Committee (2008). ‘Principle on the Right Access to Information.’ Principle 2. See also, op. cit. Organization Of American States (OAS). General Assembly (2010). ‘Model Inter-American Law on Access to Public Information,’ Article 3.

In Chile, Article 2 of the 20.285 Act on Access to Public Information established that the competent authorities obligated by the right to access to public information, under the terms of this law, are ‘ministries, intendancies, governorates, regional governments, municipalities, the armed forces, public and security forces, and public agencies and services created to carry out administrative functions. However, made and exception about the General Comptroller of the Republic and the Central Bank, shall adjust to comply with the provisions of the Law, in the cases it expressly states. Also, this same provision expressed that public enterprises created by law, State enterprises, and corporations in which the State has stock participation greater than 50% or a majority on the board of directors, are also subjects obliged by this law.<sup>290</sup>

#### **4.4 Time available for responding to requests of environmental information and silence of the administrative authority**

About the available time to respond to requests, the Escazú Agreement expressed in its Article 12 that it has to be “as quickly as possible and within a period not longer than 30 business days from the date of receipt of the request, or less if so stipulated in domestic legislation.” However, Article 5(13) established that in exceptional cases and in accordance with the national legislation, the competent authority may require more time to respond to the request, and if so, the applicant must be notified “in wri-

<sup>290</sup> See also, *op. cit.* Inter-American Commission On Human Rights (IACHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 130-131.

ting of the justification for the extension prior to the expiration of the first 30 days, and such extension may not exceed 10 business days.

Nevertheless, in the case the competent authority does not respond within the 30 business days (or after the 10 business days of extension), the Escazú Agreement included the right for the applicant to access to judicial and administrative mechanisms to challenge and appeal this omission, in Articles 5(14) and 8(2). To that end, the Agreement also included in its Article 5(2)(c) the obligation to inform the applicant of the to challenge and appeal when information is not delivered, and of the requirements for exercising this right: It is not clear who is in charge to inform the applicant about the entitlement to challenge and the requirements to exercise the right.<sup>291</sup> It might be confusing, because this obligation applies in cases information was not delivered, which could be due to two scenarios: a refusal to disclose information, in which we could find it reasonable to expect that the same authority would inform about the right and the requirements to exercise the right; or because the administration did not reply at all, and in that case, we could hardly expect they will give the information about this to the applicant, if it did not reply at all. However, nothing impedes to consider the possibility that the requester himself could seek information to challenge the omission.

Chile in this regard, as mentioned before, the 20.285 on Access to Public Information included in its Article 11(h) included the principle of opportunity, by which the Administration bodies must respond to requests of in-

291 Cfr. *op. cit.* Leme Machado, Paulo (2020), 'El Derecho de acceso a la información ambiental en el Acuerdo de Escazú,' p. 192.

formation within the legally established periods of time, as quickly as possible and avoiding all kinds of delaying procedures. In addition, Article 13 of the same 20.285 Act included a correlative obligation to inform the applicant immediately if the requested authority does not possess the requested information. However, it did not establish a determined timeline and left it somehow to the interpretation of the administrative body. Nevertheless, Article 14 of the same 20.285 Act established a deadline of 20 business days to respond to the requests of information, which may be extended for 10 business days, in cases there are difficulties about the collection of information.<sup>292</sup>

It is worthy to mention that these periods to respond to requests of information established by the 20.285 Act, may affect badly the chances to use the required information in proceeding with narrowly limited periods, such as the one regarding public participation in Environmental Impact Declarations of 20 days or the Protection Recourse which has a period of 30 continuous days.<sup>293</sup>

If the administrative body does not respond with the established period, the same 20.285 Act in its Articles 24-30 contemplates the possibility to complain in cases of delay, as well as denial, first to the Council of Transparency (Article 24), and then, if the information is denied by the Council, through an illegality complaint, the applicant may complain before the Appeal Court (Article 28).

292 See also, *op. cit.* Inter-American Commission On Human Rights (IACHR) (2011). 'The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,' para. 192.

293 *Cfr. op. cit.* NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p 12.

In addition, Article 64 of the 19.880 Act in respect of the positive administrative salience, expressed that after the expiration of the legal period to respond to a request originated by a procedure, if the Administration did not respond to it, the interested may denounce this non-compliance of the timeframe before the same authority that had to assess the matter and request a response to the request. If the administrative authority does not respond to it in five days since the receipt of the denounce, the requirement must be taken as accepted. However, Article 65 of the 19.880 Act expressed that in cases the matter is related to the fiscal patrimony or the administrative body had acted *ex officio*, it must be taken as a negative answer. Thus, in sum, about this standard, Chile complies adequately.<sup>294</sup>

#### **4.5 The right to reuse the information obtained**

Another relevant aspect concerning access to information is whether requesters are entitled to do what they fancy with the information obtained. It would seem normal to think that as the right of freedom of expression is the basis for requesting information from public authorities, then when information has been delivered to the requester—and by extension into the public domain—the recipient could freely use it in any way consistent with the principles of freedom of expression, and therefore is entitled to disseminate the information to other recipients.<sup>295</sup>

294 Cfr. *op. cit.* NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 17.

295 Cfr. *op. cit.* Darbshire, Helen (2015), 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks', p. 29.

This point of view was followed by the Escazú Agreement, which imposed a very strong and defined obligation in its Article 6(2) to ensure –although to the extent possible– that environmental information is reusable and that “no restrictions are placed on its reproduction or use, in accordance with domestic legislation.” This provision remarkably shows the desire for maximum disclosure; however, it may also represent potential nuisances. The Escazú Agreement in parallel imposed the obligation in Article 4(1) to respect any other universally recognized human right related to the Agreement. Hence, as mentioned earlier, the right to freedom of expression has been broadly recognized in human rights law and as it is interlaced with the right to access to information, we might as well consider that there are two main limitations on the reuse of information, which are the “laws on the processing of personal data and by copyright restrictions, whether it be the public body or third parties which hold the copyright.”<sup>296</sup>

The extension of this work is not extensive enough to delve into this issue, however, it is note-worthy to say that “there is a need for greater clarity as to when personal data

296 Op. cit. Darbishire, Helen (2015), ‘Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,’ p. 29. See also, Council Of Europe (2009). ‘Explanatory Report to the Council of Europe Convention on Access to Official Documents’ (Treaty Series -No. 205), para. 19: “generally requestors are free to use the information [obtained] for any lawful purpose. This includes disseminating the information and, for example, publishing it. Such use may for example be determined by laws such as those regulating intellectual property or data protection.” See also, op. cit. Fenster, Mark (2006), ‘The Opacity of Transparency’, pp. 909-910.

obtained pursuant to information requests may be used and how... and with respect to intellectual property there is currently a serious lack of clarity about what kinds of limitations can be placed on reuse of copyrighted documents. The right to make full use of documents obtained from public bodies is an issue to be worked through... as public authorities become accustomed to accepting that the right of access to information is indeed an inherent part of freedom of expression.”<sup>297</sup> In this regard, the IACHR expressed “anyone who gains access to State-held information has, in turn, the right to disseminate the information so that it circulates in society, so that society can become familiar with it, have access to it, and evaluate it. In this way, the right of access to information shares the individual and social dimensions of the right to freedom of expression, both of which must be guaranteed simultaneously by the State.”<sup>298</sup>

In Chile, the Council for Transparency expressed in its General Instruction No. 10, that the material delivery of the requested information will be carried out by the administrative body without any conditions or restrictions on its use, unless the exceptions foreseen by laws are applicable, and also, as said before, no requirements on

297 *Op. cit.* Darbshire, Helen (2015), ‘Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,’ p. 30.

298 *Op. cit.* Inter-American Commission On Human Rights (IACHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 102. See also, *op. cit.* Inter-American Court Of Human Rights (IACtHR) (2006) Case *Claude Reyes et. al. v. Chile*, para. 77.

the delivery besides the ones included in the 20.285 Act may be imposed.<sup>299</sup>

Also, considering the technological mechanisms to reuse information, although in environmental matters there are no specific regulations in this respect, the Technical Norm on the Publication of Open Data indicates the way to publish the data on the website [datos.gob.cl](http://datos.gob.cl), allowing to download archives in an accessible, processable and reusable formats. Nevertheless, in the environmental context, it just contemplates 64 groups of data, and none of them are updated. Into the bargain, there are some flaws in the delivery of information to the public, which is frequently available although in non-processable formats, which implies difficulties in the access to large and technical files, which is common in environmental matters. Examples of this may be the availability of Environmental Rating Resolutions in the Environmental Assessment Service's website, through long documents without text recognition. Therefore, Chile complies with the standard, although partially.<sup>300</sup>

#### **4.6 Information is not available because it does not exist or is lost**

Information may not be available because the request of information was directed to an incompetent authority or

299 Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information, p. 17.

300 Cfr. *op. cit.* NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', pp. 21-22.



because the information does not exist or has not been collected.

About the former, the Escazú Agreement expressed in Article 5(2)(b) that applicants have the right to be informed promptly whether the requested information is in possession or not of the competent authority receiving the request. This dimension of the right is related to another positive obligation on competent authorities to rapidly respond to the requester informing if it holds or does not hold the requested information, before determining if the competent authority is enabled to disclose the requested information. This rule was thought of as a means to warn the requester to not lose time asking in ‘the wrong door’.<sup>301</sup> Into the bargain, in Article 5(15) of the Escazú Agreement expressed that “when the competent authority receiving the request does not have the requested information, it shall notify the applicant as quickly as possible, indicating, if it can determine it, which authority may be in possession of the information. The request shall be forwarded to the relevant authority, and the applicant so informed.”

In Chile, Article 13 of the 20.285 Act on Access to Public Information expressed that in event that the requested Administration body is not competent<sup>302</sup> to deal with

301 Cfr. *op. cit.* Leme Machado, Paulo (2020), ‘El Derecho de acceso a la información ambiental en el Acuerdo de Escazú,’ p. 192.

302 In the General Instruction No. 10, the meaning of ‘competent authority’ is the competent authority to solve the request when, in the performing of its competencies, generated or must have generated the referred information, it was generated by a third party on behalf of it or in any case the information is in its possession. Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for

the request for information or does not possess the requested documents, it must immediately remit the request to the competent authority that must respond it according to the legal order, insofar as it is possible to do so. In cases where is not possible to identify the competent administrative body or if the information belongs to multiple bodies, the requested body will communicate these circumstances to the applicant.

In cases the requested information is not available because the requested body is not competent and cannot determine the competent body to fulfill this obligation, because the identification of the requested information is not very clear, the Council for Transparency in its General Instruction No. 10, expressed that the requested body has to request back to the applicant, to specify in more detail the aforementioned information.<sup>303</sup>

Also, concerning the last part of this provision regarding information belonging to multiple bodies, Article 21 of the 20.285 Act, which establishes the secrecy or confidentiality grounds that allow access to requested information to be completely or partially denied, expressed in (1)(c) of the same provision, that a denial would be possible in cases of requests of a generic nature that refer to a great number of administrative acts or background information, or for which a response would unduly divert officials from carrying out their regular job obligations.

Transparency on the Administrative Procedure of Access to Information, p. 9.

303 Cfr. op. cit. Republic Of Chile. Council Of Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information, p. 9.

In this respect, the Council for Transparency ruled on the mentioned matter in 2009 on a complaint made regarding a request of information directed to the Civil register and Identification Service, which on the grounds of the cited exception, denied access to information. The Council concluded that it was in fact possible to require the administrative body subject to the law to collect, process and systematize the information in its possession, without having necessarily to imply a duty to create new information. The Council also underlined that by virtue of the aforementioned, one might conclude that the Civil Register only possess part of the required information, and its collection, processing and systematizing it to be delivered in the requested terms would not imply the generation of new information and neither implies an unduly distraction of the officials from their regular duties, and so the grounds invoked were considered inadmissible.<sup>304</sup>

In cases the requested information does not exist or has not been collected, the Escazú Agreement in its Article 5(16) imposed the obligation to notify the applicant as quickly as possible, with explanation in 30 business days (or extended for 10 days in cases the competent authority required more time). Nevertheless, the Escazú Agreement did not include a further correlative obligation to collect the specific non-available information in response to requests for information or future requests for that matter. Darbshire highlighted that “it is often argued and even stated in some laws that the right of access is limited

304 Cfr. Republic Of Chile. Council Of Transparency (2009). Case of Héctor Segundo Poblete Gómez v. Servicio de Registro Civil e Identificación. Decision No. A08-09. 20 November 2009, para. 8.

to existing information and that there is no obligation to collect or compile information.”<sup>305</sup>

This has been highlighted by the IACtHR in the Case of *Gomes-Lund et. al. (Guerrilha do Araguaia) v. Brazil*, specifically concerning information that existed although is no longer available, it said that the obligation to access to information is not completely satisfied just by communicating that the requested information is not available because it does not exist anymore. In fact, when there is an obligation to produce, preserve and gather information and nonetheless the information does not exist, the competent authorities must explain all the steps taken towards trying to recover, collect or reconstruct the information that was lost or illegally removed.<sup>306</sup>

In Chile, cases in which the Administration does not possess the requested information because it has not been generated or it does not exist, has not been directly regulated. Nevertheless, in conformity to the mentioned Article 13 of the 20.285 Act on Access to Information,

305 Op. cit. Darbshire, Helen (2015), ‘Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,’ p. 24. See also, European Court Of Human Rights (ECtHR) (2013). ‘Case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria.’ Application No. 39534/07. Judgment of 28 November 2013, para. 41: “it has held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion.”

306 Op. cit Inter-American Court Of Human Rights (IACtHR) (2010). Case of *Gomes-Lund et. al. (Guerrilha do Araguaia) v. Brazil*, para. 292.

in cases the administrative authority does not have the requested information, it just has to inform the applicant, without any further correlative obligation to make efforts to generate it or collect it.

In this respect, the Council for Transparency, through the General Instruction No. 10, referred to the duty of public bodies to inform the applicant in cases it does not possess the requested information, and stated that after the search of the requested information by the Administration has been carried out and it realizes it does not possess the information, it must: (a) in the event of an administrative act that has ordered the expungement of the requested documents, it must communicate this circumstance to the applicant, delivering a copy of the act and respective minutes, in the terms referred to in the Circular No. 28.7904 of 1981 of the General Comptroller of the Republic, which regulates the elimination of the Public Administration's documents and any other applicable regulation. Once the aforementioned response has been notified, the body must terminate the administrative access proceeding initiated; (b) in the absence of an administrative act that has ordered the expungement of the requested documents, exhaust all means at disposal to find the information and, if it is estimated that the facts are liable to be sanctioned with a disciplinary measure, instruct the corresponding sanctioning procedure. If the information is not found, this circumstance must be communicated to the applicant, indicating in detail, the reasons that justify it.<sup>307</sup>

307 Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information, p. 11.

Thus, as the Escazú Agreement's standard in this regard is very low and just imposes the obligation to rapidly respond to the request in both cases of unavailability, Chile complies adequately and beyond this standard provided by the Agreement.

#### **4.7 Other conditions applicable to the delivery of environmental information (format and costs)**

##### 4.7.1 FORMAT

About the format the requested information has to be provided, the Escazú Agreement expressed in Article 5(11) that it has to be provided, if available, in the format requested by the applicant. On the contrary, if it is not available, it should have to be provided in the available format. In Chile, Article 17 of the 20.285 Act on Access to Public Information expressed that the requested information will be delivered in the way and means pointed out by the requester, inasmuch as it does not imply an excessive unforeseen cost or expense in the institutional budget. If it does, it must be delivered in the way and means available, in conformity with the General Instruction No. 6 of the Council for Transparency.<sup>308</sup>

In the last case, the response to the request must indicate, if applicable, the circumstances that justify the qualification of the costs of the requested format, as excessive or not foreseen and the alternative means and formats through which the applicant may access the information.

308 Cfr. Republic Of Chile. Council For Transparency (2010). General Instruction No. 6 on Gratuity and Direct Costs of Reproduction, 19 March 2010, p. 4.

For example, the public body may propose to substitute the paper format for an electronic format.<sup>309</sup> Thus, Chile complies adequately with this standard provided by the Agreement.<sup>310</sup>

#### 4.7.2 GRATUITY AND COSTS

Additionally, concerning charges for requesting public information, the Escazú Agreement in its Article 5(17) expressed that environmental information has to be disclosed for free, insofar as its reproduction or delivery is not required. If charges were applied just for requesting information, it would undermine the notion of the access to information as a right, and it would rather be just a requirement for a service of the administration.<sup>311</sup>

However, if there are costs related to the reproduction and delivery, charges may be applied although according to procedures established by the competent authority and

309 Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information, p. 14.

310 Cfr. *op. cit.* NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 16.

311 There are countries that still follow the concept of requiring a service of the administration and charge for requesting information, for example Canada and Ireland. *Op. cit.* Darbishire, Helen (2015), 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,' p. 27.

they have to be reasonable and made known in advance.<sup>312</sup> The Escazú Agreement also included in Article 5(17) the possibility to waive the payment in cases the applicant is deemed to be in a vulnerable situation or special circumstances warranting such a waiver.

Chile, in this respect, included a principle of gratuity in Article 11(k) of the 20.285 Act, by which the access to information held by the Administration is free of charge, save for the other provisions included by the same law. In addition, Article 18 of the 20.285 Act on Access to Public Information expressed that costs can only be charged for the delivery of information in the case a law expressly authorizes the payment of direct costs of reproduction and other costs to be charged. The obligation of the required body to provide the requested information will be suspended meanwhile the requester has not paid these costs.

The Council for Transparency in its General Instruction No. 10, expressed that the public body must inform if the provision of information is free of charge, and only when it does not express the gratuity in the delivery of information, it must determine the direct costs of the reproduction. Stating as well, as a good practice, to offer the least expensive options to which the applicant may access, and expressly indicating that the applicant has 30 business days to pay these costs, in conformity with the

312 Fees for copying or delivery is widely regarded as reasonable. All access to information laws consider a provision in this regard. In practice, it is usual though that requesters are not even charged because nowadays is more frequent that information is delivered electronically. Op. cit. Darbshire, Helen (2015), 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,' pp. 27-28.



General Instruction No. 6 of the Council for Transparency.<sup>313</sup> And in the case the applicant does not pay these charges, the administrative body is not obliged to reproduce the information and may end the proceeding started before it.<sup>314</sup> Thus, complies adequately with the standard provided by the Agreement.<sup>315</sup>

#### **4.8 Independent oversight mechanisms (Article 6(8) of the Escazú Agreement)**

The Agreement included in its Article 5(18) that “each Party shall establish or designate one or more impartial entities or institutions with autonomy and independence to promote transparency in access to environmental information, to oversee compliance with rules, and monitor, report on and guarantee the right of access to information. Each Party may consider including or strengthening, as appropriate, sanctioning powers with the scope of the responsibilities of the aforementioned entities or institutions.”

313 Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information, p. 14. See also, *op. cit.* Republic Of Chile. Council For Transparency. General Instruction No. 6 on Gratuity and Direct Costs of Reproduction, pp. 4-5.

314 Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2011). General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information, p. 16.

315 Cfr. *op. cit.* NGO FIMA (2020), ‘Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile’, p. 17.

In the case of Chile, the 20.285 Act on Access to Public Information in its Article 31, established the creation of the Council for Transparency. The purpose of this council, according to Article 32 of the same 20.285 Act is to promote transparency in the public function, supervise the compliance of the regulation of transparency and publicity of information held by the State's administrative bodies, and guarantee access to information.

Among its specific competencies, according to Article 33 of the 20.285 Act, it is in charge of solving the complaints on refusal to access to information, submit recommendations to the State's Administration to improve transparency in their performance and facilitate access to information, ensure the duly confidentiality of the data and information which, according to the Constitution and the Law, is secret or confidential, ensure the adequate fulfillment of the 19.628 Act on the protection of personal data by the State's Administration, etc.

The source of this provision was the national legislations on access to public information of the States in the region, which establish *ad hoc* entities for the control of the fulfillment of their provisions. As it is an obligation that is already included in most of the national legal orders of the Parties, it did not cause much surprise as being innovative or such, and it did not cause much debate during the negotiation process either.<sup>316</sup> Hence, it does not requi-

316 Cfr. op. cit. Médici, Gastón (2018), 'El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe,' p. 38.

re much further delving. Thus, in sum, Chile complies adequately with this provision of the Escazú Agreement.<sup>317</sup>

317 Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 20.



## CHAPTER V: REFUSAL OF ACCESS TO ENVIRONMENTAL INFORMATION

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### 5.1 Regime of Exceptions

It is common to find in national laws exceptions that limit the access to information to safeguard other rights, both at an individual level –such as privacy– or at a wide societal level –such as national security or rule of law. This restriction is consistent with the linkage between the right to information and the right to freedom of expression, which is a fundamental right although not absolute. It may be restricted by the limitations defined by law to safeguard other legitimate aims.<sup>318</sup>

Accordingly, Roberts highlighted that “a concern for fundamental interests will not always imply a need for disclosure of information. On the contrary, there are

318 Cfr. *op. cit.* Darbishire, Helen (2015), ‘Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks,’ p. 25. See also *Op. cit.* Howell, Devika (2009), ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ p. 101.

some instances in which these interests are better protected through non-disclosure. As a consequence, the right of access to information will never be unqualified. However, the task of setting limits on transparency is not qualitatively different from that of making the preliminary case for transparency: in both cases an appeal to fundamental interests is necessary.”<sup>319</sup> If the application of unmitigated transparency can be criticized on justifiable grounds by those who would otherwise recognize the merits of a principle of transparency, determining the reasonable limits of such a principle is of crucial importance.<sup>320</sup>

Although the Escazú Agreement follows a philosophy of openness, it also respects that there are other equally important rights or countervailing interests that have to be safeguarded. Hence, in cases the requested information is not disclosed because it is protected under the regime of exceptions, the Escazú Agreement does not challenge this albeit includes some aspects that States have to take into account, to avoid unnecessary imperils to the access to information.

319 Op. cit. Roberts, Alasdair (2001). ‘Structural Pluralism and the Right to Information.’ (in the online document p. 22). See also, op. cit. Fenster, Mark (2006), ‘The Opacity of Transparency’, pp. 902 and 903.

320 Op. cit. Hovell, Devika (2009), ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ 92. See also op. cit. Fenster, Mark (2010), ‘Seeing the State: Transparency as Metaphor’, p. 621: “Under a strong form of transparency... all government information should be available to the public; and in the rare instance when they must be kept from the public, government secrets should not be so deep that their existence is unknown.”

### 5.1.1 STANDARDS OF MAXIMUM DISCLOSURE

About the standards that arise from the principle of maximum disclosure, the Inter-American Convention on Human Rights summarized them as follows: “(a) the right of access to information must be subject to a limited regime of exceptions, and these exceptions must be interpreted restrictively, in such a way that favors the right of access to information; (b) grounds must be given for decisions to deny information, and the State has the burden to prove that the information being requested may not be released; and (c) in the event of a doubt or legal vacuum, the right of access to information must take priority.”<sup>321</sup>

Accordingly, the Agreement also included the principle of maximum disclosure as a ‘mold’ for the regime of exceptions. It considered in Article 5(6) two possibilities of legal ‘grounds’ for refusing to access to environmental information: on one hand, based on the national order of the State holding the information –in this case,

<sup>321</sup> Op. cit. Inter-American Court Of Human Rights (IACtHR) (2011) “The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 15. Also, the IACtHR has expressed that these exceptions must be in line with the requirements included in article 13(2) of the American Convention of Human Rights which can be summarized in: (1) it has to be previously established by law, as a means to ensure that public authorities do not commit abuses of their power to invoke them; (2) respond to a purposed permitted by the Convention, for example protection of national security, public order and such; and (3) be necessary in a democratic society, which will depend on the need to fulfill an imperative public interest and to be proportionate to the interest behind. Cfr. op. cit. Médici, Gastón (2018), ‘El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe,’ pp. 35-37.

the agreement does not oblige States to disseminate information that falls into pre-existing categories of information not available for public knowledge under national legislations—; and on the other hand, in cases of absence of a domestic legal regime of exceptions, the agreement provided for a guide of exceptions States may apply.

As mentioned in Chapter 2, there are three corollaries to the principle of maximum disclosure which are: (1) the right of access to information is the rule and secrecy the exception; (2) the State bears the burden of proof to justify limits on the right of access to information (3) supremacy of the right to information in the event of conflicting statutes or lack of regulation,<sup>322</sup> which are impor-

322 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). ‘Advisory Opinion OC-23/17’, para. 224. The Court summarized all of the requirements related to the refusal of access to information by saying: “The Court reiterates that the right of access to information held by the State admits restrictions, provided these have been established previously by law, respond to a purpose..., and are necessary and proportionate in a democratic society, which will depend on whether such restrictions are designed to meet an essential public interest. Consequently, the principle of maximum disclosure is applicable, based on the presumption that all information is accessible, subject to a limited system of exceptions. Accordingly, the burden of proof to justify any denial of access to information must be borne by the entity from whom the information was requested. If it is necessary to refuse to provide the requested information, the State must justify this refusal in a way that allows the reasons and rules on which it has based the decision not to deliver the information to be known. In the absence of a reasoned response from the State, the decision is arbitrary.” See also, op. cit. Inter- American Court Of Human Rights (IACtHR) (2006). ‘Case of Claude Reyes et. al. v. Chile’, paras. 88 to 92 and 262.



tant to ensure that exceptions are applied only in justified cases and limit the possibilities for the Administration to apply them arbitrarily.

*5.1.1.1 'The right of access to information is the rule and secrecy the exception'*

According to the first corollary, “disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.”<sup>323</sup> Also, in respect of environmental aspects being matters of public interest *per se*, the IACtHR explained that “regarding activities that could affect the environment, the Court has emphasized that access to information on activities and projects that could have an impact on the environment is a matter of evident public interest. The Court has considered that information on activities relating to exploration and exploitation of natural resources in the territory of indigenous communities, and implementation of a forestry industrialization projects is of public interest.”<sup>324</sup>

323 Op. cit. Supreme Court Of India (1981), ‘Case of S.P. Gupta v. President of India and Ors,’ para. 66.

324 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2017). ‘Advisory Opinion OC-23/17’, para 214. See also, Inter-American Court Of Human Rights (IACtHR) (2012). ‘Case of the Kichwa Indigenous People of Sarayaku v. Ecuador.’ Judgment of 27 June 2012 (Merits and Reparations), para. 230. See also, op. cit. Inter-American Court Of Human Rights (IACtHR) (2006). ‘Case of Claude Reyes et. al. v. Chile’, para. 73.

There are some illustrative requirements for this first corollary summarized by the Inter-American Commission on Human rights that may guide the analysis, which are: the exceptions must be (a) truly exceptional nature; (b) be established by law; (c) have a legitimate purpose, be necessary and be strictly proportionate.<sup>325</sup> In other words, information may be secret as long as disclosing it may indeed jeopardize the benefits safeguarded through secrecy.

#### *5.1.1.1.1 Truly exceptional nature*

In line with these requirements, firstly, the Escazú Agreement expressly established in Article 5(1) the requirement of having to be exceptions of 'truly exceptional nature' when expressed that the right to access to environmental had to be in accordance with the principle of maximum disclosure as a general rule and in Article 5(7) that the regime of exceptions had to be adopted favoring the disclosure of information. These provisions tell us that disclosure is always superior in the hierarchy to secrecy, which is the exception.

In parallel, the Chilean legal order considered limitations to the right of access to information as the exception to the general rule as well. For instance, in Article 16 of the 20.285 Act, it is expressed that the required administrative body is obliged to provide the requested information, unless the opposition by a third party has been submitted in accordance with Article 20 of the same 20.285 Act or any of the exceptions established

325 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2011). 'The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,' para. 21 and 342.

by law. Also, Article 21 of the 20.285 Act on Access to Public Information, is established that the only grounds for secrecy or confidentiality based on which access to information may be denied totally or partially, are those contemplated by this law. Furthermore, Article 5 of the same 20.285 Act prescribed that the only applicable exceptions are the ones contained in the same law, and the ones foreseen by qualified quorum laws.

However, this 20.285 Act, in its transitory first article established an exception by setting forth, which is that secrecy classifications legally established for acts and documents before the enactment of Law No. 20.050 which establish secrecy and confidentiality in respect of determined acts and documents, are presumed to be legitimate.”<sup>326</sup>

*5.1.1.1.2 Be established by law*

Secondly, the Agreement included the requirement of having to be established by law, when said in Article 5(5) that “If the requested information or part thereof is not delivered to the applicant because it falls under the domestic legal regime of exceptions, the competent authority shall communicate its refusal in writing, including the legal provisions and the reasons justifying the decision in each case...” Also, in Article 5(8) expressed that “the reasons for refusal shall be legally established in advance and be clearly defined and regulated.” This requirement is important inasmuch as it impedes the possibility to arbitrarily impose limitations that could un-

<sup>326</sup> See also, Op. cit. Inter-American Court Of Human Rights (IACtHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 359.

dermine the purpose of granting access to information above all and “ensure that they are not at the discretion of public authorities.”<sup>327</sup> In respect of what has to be understood by ‘laws’, the IACtHR defined widely as not referred just to any legal norm, but to general normative acts enacted by legislative bodies established by the Constitution and democratically elected, in accordance with the Constitution.<sup>328</sup>

In Chile, the principle of transparency was recognized at a constitutional level in Article 8 of the Political Constitution, which must guide the performing of the State’s administrative bodies, in which the right to access to public information is understood as implicitly included. However, this provision also expressed that this information may be excluded from this right when it falls within a ground of secrecy or confidentiality. Although, to that

327 *Op. cit.* Inter-American Court Of Human Rights (IACtHR) (2006). Case *Claude Reyes et. al. v. Chile*, para. 89. See also, *Op. cit.* Inter-American Commission On Human Rights (IACHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 343: “their establishment must be sufficiently clear and specific so as not to grant an excessive degree of discretion to the public officials who decide whether or not disclose the information.” See also, Inter-American Commission On Human Rights (IACHR) (2006). ‘Arguments before the Inter-American Court of Human Rights in the Case of *Claude-Reyes et. al. v. Chile*’. Transcribed in *op. cit.* Inter-American Court Of Human Rights (IACtHR) (2006). Case of *Claude-Reyes et. al. v. Chile*, para. 58(f).

328 *Cfr.* Inter-American Court Of Human Rights (IACtHR) (1986). ‘The Word “Laws” in Article 30 of the American Convention on Human Rights.’ Advisory Opinion OC-6/86. Series A No. 6, 9 May 1986.

end, it must be established by a qualified quorum law, in situations, as we will see, in which disclosure affects the duly fulfillment of the administrative bodies functioning, the rights of persons, national security or national interest. These grounds were developed in Article 21 of the 20.285 Act on Access to Public Information.

Hence, concerning the 20.285 Act, Article 11(b) of the 20.285 Act on Access to Public Information established the principle of freedom of information, in which it is expressly stated that by virtue of this principle, every person has the right to access to information in possession of the State's administrative bodies, and only in cases of exceptions and limitations established by a qualified quorum law, this right may be restricted. Also, the mentioned Article 16 of the same 20.285 Act expressed that the required administrative body is obliged to provide the requested information, unless the exceptions established by law are applicable.

So, these provisions make clear that these exceptions must be established by law. Moreover, about the period of secrecy and confidentiality, Article 22 of the 20.285 Act expressly referred again to this when said that qualified quorum laws which declare secrecy or confidentiality, such status will be kept until another qualified quorum law establishes otherwise. In addition, the same Article, regarding the conditions in which information declared as secret or confidential must be kept, once again expressly referred to acts declared by a qualified quorum law as secret or confidential.

Also, Article 16 of the 20.285 Act on Access to Public Information expressed that the resolution in which the refusal to provide information is stated, must be founded, specifying the invoked legal basis and the arguments

which on each case motives the refusal. Any abuse or excess in the exercise of the powers, will give rise to actions and recourses. Into the bargain, Article 45 of the same 20.285 Act, went on to say that in cases the required administrative body denies access unfoundedly will be sanctioned. Moreover, “in the Case of Banco de la Nación v. the Council for Transparency, in 2009, was declared that denying information based on the argument that the official in question was not considered to have jurisdiction, did not constitute an acceptable justification. Consequently, it was ordered that the requested information must be turned over.”<sup>329</sup> Thus, Chile complies with this standard provided by the Escazú Agreement.

*5.1.1.1.3 To have a legitimate purpose, be necessary and be strictly proportionate*

Thirdly, the Agreement gathered the requirements of exceptions to have a legitimate purpose, to be necessary and be strictly proportionate concerning the public interest consideration. The Agreement expressed in its Article 5(8) that when applying an exception, the competent authority has to take into account the public interest and interpret the exceptions in a restrictive way and went on to say in Article 5(9) that “when applying the public interest test, the competent authorities shall weigh the interest of withholding the information against the public benefit of disclosing it, based on suitability, need and proportionality.”

329 Op. cit. Inter-American Commission On Human Rights (IA-CHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 361.

The latter requires a more profound delving due to its extensivity. The first thing to start with, is to determine the basis of the public interest<sup>330</sup> test required by the Agreement. The essential debate in this test is “in competing words: ‘transparency’ and ‘the right to know’ versus ‘privacy’ and ‘national security’.”<sup>331</sup> As information is related to power, the balance between the right to know versus the right to withhold information is a relevant concern

330 Public Interest: “In the perspective of a liberal democracy, the dominant framework to define public interest is largely utilitarian although many other approaches are present in the social and political debate. In a utilitarian perspective, public interest is defined in terms of its consequences for those affected. And those that are affected should be in a position to present an enlightened consent to the actions that are proposed.” Méthot, Jean-François (2003). ‘How to Define Public Interest?’ Collège Dominicain de Philosophie et de Théologie. Ottawa ON Canada. 29 January 2003. Available on [https://ustpaul.ca/upload-files/EthicsCenter/activities-How\\_to\\_Define\\_Public\\_Interest.pdf](https://ustpaul.ca/upload-files/EthicsCenter/activities-How_to_Define_Public_Interest.pdf) Also, “The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.” Australian Victorian Civil And Administrative Tribunal (2010). XYZ v. Victoria Police (General). VCAT 255, 16 March 2010 para. 326.

331 Op. cit. Florini, Ann (2007), ‘Introduction: The Battle Over Transparency,’ p. 3.

when establishing how far disclosure should go and when secrecy should reign.<sup>332</sup>

In this regard, “it is universally recognized that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents; which must be produced if justice is to be done. There are many cases where the nature of the injury which would of might be done to the nation, or the

332 Op. cit. Hovell, Devika (2009), ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ p. 105-106; and op. cit. Florini, Ann (2007), ‘Introduction: The Battle Over Transparency,’ p. 4. See also, White, Laura (2003). ‘The Need for Governmental Secrecy: Why the US Government must be able to withhold information in the interest of National Security.’ *Virginia Journal of International Law (VJIL)*, vol. 43, no. 4, 2003, pp. 1084 and 1085. apud. op. cit. Hovell, Devika (2009), ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ p. 105: In relation to the national security exception, “governments realize that publicity of intelligence information can severely undermine national security. Secrecy is therefore a common, and sometimes important, tool employed by governments to protect national security interests. On the other hand, as many states have discerned, public access to information is vital to safeguarding important governance values such as accountability, scrutiny and public confidence. [In this regard] indiscriminate secrecy is a disproportionate response to occasional threats to national security and ignores the benefits of transparency to other matters in the public interest.”



public service is of so grave a character that no other interest, public or private, can be allowed to prevail over.”<sup>333</sup>

Hence, the agreement requires for a valuation of interests according to a three-step exam which considers appropriateness, necessity and proportionality, and therefore, it cannot be considered that the competent authority holds the monopoly of determining whether required information concerns interests safeguarded under the exceptions and can or cannot be disclosed.<sup>334</sup> The agreement regulated this circumstance, because otherwise, this could potentially give rise to an abuse of secrecy by governments, “undermining the quality of public decision-making and preventing citizens from

333 Op. cit. Supreme Court of India (1981), ‘Case of S.P. Gupta v. President of India and Ors,’ para. 72.

334 See op. cit. Inter-American Court Of Human Rights (IACtHR) (2006) Case Claude Reyes et. al. v. Chile, para 98: “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.”

checking the abuses of public power.”<sup>335</sup> In respect of the wording of Article 5(9), ‘suitability’ refers to the condition of being qualified as of right or appropriate for a specific purpose,<sup>336</sup> ‘need’ is related to something being required for its importance and essentiality and not capriciously,<sup>337</sup> and ‘proportional [to something]’ is the increasing or decreasing in size, amount or degree following the variation of something else.<sup>338</sup>

To have a legitimate purpose that justifies the applicability of an exception because it is suitable, necessary

335 Stiglitz, Joseph. (2007). Foreword. In op. cit. Florini, Ann. (Ed.), *The Right to Know: Transparency for an Open World*. Columbia University Press. New York, USA., p. 1. In this sense, Lord Scarman underlined “[b]ut, is the secrecy of the inner workings of the government machine so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some state secret of high importance, I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?” Pollard, D., Parpworth, N and Hughes, D. (2007). *Constitutional and Administrative Law. Text with materials.* Fourth Edition, Oxford University Press, p. 121.

336 Definition of ‘suitability’, in Oxford Dictionary <https://www.oxfordlearnersdictionaries.com/us/definition/english/suitability?q=suitability>

337 Definition of ‘need’, in Oxford Dictionary [https://www.oxfordlearnersdictionaries.com/us/definition/english/need\\_1?q=need](https://www.oxfordlearnersdictionaries.com/us/definition/english/need_1?q=need)

338 Definition of ‘proportional [to something]’, in Oxford Dictionary <https://www.oxfordlearnersdictionaries.com/us/definition/english/proportional>.

and proportionate, the exception must be invoked for the sake of ‘common good.’ This purpose has to be so serious that is at the level and as high as the public interest of disclosing information.<sup>339</sup> In this sense, the IACtHR expressed that “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.”<sup>340</sup>

Hence, “given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose... the restrictions 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 to access to information]. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected... more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.”<sup>341</sup> In this regard, “‘necessary,’ while not synonymous with ‘indispensable,’ implies ‘the existence of

339 See Inter-American Court Of Human Rights (IACtHR) (2004) Case of Herrera Ulloa v. Costa Rica, Judgment of 2 July 2004 (Preliminary Objections, Merits, Reparations and Costs).

340 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2006). Case Claude Reyes et. al. v. Chile, para. 91.

341 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2004). Case of Herrera-Ulloa v. Costa Rica, para. 121

a ‘pressing social need’ and that for a restriction to be ‘necessary’ it is not enough to show that it is ‘useful,’ ‘reasonable’ or ‘desirable.’<sup>342</sup>

Therefore, in the case when disclosing information could threaten an interest that may fall under the protection of an exception, however, does not meet some or all of these requirements, information should be disclosed. Accordingly, there has to be a blanket interest override in cases exceptions proceed in principle, but do not meet the criteria, to entitle authorities to discretionally reveal information on the grounds that public interest in disclosure outweighs the damage to the protected interests by the exemptions. In this regard, “this balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class.”<sup>343</sup>

In this line, the Escazú Agreement expressly mentioned in its Article 5(7) that the regime of exceptions should favor the disclosure of information and in its Article 4(8) that the most favorable interpretation towards the full enjoyment of access rights should be adopted when implementing the Agreement. Thus, considering the rights at stake, exceptions should be construed, interpreted and applied narrowly. Besides most exemptions are accommodating, instead of commanding, proffering discretion to

342 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2004). Case of Herrera-Ulloa v. Costa rica, para. 122.

343 Op. cit. Supreme Court Of India (1981), ‘Case of S.P. Gupta v. President of India and Ors,’ para. 72.

divulge information even when it is safeguarded by the exception.<sup>344</sup>

On the other hand, in Chile, the test of public interest has not been expressly included in the legal order. Moreover, some say that according to the history of the 20.285 Act, the non-inclusion of this test was to seek on purpose the prohibition to apply it.<sup>345</sup> However, this test of public interest has been somehow built by jurisprudence. In fact, the Council for Transparency has applied a balancing test, although it called it differently. The Council for Transparency has distinguished between ‘test of damage’ and ‘test of public interest’. About the former, is basically equivalent to the one included in the Escazú Agreement, because the ‘test of damage’, according to the Council for Transparency, is the balancing between the interest to withhold information and the interest to disseminate, so to determine if the public benefit resulting of knowing is greater than the damage that its dissemination may cause.<sup>346</sup> This ‘test of damage’ is applied by the Council in cases the compromised interest is predominantly public, such as national security.

344 Op. cit. Hovell, Devika (2009), ‘The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.’ p. 106.

345 Cfr. Covarrubias, Ignacio (2012). ‘Las falencias del test de interés público como instrumento de ponderación entre el acceso a la información pública y la vida privada’. En *Revista de Derecho*. Pontificia Universidad Católica de Valparaíso, No. 38, pp. 514-521.

346 Cfr. Republic Of Chile. Council For Transparency (2009). Case of José Pedro de la Carrera Valdés v. Carabineros de Chile. Decision No. A45-09. 28 July 2009, para. 8.

Concerning the latter, the ‘test of public interest’ is similar to the ‘test of damages’ in its balancing of interests, however, now it concerns rights purely individual.<sup>347</sup> This denomination might be confusing, but the Council of Transparency called this test as ‘test of public interest’ and not ‘individual test’ or such, because, in its opinion, it is assumed that only a predominant public interest justifies trespassing the barrier that impedes to reveal information protected by fundamental rights.

Into the bargain, the Chilean Constitutional Tribunal has expressed that both tests –‘test of damages’ and ‘test of public interest’– are an application of the principle of proportionality, which implies to analyze, as pinpointed by doctrine, (a) if the measure is effective; (b) if there is no more moderate means for the effective achievement of the desired purpose; and (c) if the measure to be adopted results in more benefits or advantages for the general interest than damages to other goods or values in conflict.<sup>348</sup>

In addition, in the context of access to information as a means to exercise fundamental rights such as freedom of expression or the right to live in a healthy environment, the Chilean Constitutional Tribunal has expressed that a limitation to a fundamental right is justifiable

347 Cfr. Republic Of Chile. Council For Transparency (2009). Case of Patricio Hernán Pacheco v. I. Municipalidad de Providencia. Decision No. A115-09. 22 September 2009, para. 9.

348 Cfr. *op. cit.* Republic Of Chile. Council For Transparency (2009). Case of José Pedro de la Carrera Valdés v. Carabineros de Chile. Decision No. A45-09. 28 July 2009, para. 10. See also, *op. cit.* Republic Of Chile. Council For Transparency. Case of Patricio Hernán Pacheco v. I. Municipalidad de Providencia. Decision No. A115-09. 22 September 2009, para. 9.

when this mechanism is strictly necessary convenient to achieve a constitutionally valid goal, and therefore, the legislator must choose those limitations that imply a smaller lessen to those fundamental rights.<sup>349</sup>

Thus, in sum, as there is no legal basis for the test of proportionality in Chile, it complies with this standard, although partially. This is relevant because even though the Council for Transparency has somehow built a test of interest, the application of this test by the Council for Transparency has been uneven over time. In some cases, the Council for Transparency has not applied the test of public interest it has proclaimed as of general character without justifying this absence, and in other cases, it has expressly invoked it and applied it, but it has not been faithful to the formulation of this test that the same Council for Transparency adopted as the standard.<sup>350</sup>

*5.1.1.2. 'The State bears the burden of proof to justify limits on the right of access to information'*

About the second corollary, which imposes the burden of proof to the competent authority. This requirement means that “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.”<sup>351</sup> This requirement “allows for legal certainty in the exer-

349 Cfr. Chilean Constitutional Tribunal (2007). Decision No. 519/2006. Judgment 5 June 2007, para. 19.

350 Cfr. op. cit. Covarrubias, Ignacio (2012), ‘Las falencias del test de interés público como instrumento de ponderación entre el acceso a la información pública y la vida privada’. pp. 514-521.

351 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2006). Case of Claude Reyes et. al. v. Chile, para. 93.

cise of the right of access to information, inasmuch as when information is in the State's control, every effort must be made to ensure that the State does not engage in discretionary and arbitrary conduct in establishing restrictions to this right."<sup>352</sup> The Agreement expressly included in its Article 5(8) this requirement and said, "the burden of proof will lie with the competent authority."

It is noteworthy to underline that the hypothesis included by the agreement to reject the access to information follows from the theory of risks, in which by invoking an exception, there must be proof about the existence of the risk, which in terms of criminal law, must be 'clear, likely to happen and specific' and the potential damage must be 'significant'.<sup>353</sup> Hence, to be able to balance the interests at stake, the threat to the essential interests protected by the exemptions shall be specified by the competent authority.<sup>354</sup> In other words, the competent authority must prove that the disclosure of information would pose a 'clear, likely to happen and specific' risk of subs-

352 Op. cit. Inter-American Commission On Human Rights (IA-CHR) (2011) 'The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,' para. 45. See also op. cit. Inter-American Court Of Human Rights (IACtHR) (2006) Case *Claude Reyes et. al. v. Chile* para. 98.

353 Cfr. op. cit. Leme Machado, Paulo (2020), 'El Derecho de acceso a la información ambiental en el Acuerdo de Escazú,' p. 194.

354 See *UK Information Tribunal* (2001). Case of *Norman Baker v. Secretary of State of the Home Department UKIT NSA2*, United Kingdom. In which the UK Information Tribunal revoked a certificate issued by the Home Secretary refusing to reveal information on the grounds of national security, on the rationale that the threat to national security was not identified with the pinpoint accuracy required.



tantial danger to the protected interest. Additionally, the Agreement expressed in its Article 5(5) that the basis of the refuse access to information has to be communicated “in writing, including the legal provisions and the reasons justifying the decision in each case.”<sup>355</sup>

In this regard, the IACHR explained that “if the State denies access to information, it must provide sufficient explanation of the legal standards and the reasons supporting such decision, demonstrating that the decision was not discretionary or arbitrary.”<sup>356</sup>

355 In this sense, the IACtHR in *Claude Reyes et. al. v. Chile* highlighted this requirement as one of the arguments to hold Chile responsible for the violation of the right to freedom of thought and expression. *Op. cit. Inter-American Court Of Human Rights (IACtHR) (2006) Case of Claude Reyes et. al. v. Chile, para. 95.*

356 *Op. cit. Inter-American Commission On Human Rights (IACHR) (2011) ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 346.* Also, *Inter-American Court Of Human Rights (IACtHR) (2003). ‘Case of Myrna Mack-Chang v. Guatemala.’ Series C No. 101. Judgment of 25 November 2003, para. 181: “in the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand... Public authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish*

The Escazú Agreement included that the State bears the burden of proof in Article 5(8), when expressed "...The burden of proof will lie with the competent authority." In Chile, the Council for Transparency expressed in its decision A-19-09 of 7 July 2009, that in matters of proof of secrecy and confidentiality grounds, as in the matter of proof of the causes of secrecy or confidentiality, since the extinction of the duty to deliver the information depends on the Administration, the burden of proof will correspond to who alleges their concurrence. The pure invocation of the cause devoid of sufficient proof, will lead to the rejection of the causes invoked by the Administration and will therefore imply the delivery of the information.<sup>357</sup> In sum, "the burden of proof falls to the party claiming the exception, namely, the public official or entity claiming to

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those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the "clandestinity of the Executive branch" and to perpetuate impunity. Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act... Thus, what is incompatible with the Rule of Law and effective judicial protection "is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system..." And went on to say in para. 182: "This refusal by the Ministry of National Defense to supply all the documents requested by the courts, resorting to official secret, constitutes an obstruction of justice."

<sup>357</sup> Republic Of Chile, Council For Transparency (2009). Case of Rosanna Costa Costa v. Instituto Nacional de Estadísticas (INE). Decision No. A-19-09. 7 July 2009.

have a duty to classify the information requested as privileged or secret.”<sup>358</sup> Thus, Chile complies with this standard.

*5.1.1.3 ‘Supremacy of the right to information in the event of conflicting statutes or lack of regulation’*

In respect of the third corollary, about the supremacy of the right to access to information in the event of a conflict between provisions or lack of provisions, “as has been widely recognized by the rapporteurs for freedom of expression, in the event of any inconsistency in laws, the access to information law should prevail over other legislation,<sup>359</sup> inasmuch as the right of access to information has been recognized as an essential requisite for the very functioning of democracy. This requirement helps to ensure that States comply effectively with the obligation to establish

358 Op. cit. Inter-American Commission On Human Rights (IA-CHR) (2011) ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 70.

359 Op. cit. Osce Representative On Freedom Of The Media (2004). ‘International Mechanisms for Promoting Freedom of Expression. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression, the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe (OSCE).

access to public information law and that the law is interpreted so as to favor the right of access.”<sup>360</sup>

To avoid such discretionary interpretation, the Escazú Agreement established in Articles 5(1) and 5(7) that in cases of a collision or absence of provisions, the path to follow is to favor disclosure and, according to Article 5(8), exceptions have to be interpreted restrictively in any case, taking into account public interest. Also, the Agreement expressly mentioned in Article 4(8) that the most favorable interpretation towards the full enjoyment of access rights has to be considered when implementing the Agreement.

Also, as mentioned in Chapter 1, the principle of maximum disclosure is applied when there is doubt on the pertinence of disclosure or dissemination of information, the principle says that publicize of information must prevail. This scope of the principle has been expressly included by the Agreement in its Article 5(7) and implicitly in its Article 5(8). Likewise, Chile expressly included this principle in the Law in the 20.285 Act, in which the Administration bodies must provide information in the widest possible terms, excluding only the information exempt from

360 Op. cit. Inter-American Court Of Human Rights (IACtHR) (2006) Case Claude Reyes et. al. v Chile, para 58(d): “Most States of the Americas have regulations concerning access to information. The respective Chilean laws were not applied in this case because they were promulgated after the facts that gave rise to the petition. “The State of Chile has made a series of legislative modifications; however[ , ... ] these do not guarantee effective and broad access to public information.” “The exceptions established by law [ ... ] grant an excessive degree of discretionality to the official who determines whether or not the information is disclosed.”

disclosure by a constitutional or legal exception (Article 11(d) of the 20.285 Act).

However, in the case of Chile, the application of the principle of maximum disclosure is not always clear. For instance, the supremacy of the right of access to information in cases of conflicting statutes or lack of regulation is not always considered as such. Accordingly, by virtue of Article 11(c) of the 20.285 Act which establishes the principle of transparency, expressed that although all the information held by the Administration is presumed to be public, it is limited by the exceptions included by this law.

Hence, one exception that may imply an issue in this respect, is Article 1 transitory of the same 20.285 Act. This provision expressed that the secrecy classifications implemented before the entry into force of this 20.285 Act are “presumed to be legitimate without verifying whether they meet with the legitimate aims established by the law itself...<sup>361</sup> it is problematic that the law’s transitory first article establishes that secrecy classifications legally established for acts and documents before the promulgation of Law No. 20.050 of 2005, which amended the Constitution, are presumed to be legitimate-without an exhaustive analysis of these restrictions.”<sup>362</sup> Therefore, Chile complies with this standard partially.

361 *Op. cit.* Inter-American Commission On Human Rights (IA-CHR) (2011) ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 81.

362 *Op. cit.* Inter-American Commission On Human Rights (IA-CHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 360.

### 5.1.2 THE EXCEPTIONS

The Escazú Agreement in its Article 6(6) included a guide for exceptions in cases of absence of a national regime of exceptions, which are: “(a) when disclosure would put at risk the life, safety or health of individuals; (b) when disclosure would adversely affect national security, public safety or national defense; (c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species; or (d) when disclosure would create a clear, probable and specific risk of substantial harm to law enforcement, prevention, investigation and prosecution of crime.”

In parallel, in Chile, Article 21 of the 20.285 Act on Access to Public Information expressed that access to information may be denied just in the following cases: (1) when disclosure, communication or knowledge affects the duly functioning of the agency to which the request is made; (2) when disclosure, communication or knowledge affects the rights of other persons, particularly regarding their safety, health, private life commercial and economic character; (3) when disclosure, communication or knowledge affects national security; (4) when disclosure, communication or knowledge affects national interest; (5) in cases documents, data or information has been declared as secret or confidential, in conformity with the provisions established in Article 8 of the Chilean Political Constitution.

As can be noted, the Chilean legal order included more exceptions than the ones provided by the Escazú Agreement, which are (1), (2) and (4) of Article 21 of the 20.285 Act. Thus, considering that the Escazú Agreement in its Article 4(7) expressed that it provides a minimum standard of protection of the right of access to information, meaning it is the ground never the ceiling when said “No provision

in the present Agreement shall limit or repeal other more favorable rights and guarantees set forth, at present or in the future, in the legislation of a State Party or in any other international agreement to which a State is party, or prevent a State Party from granting broader access to environmental information...” is that by including more exceptions, the Chilean legal order, in fact, restricted, even more, this right of access compared to the Escazú Agreement.

Additionally, it is note-worthy to say that during the negotiation of the regime of exceptions of the Agreement, a *numerous clausus* list to limit the possibility to invoke exceptions not included in the Agreement was proposed, however, it was not included in the final text.<sup>363</sup> Instead, the Agreement included in its Article 5(7) that “the exceptions regime shall take into account each Party’s human rights obligations,” which may seem irrelevant inasmuch as it does not refer to the compulsory nature of

363 This list of exceptions was promoted by ECLAC and the public, which considered a *numerous clausus* list of exceptions, thus competent authorities could not invoke other exceptions not explicitly included in the Agreement. Also, the submission included types of information that could never under any respect be denied from dissemination, such as information related to factors that could adversely damage the environment, security or health of humans. Nevertheless, those provisions were not included, which caused grave frustration among the public. See Latin American And Caribbean Countries – LAC P10 (LACP20)’s website. ‘The Public Express Grave Concerns about the Regressive Development of the Ongoing Principle 10 Negotiations’, available on <https://www.lacp10.org/single-post/2017/08/02/The-Public-Express-Grave-Concerns-About-the-Regressive-Development-of-the-Ongoing-Principle-10-Negotiations> apud. op. cit. Médici, Gastón (2018), ‘El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe,’ p. 33.

the human rights obligations, which by its very character must be fulfilled. Nevertheless, this provision is not irrelevant at all, because it implies a limitation to States when imposing exceptions which may undermine what has been accomplished in the human rights system,<sup>364</sup> and reminds the interconnected and causal relationship between human rights and the refusal to disseminate information, and also, makes clear that the regime of exceptions cannot be a conjunct of severe and wide prohibitions to impede disclosure of environmental information.

In this respect, exceptions included by the Chilean legal order beyond the ones included in the Agreement are problematic. These grounds for secrecy and confidentiality expressed in Article 21 of the 20.285 Act are redacted in generic terms. Thus, for instance, Article (2) of the

364 Cfr. op. cit. Médiçi, Gastón (2018), 'El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe,' p. 34-35. This approach may be seen in cases such as: op. cit. Inter-American Court Of Human Rights (IACtHR) (2004) Case of Herrera Ulloa v. Costa Rica; Inter-American Court Of Human Rights (IACtHR) (2006) Case of López Álvarez v. Honduras, Judgment of 1 February 2006 (Merits, Reparations and Costs); op. cit. Inter-American Court Of Human Rights (IACtHR) (2006) Case of Claude Reyes et. al. v. Chile; and op. cit. Inter-American Court Of Human Rights (IACtHR) (2010) Case of Gomes Lund et. al ('Guerrilha Do Araguaia') v. Brazil. Also, in the context of the United Nations: United Nations (2013). 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (A/68/362), 4 September 2013; and United Nations (2008). 'Report of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights,' Okechukwu Ibeanu (A/HRC/7/21), 18 February 2008.



20.285 Act which allows withholding information when disclosure, communication or knowledge affects the rights of other persons, particularly regarding their safety, health, private life commercial and economic character, has been frequently used by the National Service of Fishing to deny access to environmental information, which has been reflected in some jurisprudence of the Council for Transparency,<sup>365</sup> arguing that the delivery of the environmental information affects the commercial and economic rights of the enterprises from which the information is required, leaving room for a broad interpretation which is not necessarily favorable to the right of access to information. Bearing in mind as well, that there is no provision in the Chilean legal order which establishes directives on how these exceptions must be interpreted.<sup>366</sup>

365 See Republic Of Chile. Council For Transparency (2019). Case of NN.NN v. Superintendencia de Electricidad y Combustibles. Decision No. C6503-18. 17 October 2019; Republic Of Chile. Council For Transparency (2018). Case of Oceana Inc. v. Servicio Nacional de Pesca y Acuicultura. Decision No. C1003-18. 2 August 2018; Republic Of Chile. Council For Transparency (2010). Case of Rigo Obando Millar v. Servicio Nacional de Pesca. Decision No. C227-10. 7 December 2010; Republic Of Chile. Council For Transparency (2015). Case of Oceana Inc. v. Servicio Nacional de Pesca y Acuicultura. Decision No. C1407-15, 6 October 2015; Republic Of Chile. Council For Transparency (2020). Case of Fabián Teca Fuentealba v. Dirección Regional de Aysén del Servicio Nacional de Pesca. Decision No. C838-20. 9 June 2020; and Republic Of Chile. Council For Transparency (2017). Case of Juan Silva Irrázaval v. Servicio Nacional de Pesca y Acuicultura. Decision No. C2771-17. 9 January 2018.

366 Cfr. op. cit. NGO FIMA (2020), 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile', p. 15.

In fact, the Chilean legal order establishes an exception to disclose information in this regard in Article 27 of the 19.300 Act and Article 40 of the Supreme Decree No. 40, in the context of the environmental impact assessment procedure, and expressed that information may be kept from disclosure if the owner of the project requests it, to ensure the commercial and industrial confidentiality or protect investment or pattern procedures of the project or activity subject to the assessment. It is worthy to highlight that this provision does not require a justification to the request by the owner.

In this line, the information contained in an environmental impact study constitutes the grounds for the administrative act by which a project is authorized or denied. In other words, it is part of the fundamentals or motivation of the Environmental Rating Resolution. In consequence, this information is by a constitutional mandate, public. In this sense, Bermúdez expressed that we must bear in mind that Article 8 of the Chilean Political Constitution does not permit any other grounds for keeping secret or confidential information, than the ones established by qualified quorum law (which in our case, is the 20.285 Act). Therefore, the only exceptions to justify secrecy or confidentiality through which all or part of the requested information may be legally denied, are the ones included in Article 21 of the 20.285 Act.<sup>367</sup>

Hence, the grounds invoked to keep information as secret or confidential will be valid inasmuch as it can be proved that they affect the right of persons, and in this case, the owner of the project. Thus, by not having to justi-

367 Cfr. op. cit. Bermúdez, Jorge. (2010). 'El acceso a la información pública y la justicia ambiental,' pp. 588-589.

fy the request to keep information as secret or confidential, the public environmental information produced along the Environmental Impact Assessment System susceptible of being kept as secret or confidential will not be just the technical or financial information, but any information in which the Environmental Impact Study or Declaration is based on.<sup>368</sup>

Bermúdez pinpointed in the same line that basically, not only the technical and financial information may fall within the exception, depending on the qualification taken as confidential or secret, but any information on which the environmental impact study is based on. This qualification is on a case-to-case basis, and in principle, that type of information can be considered as not safeguarded under any of the exceptions provided by Article 21 of the 20.285 Act. At least as long as it has not been expressly declared as such.<sup>369</sup>

In consequence, to qualify environmental information included in an environmental impact study as confidential or secret, the Environmental Assessment System must expressly declare it as such. However, there is a practical problem. As we already know, the environmental impact study is public, and the owner of the project does not have any legal grounds to a priori request the withholding of such information. Which in other words means that the information requested to be secret or confidential by the owner of the project will be kept as such, as long as someone challenges it before the Council of Transparency,

368 Cfr. *op. cit.* Bermúdez, Jorge (2014). 'Fundamentos de Derecho Ambiental', p. 340.

369 Cfr. *op. cit.* Bermúdez, Jorge. (2010). 'El acceso a la información pública y la justicia ambiental,' p. 589.

according to Article 24 of the 20.285 Act. This implies by extent, that if none challenges this withhold of information, information will be kept as secret or confidential without necessarily having to be declared by a qualified quorum law, as prescribed by Article 8 of the Chilean Political Constitution, such as the 20.285 Act.

Moreover, if this is considered in respect to the public that may participate in the Environmental Impact Assessment System process, they will not be able to get the 'big picture' of the project, and by extent, will not be able to duly participate, which in my opinion, is an arbitrary barrier to access to information in disguise. Therefore, the Chilean legal order does not comply with the standard provided by the Escazú Agreement.

### 5.1.3 OTHER ASPECTS OF THE REGIME OF EXCEPTIONS

#### *5.1.3.1 Divisibility of information*

Also, the agreement referred to the divisibility of information when expressed in Article 5(10) "where not all the information contained in a document is exempt under paragraph 6 [regime of exceptions] of the present article, the non-exempt information shall be provided to the applicant. Likewise, in Chile, was recognized a principle of divisibility in Article 11(e) of the 20.285 Act on Access to Public Information, which in cases some parts of an administrative act are exempt from disclosure, however, not the entire document, access will be provided concerning the part of information available for disclosure.

#### *5.1.3.2 Timeframe for withholding the information*

In respect of the time frames for withholding information, the Agreement did not include any provisions re-

lated to an obligation to determine a period of time that information can be exempted from disclosure. Although, on the other hand, Chile did. In Article 22 of the 20.285 Act on Access to Public Information, it is stated that information that has been declared as secret or confidential by a qualified quorum law, will keep this character until another law of the same hierarchy declares otherwise. However, passed five years since the notification of the act that declared the qualification of secret or confidential, the administrative body that made the declaration, *ex officio* or at the request of any person, and just for once, may extend the declaration for another five years, totally or partially, assessing the risks of damage that the termination of the declaration may cause.

Nevertheless, according to Article 22 of the 20.285 Act, there are some matters that are considered so important that keeping them secret or confidential is constantly required, thus they need to be kept indefinitely as secret or confidential. Those matters are related to national defense, which establishes military or strategic planification, and those whose knowledge or disclosure may affect the territorial integrity of Chile, the interpretation or compliance of an international treaty ratified by Chile in matters of limits, international defense of the rights of Chile or the foreign policies in a serious manner.

Finally, about the conditions for withholding the information, the Escazú Agreement any provisions related to an obligation to keep information secret or confidential in determined conditions. However, in Chile, the same Article 22 of the 20.285 Act on Access to Information expressed that the information declared as confidential or secret by a qualified quorum law must be kept in conditions that guarantee its preservation and security by the respective administrative body. Also, the information which has

been declared as secret or confidential by an administrative body on the grounds established by the qualified quorum law, must keep it in the aforementioned conditions for ten years.

## CONCLUSIONS

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The availability of environmental information is relevant as seen along this work. In fact, access to environmental information is an essential condition for environmental justice. The existence of what Bermúdez called ‘environmental ignorance’, influences in an inversely proportional way the goal of achieving an equitable distribution of environmental charges. In other words, the greater dissemination of environmental information there is, the public will be in a better position to participate or to demand a fair distribution of environmental charges.<sup>370</sup>

In fact, for example, in relation to the environmental management instruments revised in Chapter 3, they are established after all, with the aim to properly distribute those environmental charges, and thus, destined to reach environmental distributive justice—such as plans of decontamination—. Therefore, these instruments become inefficient when there is not adequate environmental information. The absence of environmental information is not just dangerous, it also encourages ineffectiveness and lack

370 Cfr. *op. cit.* Bermúdez, Jorge. (2010). ‘El acceso a la información pública y la justicia ambiental,’ p. 590.

of compliance with environmental regulations.<sup>371</sup> Hence, the citizenry requires to know and be informed of the elements of the environment, the state of the environment, and more importantly, the effects that a particular activity or project will cause on this environment.

In this respect, as was noted along this revision, the Chilean legal order has advanced remarkably in respect of the right of access to environmental information. This has been noted by the Inter-American Commission on Human Rights in the context of the Council for Transparency as an Independent Revision Mechanism, and it recommended States to “follow the example of those States such as Mexico and Chile where the right to access is vigorously protected through such institutions...”<sup>372</sup> States such as Mexico and Chile... have an autonomous, specialized body tasked with reviewing the administration’s denials of requests and making a final decision. The experience and practice of these two institutions have been enormously important in strengthening the effective guarantee of the right to access and shows the importance of these types of specialized authorities in the various legal systems.”

Nevertheless, the aim of this thesis was to conclude to what extent the Chilean environmental legal order shared the standards provided by the Escazú Agreement and to identify the ‘legal lagoons’ in which the Chilean legal

371 See *op. cit.* Bermúdez, Jorge. (2010). ‘El acceso a la información pública y la justicia ambiental,’ p. 595.

372 *Op. cit.* Inter-American Commission On Human Rights (IA-CHR) (2011). ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks,’ para. 454.



order does not consider in the analyzed legal regulations those determined standards. Firstly, concerning the general provisions included by the Agreement related to access to information; secondly, regarding the generation and dissemination of environmental information; thirdly, in respect of the access to environmental information; and lastly, regarding the refusal of the requested information.

So firstly, in respect of the general provisions of the Escazú Agreement in its Article 4 revised in chapter two, the Agreement focused on ensuring that the public would be duly informed to facilitate the acquisition of knowledge on access rights. In this sense, Chile does not have a very great performance, because although environmental information is considered as a management instrument by Chile, in fact, the Chilean legal order does not contemplate concrete mechanisms for people to effectively acquire information about their access rights. In addition, regarding the provision of special assistance, so to ensure acknowledgment by vulnerable people, Chile does not contemplate policies or regulations, specifically aimed to facilitate access to information concerning access rights by these peoples.

Also, considering a more favorable interpretation for the full enjoyment of and respect for the access rights in the implementation of the agreement, there is no such rule in the Chilean legal order. The interpretation regarding access rights is left to the discretion of the Administration and Tribunals of Justice. In addition, in respect of the use of new technologies of information, Chile does comply with this standard. However, as revised, problems related to education on the use of these tools remain, because sometimes information is not duly updated and none of the implemented websites are available in other languages

besides Spanish. Thus, all of these problems contravene the standard given by the Agreement, inasmuch as it said that these electronic means must be used in a way, they do not generate restrictions or discriminations. However, in Chile, they are still a barrier to access to information.

Secondly, regarding the obligations of active transparency, if the standards of the Escazú Agreement are applied, Chile would be supposed to guarantee that the competent authorities generate, collect and disseminate environmental information in a systematized, proactive, timely, regular, accessible and proactive manner, and to update it periodically. In this respect, there are still some problems in attention to information being timely, comprehensible, regular and updated. This was highlighted by the OECD when expressed that there are still grave problems related to availability, coverage and completeness of information. In particular, scarce information about the extraction and use of waters, protection of biological diversity and the negative impacts on the ecosystems. It said that commonly, in the monitoring stations of the quality of air and water, information is collected just in respect of few parameters, which implies difficulties to provide environmental statistics to international organizations and compliance of international conventions.<sup>373</sup>

Also, as mentioned along this revision, environmental information is by nature highly technical and it is not provided in comprehensive formats thus to ensure that the public understands it. It is not just to make information publicly available if in fact it is useless for the purpose it was made available for. This was issued in the Case

373 Cfr. *op. cit.* ECLAC and OEDC (2016). 'OECD Environmental Performance Reviews: Chile 2016,' p. 30 and 130.

of ‘Central Guacolda’ by the Chilean First Environmental Tribunal, which based on Instructive of the Environmental Impact Assessment System (Of. Ord. D.E. No. 130.528) related to the consideration of public observations in the context of the Environmental Impact Assessment System, made clear that this ‘translation’ of technical information so to ensure that the public understands the environmental information is an obligation of the State through their Administrative bodies, in this case, the Environmental Assessment Service.

The tribunal said that the information provided by the owner of a project has to be just a means of reference to the Environmental Assessment Service, so it cannot just rely on or merely reproduce the information provided by the owner of the project. It has to take the information through some sort of ‘translation process’ to make the information clear in respect of the drafting and language used, so it could be understandable by a person who does not necessarily have experience or previous knowledge about a determined matter.<sup>374</sup>

Finally, another problem identified in this revision, was that most of the environmental information held by the State’s Administration has been provided by particulars, due both to the submission to the Environmental Impact Assessment System or because of environmental supervision processes in which particulars are obliged to collect information. As this information relates to an asset collectively owned, as the environment, it implies a risk in its impartiality and objectivity in the decision-making ba-

374 Cfr. Chilean First Environmental Tribunal (2018). Case of Central Guacolda, Rol No. R7-2018. 24 August 2018, para. 26.

sed on this information which may be potentially dangerous in sense of the aforementioned environmental justice.

In addition, regarding the systems of information the Escazú Agreement included in its Article 6(3), as revised, Chile complies with most of them, however, none of these systems consider a list of contaminated zones by type of pollutant and location, the sources related to climate change that contribute to strengthening national capacities and an estimated list of waste by type. As well as the fact that there is just one integrated statal system of environmental permits and licenses submitted to the Environmental Impact Assessment System, which does not include other permits or licenses.

Regarding the establishment of a pollutant release and transfer register alluded by the Escazú Agreement in its Article 6(4), it was established by Chile, however, pollutant enterprises do not perform the needed reports and there is not sufficient supervision in this respect, as exemplified by the case of Quintero-Puchuncaví alluded as well in this revision. The same example applies regarding the notification of emergency situations.

Also, in respect of promoting access of information held by private entities and to elaborate sustainability reports by enterprises, we noted that the access to information in Chile is just limited to public information and there are no such norms that consider obligations for privates to provide these reports. Thus, in sum, Chile in respect of active transparency complies with several norms, however, there are serious lagoons compared to the standards provided by the Escazú Agreement.

Now, in respect of obligations of passive transparency revised in Chapter 4, on the right to access to informa-

tion, concerning the conditions for the delivery of information, Chile complies with the standards provided by the Agreement, in respect to the format, to the obligation to rapidly respond to the requests, to the gratuity and exceptional charges of direct costs, and in cases the requested authority does not possess the information to remit the request to the competent authority.

However, problems arise regarding the refusal of access to information analyzed in Chapter 5. As mentioned before, in Chile, the advances in Administrative Law, and Environmental Law as part of Administrative Law, experienced in matters of access right are evident, and the entry into force of the 20.285 Act on access to public information confirmed that the development of the rule of law has to pass through the availability of information to the public.

In this respect, we saw that the access to public information implies that all persons can obtain information held by the State's Administration. The recognition of this right was included in Article 10 of the 20.285 Act, in very wide terms, as the right of every person to request and receive information from any State's administrative body. The acknowledgment of this right gave efficacy to the principles of transparency and publicity recognized at a constitutional level in Article 8 of the Chilean Political Constitution.

Nevertheless, when the Chilean exceptions provided by Article 21 of the 20.285 Act that justify the withholding of information because it is qualified as secret or confidential, exceeded the ones included by the Escazú Agreement in its Article 6(6). In this respect, the fact that the exceptions established beyond the ones foreseen in the Escazú Agreement are provided in wide terms they lea-

ve a broad margin of interpretation and that there are no rules to guide the interpretation of them, is dangerous.

Into the bargain, the aspect that caught my attention the most was that Article 27 of the 19.300 Act included the possibility for owners of projects to request the exclusion of information by which the process is based on, on the grounds of the broad exception included in Article 21(2) of the 20.285 Act related to commercial and economic rights.

As revised, Article 8 of the Constitution expressly established that the general rule is that information held by the Administration is public and only by the application of grounds of secrecy and confidentiality established by a qualified quorum law, the right to access to that information can be restricted. Furthermore, the fact that Article 27 of the 19.300 Act included the possibility for owners of projects to invoke provisions like the one in Article 21(b) of the 20.285 Act without any requirement whatsoever of justifying this request, implies a risk of withholding information that should be public.

This exception is particularly dangerous because it could give rise to an abuse of secrecy, which is the opposite goal of the protection of the right to access to information provided by the Agreement. The possibility of the owner to the project to request to the Environmental Assessment System the withhold of information because of a possible conflict related to economic or industrial interests of the owner, without even having to pass mandatorily through the Council for Transparency to effectively verify that this restriction is justified, through a test of interest – which as we know, is another problem in the Chilean legal system, albeit at least helps to give some certainty to the application of these exceptions– is problematic.

In this respect, the Chilean legal order contemplates that after the request of the owner of the project to withhold information he considers necessary to be held confidential or secret, the Environmental Impact Assessment has to declare it through an administrative act, that could then be challenged by the public before the Council of Transparency.

However, as Article 27 of the 19.300 does not require a justification or to prove the motivation for the request by the owner of the project to withhold information, the Environmental Assessment System would not have the necessary information to properly balance the admissibility of such request. Thus, although the Environmental Impact Assessment could deny this request and keep that information publicly available, it can also accept this request and limit the right to access to information in a context where, as we know, is an important access right to properly exercise the other access rights and fundamental rights. Thus, a decision taken in a situation where there is not enough evidence provided by the requester because the provision does not request it and there is not some sort of debate on it, could give rise to risking the limitation of information on unreliable grounds.

Also, as mentioned, as mentioned before, there is the possibility to challenge this administrative act which declared the information requested as secret or confidential before the Council of Transparency according to Article 24 of the 20.285 Act. However, this is not sufficient, because that information will be excluded from the public sphere as long as someone challenges it, which implies by extent, that if no-one challenges this withhold of information, information will be kept as secret or confidential without necessarily having to be declared by a qualified

quorum law, as prescribed by Article 8 of the Chilean Political Constitution, such as the 20.285 Act.

This is grave, because as said along the revision, this information is the basis for the Environmental Rating Resolution. Having part of the information withheld as the wishes of the owner of the project, implies that not only the technical character of the information is a common barrier to access to information, inasmuch as said before, providing information is useless if it is written in terms no one will understand, but also, the fact that vital information that communities may need to duly participate, may be excluded. Even more, arbitrarily.

This point of view was shared by Professor Bermúdez when he expressed that we must bear in mind that Article 8 of the Chilean Political Constitution does not permit any other grounds for keeping secret or confidential information, than the ones established by qualified quorum law, and therefore, the grounds invoked to keep information as secret or confidential will be valid inasmuch as it can be proved that they affect the right of persons, in this case, the owner of the project. Hence, by not having to justify the request to keep information as secret or confidential, the public environmental information produced along the Environmental Impact Assessment System susceptible of being kept as secret or confidential will not be just the technical or financial information, but any information in which the Environmental Impact Study or Declaration is based on.<sup>375</sup>

375 Cfr. op. cit. Bermúdez, Jorge (2014), 'Fundamentos de Derecho Ambiental', p. 340.



There are other issues in respect of these exceptions established in the Chilean legal order, however as they were not included by the Agreement, I left them out of the analysis, because what is relevant to us, is the fact that the Escazú Agreement in its Article 4(7) expressed that it provides a minimum standard of protection of the right of access to information, meaning it is the ground never the ceiling, and by including more exceptions, the Chilean legal order, in fact, restricted, even more, this right of access compared to the Escazú Agreement, contravening the whole purpose of the protection of the access to information. Moreover, if we bear in mind that these exceptions are so broad it provokes problems as the one mentioned and concerning the jurisprudence of the Council for Transparency in respect of the test of public interests.

Hence, I consider that regarding the access to information, as mentioned along this thesis, there are some aspects in which Chile has had a remarkable performance, particularly, with respect to the establishment of the Council of Transparency and the enactment of the 20.285 Act and 20.417 Act in matters of environmental information, nevertheless, there are several standards that have been complied partially or not at all by the Chilean legal order. Being, in my opinion, the most important of all, the regime of exceptions established by the Chilean legal order.



## BIBLIOGRAPHY

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### **I. International References (Agreements, Conventions, Treaties, Protocols, Reports, Resolutions, Foreign Countries' Laws, Etc.)**

Australian Government (1982). 'Freedom of Information Act 1982' No. 3, 1982. Compilation No. 98. Part III (Access to documents) Section 11 (Right of access). Available on <https://www.legislation.gov.au/Details/C2020C00366>

Association Of South East Asian Nations (1985) ASEAN Agreement on the Conservation of Nature and Natural Resources. Available on <http://agreement.asean.org/media/download/20161129035620.pdf>

CCAMLR (1982). 'Text of the Convention for the Conservation of Antarctic Marine Living Resources. Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources.' Available on [https://www.ccamlr.org/en/system/files/e-pt1\\_3.pdf](https://www.ccamlr.org/en/system/files/e-pt1_3.pdf)

Council Of Europe (2009). 'Explanatory Report to the Council of Europe Convention on Access to Offi-

cial Documents' (Treaty Series -No. 205). Available on <https://rm.coe.int/16800d3836>

Economic Commission For Latin America And The Caribbean (ECLAC) (2012). 'Report of the first meeting of the focal points appointed by the governments of the signatory countries of the declaration on the application of principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean.' November 6-7, 2012. Available on <https://www.cepal.org/en/publications/21664-report-first-meeting-focal-points-appointed-governments-signatory-countries>

Economic Commission For Latin America And The Caribbean (ECLAC) (2015). 'Latin America and the Caribbean: looking ahead after the Millennium Development Goals. Regional monitoring report on the Millennium Development Goals in Latin America and the Caribbean' (LC/G.2646), Santiago Chile. Available on <https://www.cepal.org/en/publications/38924-latin-america-and-caribbean-looking-ahead-after-millennium-development-goals>

International Labor Organization (ILO) (1989). 'Indigenous and Tribal Peoples Convention' (No. 169) (better known as 'Convention No. 169'), adopted on 27 June 1989 at the Organization's seventy-sixth session. Available on [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169)

Inter-American Juridical Committee (2008). 'Principles on the Right of Access to Information.' Resolution 147 OEA/Ser. Q, CJI/RES. 147 (LXXIII-O/08) of the 73<sup>o</sup> regular period of sessions. 7 August 2008.

Available on [https://www.oas.org/en/sla/dil/docs/CJI-RES\\_147\\_LXXIII-O-08\\_eng.pdf](https://www.oas.org/en/sla/dil/docs/CJI-RES_147_LXXIII-O-08_eng.pdf)

Ila Study Group On Due Diligence In International Law (2014) 'First Report'. Tim Stephens (Rapporteur) and Duncan French (Chair). 7 March 2014. Available on [https://olympereuseauinternational.files.wordpress.com/2015/07/due\\_diligence\\_-\\_first\\_report\\_2014.pdf](https://olympereuseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf)

Ila Study Group On Due Diligence In International Law (2016) 'Second Report'. Tim Stephens (Rapporteur) and Duncan French (Chair). July 2016. Available on [https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f#:~:text=The%20First%20Report%20\(2014\)%20set,specific%20areas%20of%20international%20law.](https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cafa221685f#:~:text=The%20First%20Report%20(2014)%20set,specific%20areas%20of%20international%20law.)

Irish Government (2014). 'Freedom of Information Act 2014' Number 30 of 2014. Chapter 2. Decisions of FOI. Available on <http://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/html>

Organization For American States (OAS) (1940) 'Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere' (Washington Convention) Treaty Series, No. 31. Available on <https://www.oas.org/juridico/english/treaties/c-8.html>

Organization Of American States (OAS) (2009). 'The Inter-American Legal Framework Regarding the Right to Freedom of Expression.' Office of the Special Rapporteur for Freedom of Expression. Inter-American Commission on Human Rights, OEA/Ser.L/V/II CIDH/RELE/INF. 1/09. 30 December

2009. Available on <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>

Organization Of American States (Oas) General Assembly (2010). 'Model Inter-American Law on Access to Public Information' AG/RES. 2607 (XL-O/10). Adopted at the fourth plenary session, held on 8 June 2010. Available on [https://www.oas.org/dil/AG-RES\\_2607-2010\\_eng.pdf](https://www.oas.org/dil/AG-RES_2607-2010_eng.pdf)

Organization For Economic Co-Operation And Development (OECD) (2016). 'OECD Environmental Performance Reviews: Chile 2016'. Available on [https://www.oecd-ilibrary.org/sites/9789264252615-en/1/2/2/2/index.html?itemId=/content/publication/9789264252615-en&\\_csp\\_=ac6dae33cb62811ee0180ed3191a1f84&itemIGO=oecd&itemContentType=book](https://www.oecd-ilibrary.org/sites/9789264252615-en/1/2/2/2/index.html?itemId=/content/publication/9789264252615-en&_csp_=ac6dae33cb62811ee0180ed3191a1f84&itemIGO=oecd&itemContentType=book)

Osce Representative On Freedom Of The Media (2004). 'International Mechanisms for Promoting Freedom of Expression. Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression, the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe (OSCE).' 6 December 2004. Available on <https://www.osce.org/files/f/documents/6/f/38632.pdf>

United Nations Educational, Scientific And Cultural Organization (UNESCO) (1971). 'Convention on Wetlands of International Importance especia-

lly as Waterfowl Habitat,' (Ramsar Convention). Ratified by Chile on 27 November 1981. Available on [http://portal.unesco.org/en/ev.php-URL\\_ID=15398&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15398&URL_DO=DO_TOPIC&URL_SECTION=201.html)

United Nations (1979). 'Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention; CMS). Available on <https://www.cms.int/en/convention-text>

United Nations (1987) Montreal Protocol on Substances that Deplete the Ozone Layer. Montreal. 16 September 1987. Available on [https://treaties.un.org/doc/Treaties/1989/01/19890101%2003-25%20AM/Ch\\_XXVII\\_02\\_ap.pdf](https://treaties.un.org/doc/Treaties/1989/01/19890101%2003-25%20AM/Ch_XXVII_02_ap.pdf)

United Nations (1989) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted by the Conference on the Plenipotentiaries. 22 March 1989. Available on <http://archive.basel.int/text/con-e.pdf>

United Nations (1992). 'Report of the United Nations Conference on Environment and Development.' A/CONF.151/26 (Vol. I) Annex I. Rio Declaration on Environment and Development. 3-14 June 1992. Available on [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

United Nations (1992). 'Convention on Biological Diversity.' Available on <https://www.cbd.int/doc/legal/cbd-en.pdf>

United Nations (1992). Rio Declaration on Environment and Development. E/CN.4/RES/1994/65. 12 Au-

gust 1992. Available on [https://www.un.org/en/development/desa/population/migration/general-assembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/general-assembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

United Nations (1992). 'United Nations Framework Convention on Climate Change'. Available on [https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf)

United Nations (1992). 'Convention on Biological Diversity (CBD)' Treaty Series, Vol. 1760. Available on <https://www.cbd.int/doc/legal/cbd-en.pdf>

United Nations Sustainable Development (1992). United Nations Conference on Environment and Development. Agenda 21. Rio de Janeiro, Brazil. 3-14 June 1992. Available on <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>

United Nations Security Council (1992). 'An Agenda for Peace, preventive diplomacy, peacemaking and peace-keeping.' Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992 (A/47/277-S/24111). 17 June 1992, para. 81. Available on [https://www.un.org/ruleoflaw/files/A\\_47\\_277.pdf](https://www.un.org/ruleoflaw/files/A_47_277.pdf)

United Nations. Commission On Human Rights (1994). Question of the Human Right of all persons subjected to any form of detention or imprisonment. Promotion and protection of the right to freedom of opinion and expression. Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights. Resolution 1993/45 (E/



CN.4/1995/32). 14 December 1994. Available on <https://undocs.org/en/E/CN.4/1995/32>

United Nations. Economic Commission For Europe (UNECE) (1998). Protocol (POP) to the 1979 Convention on Long-range Transboundary Air Pollution on Persistent Organic Pollutants (LRTAP). Available on <https://unece.org/DAM/env/lrtap/full%20text/1998.POPs.e.pdf>

United Nations. Economic Commission For Europe (UNECE) (1998). 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters' (Aarhus Convention). Aarhus, Denmark. 25 June 1998. Available on <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

United Nations. Economic Commission For Europe (UNECE) (1999). Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone (Gothenburg). Available on [https://unece.org/DAM/env/documents/2013/air/eb/ECE.EB.AIR.114\\_ENG.pdf](https://unece.org/DAM/env/documents/2013/air/eb/ECE.EB.AIR.114_ENG.pdf)

United Nations. Economic Commission For Europe (UNECE) (1999). Protocol on Water and Health to the 1992 Watercourses Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Volume 2331, A-33207. Available on [https://www.wipo.int/edocs/lexdocs/treaties/en/unece-ln/trt\\_unece\\_ln.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/unece-ln/trt_unece_ln.pdf)

United Nations Educational, Scientific And Cultural Organization (UNESCO) (1999) Convention's Outreach Programme 1999-2002. Actions to promo-

te communication, education and public awareness to support implementation of the Convention on Wetlands (Ramsar Convention. Ramsar, Iran, 1971) Res. VII.9. Available on [https://www.ramsar.org/sites/default/files/documents/library/key\\_res\\_vii.09e.pdf](https://www.ramsar.org/sites/default/files/documents/library/key_res_vii.09e.pdf)

United Nations. Department of Economic and Social Affairs and United Nations Environment Programme (2000). 'Handbook of National Accounting. Integrated Environmental and Economic Accounting. An Operational Manual', Series F, No. 78 (ST/ESA/STAT/SER.F/78). New York. Available on <https://undocs.org/ST/ESA/STAT/SER.F/78>

United Nations (2000). Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Montreal. Available on <https://bch.cbd.int/protocol/text/>

United Nations Environment Programme (2001). Stockholm Convention on Persistent Organic Pollutants (POPs Convention). Available on <http://www.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>

United Nations Commission On Human Rights (2001). Prevention of Discrimination and Protection of Indigenous Peoples and Minorities. Indigenous peoples and their relationship to land (E/CN.4/Sub.2/2001/21). Final working paper prepared by the Special Rapporteur, Mrs. Erika-Irene A. Daes. 11 June 2001. Available on <https://undocs.org/en/E/CN.4/Sub.2/2001/21>

United Nations General Assembly (2007). 61/295 Declaration on the Rights of Indigenous Peoples (UNDRIP) (A/61/L.67 and Add.1). Resolution adopted

on 13 September 2007. Available on [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)

United Nations Economic And Social Commission For Asia And The Pacific (UNESCAP) (2007). 'What is good governance?' Available on <https://www.unescap.org/sites/default/files/good-governance.pdf>

United Nations Permanent Forum On Indigenous Issues (2007). Economic and Social Council Official Records Supplement No. 23 (E/2007/43, E/C.19/2007/12). Report on the sixth session, 14-25 May 2007. Available on <https://digitallibrary.un.org/record/603352?ln=es>

United Nations (2008). Report of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu (A/HRC/7/21), 18 February 2008, available on <https://digitallibrary.un.org/record/621576?ln=es>

United Nations Environment Programme (UNEP). Governing Council (2010). 'Guidelines for Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (Bali Guidelines), Decision SS. XI/5, part A.

United Nations (2011). 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010.' FCCC/CP/2010/7/Add.1. Part Two: Action taken by the

Conference of the Parties at its sixteenth session. Contents: Decisions adopted by the Conference of the Parties. Decision 1/CP.16. The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention. 15 March 2011. Available on <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>

United Nations Human Rights Committee (2011). General Comment 34 (CCPR/C/GC/34).

102nd session. Geneva. 11-29 July 2011. Available on <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

United Nations (2013). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (A/68/362), 4 September 2013, available on <https://digitallibrary.un.org/record/768352?ln=es>

United Nations (2015). 'Paris Agreement.' Available on [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf)

Wto Committee on Trade and Environment (1996). Report 'Trade and the Environment, News and View from the WTO' (Doc. PRESS/TE 014), 18 November 1996. Available on <https://enb.iisd.org/wto/envrep.htm>

## **II. Chilean Instruments**

Republic Of Chile. Ministry Of Energy (2017). 'Plan de Mitigación de Gases de Efecto Invernadero para el Sector de la Energía'. December 2017. Available on

[https://energia.gob.cl/sites/default/files/plan\\_de\\_mitigacion\\_energia.pdf](https://energia.gob.cl/sites/default/files/plan_de_mitigacion_energia.pdf)

Republic Of Chile. Ministry Of The Environment (2014). 'Plan Nacional de Adaptación al Cambio Climático' Tercera Comunicación Nacional sobre Cambio Climático. Cooperación Alemana. Available on <https://mma.gob.cl/wp-content/uploads/2016/02/Plan-Nacional-Adaptacion-Cambio-Climatico-version-final.pdf>

Republic Of Chile. National Forest Corporation And Ministry Of Agriculture (2016). National Strategy on Climate Change and Vegetable Resources 2017-2025, prologue. Available on [https://www.conaf.cl/cms/editorweb/ENCCR/ENCCR-3a\\_Edicion-17mayo2017.pdf](https://www.conaf.cl/cms/editorweb/ENCCR/ENCCR-3a_Edicion-17mayo2017.pdf)

### **III. Chilean Legislation**

Republic Of Chile, Council For Transparency (2010). 'General Instruction No. 6 on Gratuity and Direct Costs of Reproduction.' 19 March 2010. Available on [https://www.consejotransparencia.cl/consejo/site//artic/20121219/asocfile/20121219161832/instruccion\\_general6.pdf](https://www.consejotransparencia.cl/consejo/site//artic/20121219/asocfile/20121219161832/instruccion_general6.pdf).

Republic Of Chile. Council For Transparency (2011). 'General Instruction No. 10 of the Council for Transparency on the Administrative Procedure of Access to Information.' 28 October 2011. Available on [https://www.consejotransparencia.cl/consejo/site//artic/20121223/asocfile/20121223235850/instruccion\\_general\\_10\\_dai.pdf](https://www.consejotransparencia.cl/consejo/site//artic/20121223/asocfile/20121223235850/instruccion_general_10_dai.pdf)

Republic Of Chile, Council Of Ministers For Sustainability And Climate Change (2015). 'Chilean National

Tentative Contribution to Paris Agreement.’ September 2015. Available on <https://mma.gob.cl/wp-content/uploads/2016/05/2015-INDC-web.pdf>

Republic Of Chile, Environmental Assessment Service (2013). ‘OF. ORD. D. E. No. 130528 which gives instructions on the consideration of public observations in the context of the Environmental Impact Assessment System.’ 1 April 2013. Available on [https://www.sea.gob.cl/sites/default/files/migration\\_files/archivos/instructivos/inst130528\\_obs\\_ciu\\_dadana\\_evaluacion.pdf](https://www.sea.gob.cl/sites/default/files/migration_files/archivos/instructivos/inst130528_obs_ciu_dadana_evaluacion.pdf)

Republic Of Chile, Ministry Of Agriculture (1984). ‘18.362 Act which creates the National System of Protected Wild Areas protected by the State.’ 27 December 1984. Available on <https://www.bcn.cl/leychile/navegar?idNorma=29777>

Republic Of Chile, Ministry Of Agriculture (1984). ‘18.348 Act which creates the National Forest Corporation and the protection of renewable natural resources.’ 19 October 1984. Available on <https://www.bcn.cl/leychile/navegar?idNorma=29764>

Republic Of Chile, Ministry Of Agriculture (2005). ‘20.089 Act which creates the National Certification System for Agricultural Products.’ 17 January 2006. Available on <https://www.bcn.cl/leychile/navegar?idNorma=246460>

Republic Of Chile, Ministry Of Economy (1985). ‘18.410 Act which creates de Superintendency of Electricity and Fuels.’ 22 May 1985. Available on <https://www.bcn.cl/leychile/navegar?idNorma=29819>

Republic Of Chile, Ministry Of Economy (2008). ‘20.257 Act which introduces modifications to

the general law of electric services in respect of the generation of electric energy with sources of renewable non-conventional energies.’ 1 April 2008. Available on <https://www.bcn.cl/leychile/navegar?idNorma=270212&idVersion=2013-10-22&idParte=8021629>

Republic Of Chile, Ministry Of Energy (2013). ‘20.698 Act which enables the expansion of the energy matrix through non-conventional renewable sources.’ 22 October 2013. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1055402>

Republic Of Chile, Ministry Of Energy (2016). ‘Circular No. 16.621 which communicates the obligation to keep linked to online selling products, visible to the public, the certification labeling (SEC label) and the energetic efficiency label if it corresponds.’ 22 December 2016. Available on [https://www.sec.cl/transparencia/docs2016/Circular\\_16621\\_2016.pdf](https://www.sec.cl/transparencia/docs2016/Circular_16621_2016.pdf)

Republic Of Chile, Ministry Of The Environment (2012). ‘Decree No. 29, which approves the regulation for the classification of wild species according to the conservation state.’ 27 April 2012. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1039460>

Republic Of Chile, Ministry Of The Environment (2013). ‘Supreme Decree No. 39 which approves the regulation for the dictation of plans or prevention and decontamination.’ 22 July 2013. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1053037&idVersion=2013-08-01>

Republic Of Chile, Ministry Of The Environment (2013). ‘Supreme Decree No. 1 which approves the regulation of the Emissions and Transfer Register,

PRTR.’ 2 May 2013. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1050536>

Republic Of Chile, Ministry Of The Environment (2013). ‘Decree No. 40, which approved the regulation of the Environmental Impact Assessment System.’ 12 August 2013. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1053563>

Republic Of Chile, Ministry Of The Environment (2013). ‘Exempt Resolution 269 of the Subsecretary of the Environment which establishes the structure and organization of the offices under the direct dependence of the Subsecretary of the Environment.’ 10 April 2013. Available on [http://www.mma.gob.cl/transparencia/mma/doc/Res\\_269\\_EstableceEstructuraOrganizacionOficinasDependenciaDirecta-Subsecretario.pdf](http://www.mma.gob.cl/transparencia/mma/doc/Res_269_EstableceEstructuraOrganizacionOficinasDependenciaDirecta-Subsecretario.pdf)

Republic Of Chile, Ministry Of The Environment (2014). ‘Supreme Decree No. 39 which approves the regulation for technical entities of environmental certification of the Superintendency of the Environment.’ 18 March 2014. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1060367>

Republic Of Chile, Ministry Of The Environment (2015). ‘Exempt Resolution No. 601 which approves the Ministry of the Environment’s general norm on public participation which establishes formal modalities and specific in the framework of the 20.500 Act.’ 8 July 2015. Available on [http://www.mma.gob.cl/transparencia/mma/doc/Norma-PAC-MMA\\_Res-0601.pdf](http://www.mma.gob.cl/transparencia/mma/doc/Norma-PAC-MMA_Res-0601.pdf)

Republic Of Chile, Ministry Of The Environment (2016). ‘20.920 Act which establishes the framework



for the waste management and responsibility of the producer and promotion of recycling.’ 1 June 2016. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1090894>

Republic Of Chile. Ministry Of The Environment (2016). Final Report. Presidential Advisory Commission to Assess the Environmental Impact Assessment System. Available on [https://www.sea.gob.cl/sites/default/files/imce/archivos/2017/05/10/35877\\_informe-mmef\\_final.pdf](https://www.sea.gob.cl/sites/default/files/imce/archivos/2017/05/10/35877_informe-mmef_final.pdf)

Republic Of Chile, Ministry Of The Environment (2016). ‘Second Biennial Report on the Chilean update.’ Available on [http://www.snichile.cl/sites/default/files/documentos/2016\\_re2iba\\_chile.pdf](http://www.snichile.cl/sites/default/files/documentos/2016_re2iba_chile.pdf).

Republic Of Chile, Ministry Of The Environment (2019). ‘Informe del Inventario Nacional de Gases de Efecto Invernadero de Chile’, serie 1990-2016. Santiago, Chile. Available on [https://mma.gob.cl/wp-content/uploads/2019/07/2018\\_NIR\\_CL.pdf](https://mma.gob.cl/wp-content/uploads/2019/07/2018_NIR_CL.pdf)

Republic Of Chile, Ministry General Secretary Of The Presidency (1980). Political Constitution of the Republic. Decree No. 100 which establishes the re-funded, coordinated and systematized text of the Political Constitution of the Republic of Chile. 22 September 2005. Available on <https://www.bcn.cl/leychile/navegar?idNorma=242302>

Republic Of Chile, Ministry General Secretary Of The Presidency (1994). ‘19.300 Act which approves the law on the general environmental bases.’ 9 March 1994. Available on <https://www.bcn.cl/leychile/navegar?idNorma=30667>

Republic Of Chile, Ministry General Secretary Of The Presidency (2003). '19.880 Act which establishes the bases of the administrative procedures that govern the acts of the bodies of the State.' 29 May 2003. Available on <https://www.bcn.cl/leychile/navegar?idNorma=210676>

Republic Of Chile, Ministry General Secretary Of The Presidency (2008). '20.285 Act on Access to Public Information' (Law of Transparency). 20 August 2008. Available on <https://www.bcn.cl/leychile/navegar?idNorma=276363>

Republic Of Chile, Ministry General Secretary Of The Presidency (2010). '20.417 Act which creates the Ministry, Environmental Assessment Service and the Superintendency of the Environment and is the Organic Law of the Superintendency of the Environment.' 26 January 2010. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1010459>

Republic Of Chile, Ministry Of Health (1997). 'Decree No. 977 which approves de sanitary regulation of food.' 13 May 1997. Available on <https://www.bcn.cl/leychile/navegar?idNorma=71271>

Republic Of Chile, Ministry Of Health (2005). 'Decree No. 136/04, Regulation of the Ministry of Health.' 21 April 2005. Available on <http://transparencia.redsalud.gob.cl/transparencia/public/seremi7/archivos/3.pdf>

Republic Of Chile, Ministry Of Health (2012). '20.606 Act on the Nutritional Composition of Food and their Publicity.' 6 July 2012. Available on <https://www.bcn.cl/leychile/navegar?idNorma=1041570>

- Republic Of Chile, Ministry Of The Interior (1974). 'Decree Law No. 369 which created the National Emergency Office dependent of the Ministry of the Interior.' 22 March 1974. Available on <https://www.bcn.cl/leychile/navegar?idNorma=6027>
- Republic Of Chile, Ministry Of The Interior (1986). '18.575 Act, Organic Constitutional Law on the General Grounds of the State's Administration.' 5 December 1986. Refunded by Decree with legal force 19.653 which establishes the refunded, coordinated and systematized text of the 18.575 Act. 17 November 2001. Available on <https://www.bcn.cl/leychile/navegar?idNorma=29967>
- Republic Of Chile, Ministry Of The Interior (1990). 'Supreme Decree No. 680 which approves the instructions for the establishment of information offices for the public users of the State's Administration.' 21 September 1990. Available on <https://www.interior.gob.cl/transparenciaactiva/doc/Funciones-UnidadesInternas/1300/15480.pdf>
- Republic Of Chile, Ministry Of The Interior (2002). 'Decree No. 156/2002, which approves the National Plan on Civil Protection and derogates Decree No. 155 of 1977 which approved the National Emergency Plan.' 13 June 2002. Available on <https://www.bcn.cl/leychile/navegar?idNorma=199115>
- Republic Of Chile, Ministry Of Justice (2000). 'Civil Code. Decree with Force of Law No. 1 which establishes the refunded, coordinated and systematized text of the Civil Code.' 30 May 2000. Available on <https://www.bcn.cl/leychile/navegar?idNorma=172986>

Republic Of Chile, Ministry Of National Assets (2006). 'Decree No. 28 which creates the National System of coordination of territorial information.' 2 July 2006. Available on [http://www.ide.cl/documentos/DTO-28\\_02-SEP-2006.pdf](http://www.ide.cl/documentos/DTO-28_02-SEP-2006.pdf)

Republic Of Chile. Project of Law, which establishes the Framework Law on Climate Change. Message No. 574-367. Bulletin No. 13.191-12. Available on [http://leycambioclimatico.cl/wp-content/uploads/2020/07/ProyectoLeyCC\\_13012020.pdf](http://leycambioclimatico.cl/wp-content/uploads/2020/07/ProyectoLeyCC_13012020.pdf)

Republic Of Chile, Superintendency Of Securities And Insurance (1989). 'Norm of General Character No. 30 of 1989.' Modified by the Norm of General Character of the Superintendency of Securities and Insurance No. 386 of 2015. Both available on [http://www.svs.cl/institucional/legislacion\\_normativa/normativa2.php?tiponorma=NCG&numero=30&dd=&mm=&aa=&dd2=&mm2=&aa2=&busca r=&entidad\\_web=ALL&materia=ALL&enviado=1&hidden\\_mercado=V](http://www.svs.cl/institucional/legislacion_normativa/normativa2.php?tiponorma=NCG&numero=30&dd=&mm=&aa=&dd2=&mm2=&aa2=&busca r=&entidad_web=ALL&materia=ALL&enviado=1&hidden_mercado=V)

#### **IV. International Jurisprudence (From International Bodies Or Foreign Countries' Courts)**

Australian Victorian Civil And Administrative Tribunal (2010). XYZ v. Victoria Police (General). VCAT 255, 16 March 2010. Available on [https://www.right2info.org/resources/publications/case-pdfs/australia\\_xyz-v-victoria-police](https://www.right2info.org/resources/publications/case-pdfs/australia_xyz-v-victoria-police)

African Commission On Human And Peoples' Rights. (2001). 'Social and Economic Rights Center (SE-RAC) and Center for Economic and Social Rights

(CESR) v. Nigeria.’ Communication 155/96. Decision of 27 October 2001. Available on [https://www.achpr.org/public/Document/file/English/achpr30\\_155\\_96\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf)

European Court Of Human Rights (ECtHR) (1998). ‘Case of Guerra and Others v. Italy.’ (116/1996/735/932). Judgment 19 February 1998. Available on <http://hudoc.echr.coe.int/eng?i=001-58135>

European Court Of Human Rights (ECtHR) (1998). ‘Case of McGinley and Egan v. The United Kingdom,’ No. 21825/93 and 23414/94, Judgment of 9 July 1998. Available on <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-6861&filename=002-6861.pdf&TID=ihgdqbxnfi>

European Court Of Human Rights (ECtHR) (2004). ‘Case of Taskin and Others v. Turkey,’ No. 46117/99. Judgment of 10 November 2004. Available on <http://hudoc.echr.coe.int/eng?i=001-67401>

European Court Of Human Rights (ECtHR) (2005). ‘Case of Roche v. The United Kingdom,’ No. 32555/96. Judgment of 19 October 2005. Available on <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-3662&filename=002-3662.pdf>

European Court Of Human Rights (ECtHR) (2009). ‘Case of Társaság a Szabadságjogokért v. Hungary’ (App. No. 37374/05). Judgment of 14 April 2009. Available on [https://www.right2info.org/resources/publications/case-pdfs/echr\\_hclu-v.-hungary\\_dec\\_eng](https://www.right2info.org/resources/publications/case-pdfs/echr_hclu-v.-hungary_dec_eng)

European Court Of Human Rights (ECtHR) (2013). ‘Case of Österreichische Vereinigung zur Erhal-

tung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria.’ Application No. 39534/07. Judgment of 28 November 2013. Available on <http://hudoc.echr.coe.int/fre?i=001-139084>

GATT Panel Report (1993). Report on United States – Restriction on Imports of Tuna (DS29/R). 18 February 1992. Available on [https://www.wto.org/english/tratop\\_e/dispu\\_e/gatt\\_e/91tuna.pdf](https://www.wto.org/english/tratop_e/dispu_e/gatt_e/91tuna.pdf)

International Court Of Justice (ICJ) (1986). ‘Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)’. Judgment of 27 June 1986. Available on <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf>

Inter-American Court Of Human Rights (IACtHR) (1986). ‘The Word “Laws” in Article 30 of the American Convention on Human Rights.’ Advisory Opinion OC-6/86. Series A No. 6, 9 May 1986. Available on [https://www.corteidh.or.cr/docs/opiniones/seriea\\_06\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2001). Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Series C No. 79). Judgment of 31 August 2001 (Merits, Reparations and Costs). Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2003). ‘Case of Myrna Mack-Chang v. Guatemala.’ Series C No. 101. Judgment of 25 November 2003 (Merits, Reparations and Costs). Available on

[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_101\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2004). Case of Herrera-Ulloa v. Costa Rica. Judgment of 2 July 2004 (Preliminary Objections, Merits, Reparations and Costs). Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_107\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2005). Case of Palamara-Iribarne v. Chile (Merits, Reparation and Costs), Judgment of 22 November 2005. Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_135\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2005). Case of Yakye Axa Indigenous Community v. Paraguay (Series C No. 125). Judgment of 17 June 2005 (Merits, Reparations, and Costs). Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_125\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2006). Case of Claude Reyes et al. v. Chile (Merits, Reparations and Costs). Judgment of 19 September 2006. Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2006) Case of López Álvarez v. Honduras, Judgment of 1 February 2006 (Merits, Reparations and Costs). Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_141\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_141_esp.pdf)

Inter-American Court Of Human Rights (IACtHR) (2007). Case of the Saramaka People v. Suriname (Series C No 172). Judgment of 28 November 2007

(Preliminary Objections, Merits, Reparations, and Costs). Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2010) Case of Gomes Lund et. Al (‘Guerrilha do Araguaia’) v. Brazil. Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations, and Costs). Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf)

Inter-American Commission On Human Rights (IA-CHR) (2011) ‘The Right to Access to Information in the Americas. Inter-American Standards and Comparison of Legal Frameworks.’ Office of the Special Rapporteur for Freedom of Expression. OEA/SER.L/V/II. CIDH/RELE/INF.7/12. 30 December 2011. Available on <https://www.oas.org/en/iachr/expression/docs/publications/access%20to%20information%20in%20the%20Americas%202012%2005%2015.pdf>

Inter-American Court Of Human Rights (IACtHR) (2012). Case of Furlan and family members v. Argentina (Preliminary Objections, Merits, Reparations and Costs). Judgment of 31 August 2012. Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_246\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_246_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2012). ‘Case of the Kichwa Indigenous People of Sarayaku v. Ecuador.’ Judgment of 27 June 2012 (Merits and Reparations). Available on [https://corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf)



Inter-American Court Of Human Rights (IACtHR) (2015). Case of the Kaliña and Lokono Peoples v. Suriname (Merits, reparations and costs), Judgment of 25 November 2015. Available on [https://www.corteidh.or.cr/docs/casos/articulos/resumen\\_309\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/resumen_309_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2016). Case of I.V. v. Bolivia (Preliminary objections, merits, reparations and costs), Judgment of 30 November 2016. Available on [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_329\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_ing.pdf)

Inter-American Court Of Human Rights (IACtHR) (2018). Advisory Opinion OC-23/17 requested by the Republic of Colombia. The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Articles 4(1) And 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights). 15 November 2017. Available on <https://elaw.org/system/files/attachments/publicresource/English%20version%20of%20AdvOp%20OC-23.pdf>

Supreme Court Of India (1981). Case of S.P. Gupta v. President of India and Ors. (AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365). Judgment of 30 December 1981. Available on [https://indiankanoon.org/doc/1294854/?cf\\_chl\\_jschl\\_tk=4496955215b37e766e79d27f88f246e89ef6a222-1615369913-0-AWPxIJ1hbp6c54-piFfJtV4D72RuuhK20P7fhgy1PBzI0MSHRcS-7vFKuKrijlWa1v0CpBaxLcqoC3UyQtK1Y5LR-xE2lbqeY0jpb0Dk9SupGoOcgKOFgaljMXGwL-](https://indiankanoon.org/doc/1294854/?cf_chl_jschl_tk=4496955215b37e766e79d27f88f246e89ef6a222-1615369913-0-AWPxIJ1hbp6c54-piFfJtV4D72RuuhK20P7fhgy1PBzI0MSHRcS-7vFKuKrijlWa1v0CpBaxLcqoC3UyQtK1Y5LR-xE2lbqeY0jpb0Dk9SupGoOcgKOFgaljMXGwL-)

Dhtd1X00y-HnpPYyMfnOoapVEIU1tUI0Qa-  
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qZojS72WYVqmVXxRbQLc eY0KoXQWpvC0Y-  
Ytn-lE0Ri2kov8loqHMKRODPfhxDio6nF3xliO-  
ZXs1M

United Nations Human Rights Committee (2009).  
Case of S.B. v. Kyrgyzstan. UN Doc. CCPR/  
C/96/D/1877/2009, Communication No.  
1877/2009. 30 July 2009. Available on [http://www.worldcourts.com/hrc/eng/decisions/2009.07.30\\_SB\\_v\\_Kyrgyzstan.htm](http://www.worldcourts.com/hrc/eng/decisions/2009.07.30_SB_v_Kyrgyzstan.htm)

Uk Information Tribunal (2001). Case of Norman  
Baker v. Secretary of State of the Home De-  
partment UKIT NSA2. United Kingdom. Avail-  
able on [https://www.casemine.com/judgement/  
uk/5a8ff76e60d03e7f57eac68a#](https://www.casemine.com/judgement/uk/5a8ff76e60d03e7f57eac68a#)

## V. Chilean Jurisprudence

Chilean Constitutional Tribunal (2006). Decision No.  
634-2006. Judgment of 9 August 2007.

Chilean Onstitutional Tribunal (2007). Decision No.  
519/2006. Judgment of 5 June 2007.

Chilean Constitutional Tribunal (2008). Decision No.  
1024-2008. Judgment of 1 July 2008.

Chilean Constitutional Tribunal (2016). Decision No.  
3111-2016. Judgment of 23 March 2016

- Chilean Constitutional Tribunal (2018). Decision No. 4669-18. Judgment of 14 March 2019
- Chilean Constitutional Tribunal (2018). Decision No. 4986-18. Judgment of 14 May 2019
- Chilean Constitutional Tribunal (2020). Decision No. 8118-2020. Judgment of 23 July 2020.
- Chilean First Environmental Tribunal (2018). Case of Central Guacolda, Rol No. R7-2018. 24 August 2018. Available on <https://causas.1ta.cl/causes/20/expedient/778/?attachmentId=1231>
- Chilean Second Environmental Tribunal (2013). Case of Pascua Lama, Rol No. D2-2013. 20 March 2015. Available on <https://www.tribunalambiental.cl/wp-content/uploads/2015/06/D-02-2013-20-03-2015-Sentencia.pdf>
- Chilean Third Environmental Tribunal (2017). Case of Ilustre Municipalidad de Puerto Varas v. Empresa de Servicios Sanitarios de los Lagos S.A., Rol No. D 30-2017. 8 August 2019. Available on [https://3ta.cl/wp-content/uploads/D30\\_2017\\_Sentencia\\_definitiva-1.pdf](https://3ta.cl/wp-content/uploads/D30_2017_Sentencia_definitiva-1.pdf)
- Chilean Supreme Court (2019). Case of Quintero-Puchuncaví, Decision No. 5.888-2019. Judgment of 28 May 2019. Available on [https://observatoriop10.cepal.org/sites/default/files/documents/5888-2019\\_corte\\_suprema.pdf](https://observatoriop10.cepal.org/sites/default/files/documents/5888-2019_corte_suprema.pdf)
- Republic Of Chile. Council Of Transparency (2009). Case of Héctor Segundo Poblete Gómez v. Servicio de Registro Civil e Identificación. Decision No. A08-09. 20 November 2009. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT0000116>

- Republic Of Chile. Council For Transparency (2009).  
Case of José Pedro de la Carrera Valdés v. Carabineros de Chile. Decision No. A45-09. 28 July 2009.  
Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT000087>
- Republic Of Chile. Council For Transparency (2009).  
Case of Patricio Hernán Pacheco v. I. Municipalidad de Providencia. Decision No. A115-09. 22 September 2009. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT0000139>
- Republic Of Chile. Council For Transparency (2009).  
Case of Rosanna Costa Costa v. Instituto Nacional de Estadísticas (INE). Decision No. A-19-09. 7 July 2009. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT000063>
- Republic Of Chile. Council For Transparency (2010).  
Case of Rigo Obando Millar v. Servicio Nacional de Pesca. Decision No. C227-10. 7 December 2010. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT0000426>
- Republic Of Chile. Council For Transparency (2015).  
Case of Oceana Inc. v. Servicio Nacional de Pesca y Acuicultura. Decision No. C1407-15. 6 October 2015. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT000012524>
- Republic Of Chile. Council For Transparency (2017).  
Case of Juan Silva Irarrázaval v. Servicio Nacional de Pesca y Acuicultura. Decision No. C2771-17. 9 January 2018. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT000020209>
- Republic Of Chile. Council For Transparency (2018).  
Case of Oceana Inc. v. Servicio Nacional de Pesca y

Acuicultura. Decision No. C1003-18. 2 August 2018. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT000020904>

Republic Of Chile. Council For Transparency (2019). Case of NN.NN v. Superintendencia de Electricidad y Combustibles. Decision No. C6503-19. 17 October 2019. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT000030607>

Republic Of Chile. Council For Transparency (2020). Case of Fabián Teca Fuentealba v. Dirección Regional de Aysén del Servicio Nacional de Pesca. Decision No. C838-20. 9 June 2020. Available on <https://jurisprudencia.cplt.cl/cplt/decision.php?id=CPLT000034019>

## VI. Doctrine

Ackerman, J. and Sandoval-Ballesteros, I. (2006). 'The Global Explosion of Freedom of Information Laws. Administrative Law Review' apud. MCDONAGH, Maeve (2013). 'The Right to Information in International Human Rights Law'. Human Rights Law Review 13:1. Oxford University Press. Available on <https://www.corteidh.or.cr/tablas/r30698.pdf>

Anaya, S.J. (2004). 'International Human Rights and Indigenous Peoples: The move toward the multicultural state.' Arizona Journal of International and Comparative Law, Vol. 21, No. 1, p. 54. Available on [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1485138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485138)

Baldwin, R., Cave, M. and Lodge, M. (2012). 'Understanding Regulation', Second Edition. Oxford University Press, p. 227 eq. al. apud. SOTO, Pablo (2016). 'San-

- ciones Administrativas como medidas de cumplimiento del Derecho: un enfoque funcional y responsivo aplicado al régimen sancionatorio ambiental'. *Ius et Praxis*, Vol. 22 No. 2. Talca, Chile. Available on [https://scielo.conicyt.cl/scielo.php?script=sci\\_arttext&pid=S0718-00122016000200007#9](https://scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-00122016000200007#9)
- Bárcena, Alicia (2020). 'Prólogo'. In PRIEUR, M., SOZZO, G. and NÁPOLI, A. (Eds.) (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe', Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)
- Bermúdez, Jorge (1998). 'Elementos para definir las sanciones administrativas'. In *Revista Chilena de Derecho*, No. Especial. Available on [https://www.researchgate.net/publication/28218935\\_Elementos\\_para\\_definir\\_las\\_sanciones\\_administrativas](https://www.researchgate.net/publication/28218935_Elementos_para_definir_las_sanciones_administrativas)
- Bermúdez, Jorge. (2010). 'El acceso a la información pública y la justicia ambiental.' *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso XXXIV*. Valparaíso, Chile. 1° Semester 2010. Available on <https://scielo.conicyt.cl/pdf/rdpucv/n34/a18.pdf>
- Bermúdez, Jorge (2014). 'Fundamentos de Derecho Ambiental', 2° Edition. Ediciones Universitarias de Valparaíso, Pontificia Universidad Católica de Valparaíso. Valparaíso, Chile.
- Bianchi, Andrea (2013). 'On Power and Illusion: The Concept of Transparency in International Law.' In BIANCHI, A. and PETERS, A. (Eds.) 'Transpa-

rency in International Law.' Cambridge University Press, United Kingdom.

- Bovens, Mark (2002). 'Information Rights: Citizenship in the Information Society.' *The Journal of Political Philosophy*: Volume 10, Number 3. Law & Public Administration, Utrecht University. Available on [https://oci.juridicas.unam.mx/sites/default/files/Bovens-2002-Journal\\_of\\_Political\\_Philosophy.pdf](https://oci.juridicas.unam.mx/sites/default/files/Bovens-2002-Journal_of_Political_Philosophy.pdf)
- Chetail, Vincent (2003). 'The Contribution of the International Court of Justice to International Humanitarian Law.' *International Review of the Red Cross*, Vol. 85, No. 4. 16 July 2003. Available on [https://www.icrc.org/en/doc/assets/files/other/irrc\\_850\\_chetail.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_850_chetail.pdf)
- Covarrubias, Ignacio (2012). 'Las falencias del test de interés público como instrumento de ponderación entre el acceso a la información pública y la vida privada'. En *Revista de Derecho*. Pontificia Universidad Católica de Valparaíso, No. 38, pp. 514-521. Available on [https://scielo.conicyt.cl/scielo.php?script=sci\\_arttext&pid=S0718-68512012000100012](https://scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-68512012000100012)
- Darbishire, Helen (2015). 'Critical perspectives on freedom of expression: Ten Challenges for the Right to Information in the Era of Mega-Leaks'. In MCGONAGLE, T. and DONDEERS, Y. (Eds.) 'The United Nations and Freedom of Expression and Information Critical Perspectives.' Universiteit van Amsterdam. June 2015. Available on [https://www.access-info.org/wp-content/uploads/CriticalPerspective-sonRightofAccesstoInfo\\_HelenDarbishire.pdf](https://www.access-info.org/wp-content/uploads/CriticalPerspective-sonRightofAccesstoInfo_HelenDarbishire.pdf)
- De Los Ríos, Isabel (2020). 'El acuerdo regional sobre el acceso a la información, la participación pública

- y el acceso a la justicia en asuntos ambientales en América Latina y el Caribe.’ In PRIEUR, M., SOZZO, G. and NÁPOLI, A. (Eds.) (2020), ‘Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe’, Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)
- De Miguel, C. and Torres, V. (2016), ‘América Latina y el Caribe. Avanzando hacia el Desarrollo Sostenible mediante la Aplicación del principio 10 de la Declaración de Río. Informe Ambiental FARN’. Available on <https://farn.org.ar/wp-content/uploads/2020/09/04DE-Miguel-Torres.pdf>
- Di Paola, María. (2018). ‘El Derecho Humano al Ambiente y la Agenda 2030, Suplemento de Derecho Ambiental, La Ley’. FARN. November 2018. Available on <https://es.scribd.com/document/435429762/El-Derecho-Humano-al-Ambiente-y-la-Agenda-2030-1-pdf>
- Di Paola, M. and Castillo, M. (2020). ‘Principio 10: de Río a Río+20 América Latina y el Caribe. ¿Qué 20 años no es nada?’. In Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), ‘Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe’. Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)
- Di Pangrancio, A., Nápoli, A. and Sangalli, F. (Eds.) (2014). Informe Ambiental Anual 2014 [Anual Environ-



- mental Report 2014]. FARN. Buenos Aires, Argentina. Available on [https://farn.org.ar/wp-content/uploads/2020/06/2014\\_IAF.pdf](https://farn.org.ar/wp-content/uploads/2020/06/2014_IAF.pdf)
- Fenster, Mark (2006). 'The Opacity of Transparency', 91 *Iowa L. Rev.* 885. University of Florida Levin College of Law, UF Law Scholarship Repository. Available on <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1059&context=facultypub/>
- Fenster, Mark (2010). 'Seeing the State: Transparency as Metaphor', 62 *Admin L. Rev.* 617. University of Florida Levin College of Law, UF Law Scholarship Repository. Available on <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1571&context=facultypub>
- Fernández Bitterlich, Pedro (2004). 'Manual de Derecho Ambiental', Second Edition. Editorial Jurídica de Chile. Santiago, Chile.
- Florini, Ann. (2007). 'Introduction: The Battle Over Transparency'. In Florini, Ann. (Ed.), 'The Right to Know: Transparency for an Open World'. Columbia University Press. New York, USA.
- Gilbert, J. and Doyle, C. (2011). 'A new dawn over the land: Shedding Light on Collective Ownership and Consent'. In Allen, S. and Xanthaki, A. (Eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Hart Publishing. Available on [https://repository.uel.ac.uk/download/1da7704954cb530bb212b8f0b5d91640a36004cb97dadd5ef8c45d587b8c4034/460841/A\\_New\\_Dawn\\_Over\\_the\\_Land\\_-\\_Shedding\\_Light\\_on\\_Collective\\_Ownership\\_and\\_Consent.pdf](https://repository.uel.ac.uk/download/1da7704954cb530bb212b8f0b5d91640a36004cb97dadd5ef8c45d587b8c4034/460841/A_New_Dawn_Over_the_Land_-_Shedding_Light_on_Collective_Ownership_and_Consent.pdf)

- Hovell, Devika (2009). 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.' In Farrall, J. and Rubenstein, K. 'Sanctions, Accountability and Governance in a Globalized World.' Cambridge University Press, United Kingdom.
- Jendróska, Jerzy (2020). 'El Acuerdo de Escazú a la luz de la experiencia del Convenio de Aarhus.' Prieur, M., Sozzo, G. and Nápoli, A. (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe'. Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)
- Lauterpacht, H. (1958) 'The Development of International Law by the International Court.' Stevens & Sons, London. apud. Chetail, Vincent (2003). 'The Contribution of the International Court of Justice to International Humanitarian Law.' International Review of the Red Cross, Vol. 85, No. 4. 16 July 2003. Available on [https://www.icrc.org/en/doc/assets/files/other/irrc\\_850\\_chetail.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_850_chetail.pdf)
- Leme Machado, Paulo (1984), Direito à Informação Ambiental. Revista de Informação Legislativa. Brasília: Senado Federal. A. 21, n° 84, out./dez. apud Leme Machado, Paulo (2020). 'El Derecho de acceso a la información ambiental en el Acuerdo de Escazú'. In Prieur, M., Sozzo, G. and Nápoli, A. (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe'. Ediciones UNI. 17 November 2020. Available on <https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1->

Libro%20ESCAZU%cc%81\_Digital\_BV.pdf?sequence=1&isAllowed=y

Leme Machado, Paulo (2018). 'Direito à Informação e Meio Ambiental' 3. 1º ed. São Paulo: Malheiros Editores. Apud. Leme Machado, Paulo (2020). 'El Derecho de acceso a la información ambiental en el Acuerdo de Escazú'. In PRIEUR, M., SOZZO, G. and NÁPOLI, A. (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe'. Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)

Leme Machado, Paulo (2020). 'El Derecho de acceso a la información ambiental en el Acuerdo de Escazú'. In Prieur, M., Sozzo, G. and Nápoli, A. (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe'. Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)

Lucas, Andrea (2018). 'Más de una década de cambio climático en Chile: análisis de las políticas domésticas.' Mexican Bulletin of Compared Law, Vol. 51 No. 153. Mexico. Available on [http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S0041-86332018000300587#fn3](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0041-86332018000300587#fn3)

Mcdonagh, Maeve (2013). 'The Right to Information in International Human Rights Law'. Human Rights Law Review 13:1. Oxford University Press. Available on <https://www.corteidh.or.cr/tablas/r30698.pdf>

- Médici, Gastón (2018). El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe. *Revista Catalana de Dret Ambiental*, Vol. IX Núm. 1. Available on <https://revistes.urv.cat/index.php/rcda/article/view/2412>
- NGO FIMA (2020). 'Análisis del cumplimiento de estándares del Acuerdo de Escazú en Chile'. Santiago, Chile. Available on <https://www.fima.cl/wordpress/2020/09/22/ong-fima-entrega-estudio-comparativo-entre-parametros-del-acuerdo-de-esazu-y-legislacion-chilena/>
- NGO FIMA and NAMATI (2019). 'Estado del ODS 16.3 sobre acceso a la justicia en Chile: avances y desafíos para la justicia ambiental'. September 2019. Available on <https://fima.cl/wordpress/wp-content/uploads/2019/09/INFORME-ALTERNATIVO-%E2%80%9CESTADO-DEL-ODS-16.3- SOBRE-ACCESO-A-LA-JUSTICIA-EN-CHILE-AVANCES-Y-DESAFI%CC%81OS-PARA-LA- JUSTICIA-AMBIENTAL%E2%80%9D.pdf>
- Olmos, Belén (2019), 'Fostering environmental democracy in Latin America and the Caribbean: An analysis of the Regional Agreement on Environmental Access Rights.' *Wiley Reciel Review of European, Comparative and International Environmental Law* 2019;28:136-151. Oxford, USA. Available on <https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12274>
- Orellana, Marcos (2014). *Democracia Ambiental y Desarrollo Sostenible: Hacia un Instrumento Regional sobre Derechos de Acceso*. In Di Pangraccio, A., Nápoli, A. and Sangalli, F. (Eds). *Informe Ambiental Anual 2014*. FARN. Buenos Aires, Argenti-

na. Available on [https://farn.org.ar/wp-content/uploads/2020/06/2014\\_IAF.pdf](https://farn.org.ar/wp-content/uploads/2020/06/2014_IAF.pdf)

- Prieur, M., Sozzo, G. and Nápoli, A. (Eds.) (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe'. Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)
- Pigrau Solé, A. and Borrás Pentinat, S. (2008). Diez años del Convenio de Aarhus sobre el acceso a la información, la participación y el acceso a la justicia en materia de medio ambiente. In Pigrau Solé, A. (Ed.) *Acceso a la información, participación pública y acceso a la justicia en materia de medio ambiente: diez años del Convenio de Aarhus*. Atelier, Barcelona España, Apud. Médici, Gastón (2018). *El Acuerdo de Escazú: La implementación del principio 10 de Río en América Latina y el Caribe*. *Revista Catalana de Dret Ambiental*, Vol. IX Núm. 1. Available on <https://revistes.urv.cat/index.php/rcda/article/view/2412>
- Polland, D., Parpworth, N and Hughes, D. (2007). 'Constitutional and Administrative Law. Text with materials.' Fourth Edition, Oxford University Press.
- Ramkumar, V. and Petkova, E. (2007). 'Transparency and Environmental Governance.' In Florini, Ann. (Ed.), 'The Right to Know: Transparency for an Open World.' Columbia University Press. New York, USA.
- Roberts, Alasdair (2001). 'Structural Pluralism and the Right to Information.' *University of Toronto Law Journal*, Vol. 51, No. 3, July 2001. Available on

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1305423](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305423)

Sánchez, Luis and Reyes, Orlando (2015). 'Medidas de adaptación y mitigación frente al cambio climático en América Latina y el Caribe. Una revisión general.' LC/W.675. Santiago, Chile. ECLAC. Available on [https://repositorio.cepal.org/bitstream/handle/11362/39781/1/S1501265\\_es.pdf](https://repositorio.cepal.org/bitstream/handle/11362/39781/1/S1501265_es.pdf)

Sands, Philippe (2003). 'Principles of International Environmental Law', 2<sup>a</sup> Edition. Cambridge University Press. Available on [https://www.academia.edu/37547219/Philippe\\_Sands\\_Principles\\_of\\_International\\_Law](https://www.academia.edu/37547219/Philippe_Sands_Principles_of_International_Law)

Sanhueza, A. and Nápoli, A. (2020). 'El aporte de la Sociedad civil al Acuerdo de Escazú. Nuevas formas para la negociación internacional.' Prieur, M., Sozzo, G. and Nápoli, A. (2020), 'Acuerdo de Escazú: Hacia la democracia ambiental en América Latina y el Caribe'. Ediciones UNI. 17 November 2020. Available on [https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81\\_Digital\\_BV.pdf?sequence=1&isAllowed=y](https://bibliotecavirtual.unl.edu.ar:8443/bitstream/handle/11185/5688/1-Libro%20ESCAZU%cc%81_Digital_BV.pdf?sequence=1&isAllowed=y)

Soto, Pablo (2016). 'Sanciones Administrativas como medidas de cumplimiento del Derecho: un enfoque funcional y responsivo aplicado al régimen sancionatorio ambiental'. Ius et Praxis, Vol. 22 No. 2. Talca, Chile. Available on [https://scielo.conicyt.cl/scielo.php?script=sci\\_arttext&pid=S0718-00122016000200007#9](https://scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-00122016000200007#9)

Stiglitz, Joseph (2002). 'Transparency in Government.' In World Bank, 'The Right to Tell: The Role of the

- Mass Media in Economic Development.' WBI Development Studies. Washington, D.C. World Bank. Available on <https://openknowledge.worldbank.org/handle/10986/15212>
- Stiglitz, Joseph. (2007). Foreword. In FLORINI, Ann. (Ed.), *The Right to Know: Transparency for an Open World*. Columbia University Press. New York, USA.
- Subedi, Surya P. (1999). 'Balancing International Trade with Environmental Protection: International Legal Aspects of Eco-Labels.' *Brooklyn Journal of International Law*, Vol. 25, Issue 2, Article 26. Available on <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1624&context=bjil>
- Tallis, Heather and Polasky, Stephen. (2009). 'Mapping and Valuing Ecosystem Services as an Approach for Conservation and Natural-Resource Management.' *The Year in Ecology and Conservation Biology*. New York Academy of Sciences. Available on [http://courses.washington.edu/cfr590/pdfs/Tallis\\_Polasky\\_2009.pdf](http://courses.washington.edu/cfr590/pdfs/Tallis_Polasky_2009.pdf)
- White, Laura (2003). 'The Need for Governmental Secrecy: Why the US Government must be able to withhold information in the interest of National Security.' *Virginia Journal of International Law (VJIL)*, vol. 43, no. 4, 2003. apud. Hovell, Devika (2009). 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions.' In Farrall, J. and Rubenstein, K. 'Sanctions, Accountability and Governance in a Globalized World.' Cambridge University Press, United Kingdom.

## VII. Websites

Cambio Climático Chile's website. 'Chile: Agencia de Cambio Climático y Sustentabilidad comenzará a operar el 1 de enero de 2017.' Available on <https://www.cambioclimaticochile.cl/2016/11/agencia-de-cambio-climatico-y-sustentabilidad-comenzara-a-operar-el-1-de-enero-de-2017/>

Chilean Agricultural And Livestock SERVICE's website. 'Acuerdos de producción limpia (APL).' Available on <https://www.sag.gob.cl/ambitos-de-accion/acuerdos-de-produccion-limpia-apl>

Chilean Ministry Of The Environment's website. 'Historia de la clasificación de especies según estado de conservación en Chile y del Reglamento de clasificación de especies silvestres.' Available on <https://clasificacionespecies.mma.gob.cl/wp-content/uploads/2019/10/historiadelaClasificaiondeEspecieenChile.pdf>

Chilean Ministry Of The Environment's website. 'Ministerio del Medio Ambiente crea nueva división dedicada al cambio climático.' Available on <https://mma.gob.cl/ministerio-del-medio-ambiente-crea-nueva-division-dedicada-al-fenomeno-del-cambio-climatico/>

Chilean Ministry Of The Environment's website. 'Autoridad nacional designada para el mecanismo de desarrollo limpio (MDL) del Protocolo de Kioto.' Available on <https://mma.gob.cl/cambio-climatico/autoridad-nacional-designada-para-el-mecanismo-de-desarrollo-limpio-mdl-del-protocolo-de-kioto/>



Chilean Ministry Of The Environment's website. 'Huella Chile. Programa de Gestión de Carbono'. Available on <https://huellachile.mma.gob.cl/objetivo/> and <https://huellachile.mma.gob.cl/historia/>

Chilean Ministry Of The Environment's website. '¿Qué son los planes de prevención y descontaminación?' Available on

<http://epac.mma.gob.cl/Pages/Home/respuestas.aspx?IdEducativo=3#:~:text=El%20PLAN%20DE%20DESCONTAMINACI%C3%93N%20es,calidad%20ambiental%20se%20encuentran%20sobrepasadas.>

Chilean Ministry Of The Environment's website. Available on <https://mma.gob.cl/cambio-climatico/preguntas-frecuentes/>

Chilean Ministry Of The Environment's website. 'Sello informará a los consumidores sobre la reciclabilidad de los envases de los productos.' Available on <https://mma.gob.cl/sello-informara-a-los-consumidores-sobre-la-reciclabilidad-de-los-envases-de-los-productos/>

Chilean Ministry Of The Environment's website. Available on <https://educacion.mma.gob.cl/que-es-educacion-ambiental/>

Chilean Ministry Of The Environment's website. Environmental Training Academy Adriana Hoffmann. Available on <https://mma.gob.cl/academia/>

Chilean Ministry Of The Environment's website. Division of Environmental Education and Public Participation (2018). 'Educación Ambiental. Una mirada desde la institucionalidad ambiental chilena'. Santiago, Chile. Available on <https://mma.gob.cl/wp->

content/uploads/2018/08/LIBRO- EDUCACION-AMBIENTAL-final\_web.pdf

Chilean Ministry Of The Environment's website. 'Servicio de Biodiversidad y Áreas Protegidas.' Available on <https://mma.gob.cl/biodiversidad/servicio-de-biodiversidad-y-areas-protegidas/>

Chilean Ministry Of The Environment's website. '#ElijoReciclar'. Available on [www.elijoreciclar.cl](http://www.elijoreciclar.cl)

Chilean Ministry Of National Assets' website. Chilean Georeferenced Data Infrastructure. 'Zonas saturadas y latentes.' Available on <http://www.ide.cl/index.php/medio-ambiente/item/1963-zonas-saturadas-latentes>

Chilean Environmental Assessment Service's website. Available on <https://www.sea.gob.cl/documentacion/guias-evaluacion-impacto-ambiental/permisos-ambientales-sectoriales>

Chilean Environmental Assessment Service's website. Available on <https://www.sea.gob.cl/documentacion/permisos-autorizaciones-ambientales>

Costa, Ezio (2020). In Aliaga, R. and Bustos, A. 'El sacrificio es el mismo: Quintero y Puchuncaví a un año del fallo de la Corte Suprema'. *Diario Uchile*, 27 May 2020. Available on <https://radio.uchile.cl/2020/05/27/el-sacrificio-es-el-mismo-quintero-y-puchuncavi-a-un-ano-del-fallo-de-la-corte-suprema/>

Datos.Gob's website. 'Agencia de Sustentabilidad y Cambio Climático.' Available on <https://datos.gob.cl/organization/agencia-de-sustentabilidad-y-cambio-climatico>

Definition of 'suitability', in Oxford Dictionary <https://www.oxfordlearnersdictionaries.com/us/definition/english/suitability?q=suitability>

Definition of 'need', in Oxford Dictionary [https://www.oxfordlearnersdictionaries.com/us/definition/english/need\\_1?q=need](https://www.oxfordlearnersdictionaries.com/us/definition/english/need_1?q=need)

Definition of 'proportional [to something]', in Oxford Dictionary <https://www.oxfordlearnersdictionaries.com/us/definition/english/proportional>

Environmental Justice Atlas, available on <https://ejatlas.org/country>

European Commission's website. 'Environmental Assessment.' Available on [https://ec.europa.eu/environment/eia/index\\_en.htm](https://ec.europa.eu/environment/eia/index_en.htm)

Economic Commission For Latin America And The Caribbean's website. 'Sistema Nacional de Coordinación de Información Territorial – SNIT Infraestructura de Datos Geoespaciales de Chile IDE-Chile'. Available on <https://www.cepal.org/sites/default/files/presentations/chile-infraestructura-datos-geoespaciales.pdf>

Global Ecolabelling Network's website. 'What is Ecolabelling?'. Available on

<https://globalecolabelling.net/what-is-ecolabelling/#:~:text=Ecolabelling%20is%20a%20voluntary%20method,preferable%20within%20a%20specific%20category.>

Latin American And Caribbean Countries – LAC P10 (LACP20)'s website. 'The Public Express Grave Concerns about the Regressive Development of the Ongoing Principle 10 Negotiations', available on

<https://www.lacp10.org/single-post/2017/08/02/The-Public-Express-Grave-Concerns-About-the-Regressive-Development-of-the-Ongoing-Principle-10-Negotiations>

Manuschевич, D. and Meynen, D. (2018). Chilean Union Leader found dead one day after anti- pollution demo. 16 October 2018. Available on <https://www.commondreams.org/views/2018/10/16/chilean-union-leader-found-dead-one-day-after-anti-pollution-demo>

Méthot, Jean-François (2003). 'How to Define Public Interest?' Collège Dominicain de Philosophie et de Théologie. Ottawa ON Canada. 29 January 2003. Available on [https://ustpaul.ca/upload-files/Ethics-Center/activities-How\\_to\\_Define\\_Public\\_Interest.pdf](https://ustpaul.ca/upload-files/Ethics-Center/activities-How_to_Define_Public_Interest.pdf)

Observatory Of The Climate Change Law For Chile's website. Center for Climate and Resilience Research. Faculty of Law, University of Chile. Center of Environmental Law., <http://leycambioclimatico.cl/policy-brief-de-que-se-hablo-durante-la-discusion-en-general-del-proyecto-de-ley-marco-de-cambio-climatico-en-la-comision-de-medio-ambiente-y-bienes-nacionales-del-senado/>

Observatory Of The Climate Change Law For Chile's website. Center for Climate and Resilience Research. Faculty of Law, University of Chile. Center of Environmental Law. Available on <http://leycambioclimatico.cl/leyccchile/>

Observatory Of The Climate Change Law For Chile's website. Center for Climate and Resilience Research. Faculty of Law, University of Chile. Center of En-

vironmental Law. Available on <http://leycambioclimatico.cl/quienes-somos/>

Republic Of Chile. Council For Transparency's website. 'CPLT refuerza campaña de acceso a información pública con formularios en distintos idiomas'. Available on <https://www.consejotransparencia.cl/cplt-refuerza-campana-de-acceso-a-informacion-publica-con-formularios-en-distintos-idiom/>

Sheate, William. Unit 1 'Introduction to Environmental Auditing and Management' 2.1 'What is environmental auditing?'. University of London, International Programmes. Center for Development, Environment and Policy. Available on [https://www.soas.ac.uk/cedep-demos/000\\_P508\\_EAEMS\\_K3736-Demo/unit1/page\\_14.htm](https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/unit1/page_14.htm)

United Nations Food And Agriculture Organization's website. '2. Why Label for Sustainability?'. Available on <http://www.fao.org/3/y2789e/y2789e05.htm#fn2>

United Nations Office For Disaster Risk Reduction (UNDRR)'s website. 'Early warning system.' Available on <https://www.undrr.org/terminology/early-warning-system>

United Nations On Climate Change's website. 'Cities and Local Action. Early Warning Systems.' Available on <https://www.un.org/en/climatechange/climate-solutions/early-warning-systems>

United Nations Economic Commission For Europe (UNECE)'s website. 'Introduction to the Kyiv Protocol on Pollutant Release and Transfer Registers. Available on <https://unece.org/environment->

policy/public-participation/introduction-kyiv-  
protocol-pollutant- release-and-transfer

4E's website (Programa de Energías Renovables y Eficiencia Energética en Chile, Deutsche Gessellschaft für Internationale Zusammenarbeit (GIZ) GmbH and NAMA Facility). 'Proyecto de Apoyo a la NAMA "Energías Renovables para Autoconsumo"'. Available on <https://www.4echile.cl/proyectos/nama/>



The book titled **Comparative Analysis of Legal Standards Related to Access to Environmental Information Between the Escazú Agreement and the Chilean Legal Order** offers an in-depth study on how Chile's legal framework on access to environmental information compares to the standards set by the Escazú Agreement. This international treaty, focused on access to information, public participation, and justice in environmental matters, aims to promote more equitable and sustainable development in Latin America and the Caribbean.

Throughout its chapters, author **Alejandra Silva Meneses** delves into the principles of transparency, accountability, and maximum disclosure, exploring to what extent Chile's legal system meets these principles. The analysis not only highlights Chile's strengths in this area but also identifies gaps and areas for improvement in implementing international standards. This work serves as an invaluable resource for scholars, legal professionals, and environmental activists interested in the intersection of human rights and environmental protection.

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