ARTICLE

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Native Forest Protection in Chile: The Inadequacies of the Recent Environmental Framework Law and Relevant Multilateral Instruments

Acronyms

CENMA	National Environmental Center/Centro Nacional del Medio Ambiente
CEPAL	Economic Commission of the United Nations for Latin America
CODEFF	Comité Nacional Pro Defensa de la Fauna y Flora
CONAF	National Forestry Corporation of Chile/ Corporación Nacional Forestal
CONAMA	National Environmental Commission
COREMA	Regional Environmental Commissions
DIA	Environmental Impact Declaration/Declaración de Impacto Ambiental
DL 701	Decree Law 701 of 1974/Ley Decreto 701 de 1974
EIA	Environmental Impact Study/Evaluación de Impacto Ambiental
INFOR	National Forest Institute of Chile/Instituto Forestal

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Ley Marco	Environmental Framework Law of Chile/Ley de Bases del Medio Ambiente
MERCOSUR	Southern Cone Common Market/Mercado Común del Sur
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
SEIA	System of Environmental Impact Evaluation
SFD	Sustainable Forest Development

One of the most serious environmental problems in Latin America is the massive destruction of the native forests. It is estimated that approximately fifteen million acres of these natural resources are eradicated annually.[1] With the benign objective of promoting economic growth in this developing region, various countries have transformed their forests into agriculture lands, grazing pastures, and tree plantations of exotic species.[2] In Chile, with the goal of stimulating private investment in the forest sector and thereby augmenting its presence in the international timber markets, the country has maintained a national program since 1974 that, in effect, encourages the substitution of natural forestry zones with exotic species of trees that have rapid growth rates. The situation in this country has appeared so quickly that, according to Central Bank studies, if the current rate of exploitation continues, the native forests in Chile would be completely eliminated within 30 years.[3] Although the validity of the cited study has been challenged, it is undeniable that in both Chile and the rest of Latin America the destruction of the native forests represents an urgent problem.[4]

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[1] RAMÓN LÓPEZ, INTER-AMERICAN DEVELOPMENT BANK, ENVTL. DIV., POLICY INSTRUMENTS AND FINANCING MECHANISMS FOR THE SUSTAINABLE USE OF FORESTS IN LATIN AMERICA (1996).

[2] *Id.* at 28. It is argued that these Latin American forestry policies are contradictory given that the local governments "are unable to openly recognize that their objective is to exploit forest resources for the benefit of the nation." *Id.* For example, while the legislation is allegedly promulgated in order to protect the forests, the governments simultaneously invest in the expansion of infrastructure in these areas in order to implement policies that promote intensive exploitation. Therefore, it is suggested that the forestry sector in Latin America finds itself at a crucial juncture, an ideal moment to make an unequivocal decision about its political goals.

[3] *See, e.g.*, *Forest Disputes Lead to Enviro-Auditing Shakeup*, 5 AMERICAN POLITICAL NETWORK GREENWIRE, Feb. 8, 1996; *Native Forests Could Be Wiped Out in 42 Years*, 6 AMERICAN POLITICAL NETWORK GREENWIRE, May 20, 1996; *Productive Native Forests Could Vanish Within 30 Years, Chilean Central Bank Says*, 18 INTERNATIONAL ENVIRONMENT REPORT 878 (1995).

[4] José Antonio Cabello, *Mucho que mejorar*, CHILE FORESTAL, Feb. 1996, at 5. In order to verify the results of the Central Bank (Banco Central) study, the national forest service of France was contracted to perform a separate investigation. Accord-

As a possible solution, the idea of Sustainable Forest Development (SFD) was recently introduced in Chile. This holistic concept, distinct from other environmental measures, has been defined in the following manner:

> Preservation refers to initiatives that prohibit the economic exploitation of the natural resources of an ecosystem; this is the most rigid form of protection. On the contrary, conservation does not discard the economic use of the ecosystem, intending instead to rationalize the use in order to assure the future availability of a determined resource. In spite of their differences, both of these concepts share a common denominator—in effect, the center of attention is the resource itself. Sustainable Forest Development, however, is a concept that attempts to link the ecological and social dimensions with the notion of conservation in three interrelated components: An economy of healthy growth, a commitment to social equity, and protection of the environment.[5]

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ing to the text entitled *Auditoría Ambiental de los Bosques de Lenga de la Patagonia*, although the eradication of the Chilean native forests is considerable, the situation is not as grave as it may appear. This second study was particularly critical of the quality of the environmental management of the Lenga forest, yet it recognized that the conditions in Chile are adequate to obtain an accreditation of sustainability in the use of the native forests. The second study concludes, in particular, that the present situation "is not catastrophic in the sense that the future risks have been clearly identified and could be easily prevented by putting in practice simple measures that do not cause an insurmountable amount of prejudice to the industrial activity in the short term." *Id.*

[5] Eduardo Silva, *Conservacion, desarrollo sustentable y juego político en la política de bosques nativos en Chile*, 85 SÍNTESIS 63 (1994); *see also* U.S. DEP'T OF AGRICULTURE FOREST SERVICE, AN APPROACH TO WORKING WITH SUSTAINABILITY, SUSTAINABLE DEVELOPMENT INTERDEPUTY AREA TEAM DISCUSSION PAPER #4 (1995) *available in* <http://www.fs.fed.us/land/sustain_dev> (visited Nov. 15, 1999). The most commonly accepted definition of sustainable development was introduced in the report entitled *Our Common Future* written by the World Commission on Environment and Development in 1987. Accordingly, sustainable development is that which meets the needs of the present without compromising the ability of future generations to meet their own needs. According to the Forest Service, the international community has come to the conclusion that "it is not possible to craft a few simple sentences that will adequately define sustainable forest development [and that] it would be futile to spend time and energy developing a single 'soundbyte' definition." U.S. DEP'T OF AGRICULTURE FOREST SERVICE at 2. Instead, as stated in the Santiago Declaration of 1995, the countries have chosen to use a set of criteria and indicators to provide a common understanding of what is meant by the concept of sustainable forest development at the national level. "Taken together, the Criteria and Indicators suggest an implicit definition of sustainable forest development," conclude members of the Forest Service. U.S. DEP'T OF AGRICULTURE FOREST SERVICE at 2.

Although interpretations of SFD are abundant[6], it is certain that the seriousness of the problem has motivated countries around the globe to initiate efforts to convert this concept into tangible mechanisms capable of counteracting the current native deforestation. However, if the theory of SFD is not translated into adequate legislation and coherent policies, the concept may constitute only another environmental cliché without practical effect.[7]

With the aim of protecting the native forests from imminent destruction, various national and international instruments have been introduced. None of these, however, has managed to effectively combat the deforestation. During the United Nations Conference on Environment and Development (Earth Summit) held in Brazil in 1992, the first instrument or Forest Principles were established in which the participating nations agreed to

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[6] Ley de Bases del Medio Ambiente, 1994 (Chile), Intervention of Rafael Asenjo Zegers, Executive Secretary of the National Environmental Commission. This national authority affirmed that prior to 1994 Chile lacked an environmental management framework — in terms of policies, legislation, and administration — which would allow the country to confront one of its central challenges, sustainable development. This concept, according to Asenjo, is defined as "continuing to grow economically, within the context of increasing international competitiveness in order to satisfy our needs and defeat poverty, assuring a socially-just distribution of the benefits of such growth and guaranteeing a healthy environment and an adequate base of natural resources to project ourselves toward the future." *Id.* To accomplish this type of development, Chile introduced the Ley Marco in 1994 which, among other things, attempts to prevent the destruction of the native forests. *See also* Gunter Könsgen, *Desarrollo sustentable: Libertad de Eleccíon*, CHILE FORESTAL, July 1998, at 4. This German expert explains that the three dimensions of SFD are social equity, forest conservation, and freedom-of-choice. The inclusion of the variable "freedom" as opposed to "economy," according to Könsgen, signifies that each society has the option to define the lifestyle of its inhabitants; that is, each nation may elect its location between the extremes of poverty (socially unsustainable) and overconsumption (environmentally unsustainable). Notwithstanding this flexibility, Könsgen warns that SFD has its limits at "the moment in which the forest resources are collapsing." *Id.*

[7] Andrés Asenjo, *El debate público en torno al bosque nativo*, AMBIENTE Y DESARROLLO, Apr. 1992, at 7. According to the author, there exists a cliché in the environmental debate in Chile; that is, a desire shared by the individuals and institutions involved, a common aspiration that could eventually serve as a pillar of a coherent public policy. This cliché manifests itself in SFD and, like all clichés, it functions as both a rhetorical formula and as a real grass roots starting point in the search for and evaluation of concrete actions. The transformation of SFD into adequate laws and policies is, therefore, the challenge "that compromises all of the actors involved in the debate over the native forests . . . in particular, the public institutions directly concerned with their protection." *Id.*

work in four main areas.[8] These principles were not legally binding and contained neither the sanctions nor the incentives necessary to guarantee compliance.[9] After five years of being in effect, the general opinion with respect to the Principles was expressed at the second Earth Summit: "The final result is clear: the progress in the compliance with the goals established in 1992 is scarce and there exists a general sense of disappointment for the few real advances obtained in these last few years."[10] Since then, efforts have been renewed to elaborate a judicially-binding instrument that would regulate forest interventions and the commercialization of timber products. However, as a result of the opposition of the developing nations, such an initiative has been postponed until at least the year 2000.[11]

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[8] *II Cumbre de la Tierra: avanzando hacia atrás*, CHILE FORESTAL, Aug. 1997, at 52. The Forest Principles are derived from the United Nations' document entitled the *Non-Legally Binding Authoritative Statement of Principles For a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*. The four primary actions in this document include: (1) maintaining the multiple roles and functions of all types of forests, (2) increasing the protection, sustainable management and conservation of the forests, and the recuperation of the degraded areas via reforestation, (3) adequately valuing the goods and services derived from the forests, and (4) establishing and/or fortifying the capacity to plan and systematically evaluate the commercial aspects of forests.

[9] Matthew B. Royer, *Halting Neotropical Deforestation: Do the Forest Principles Have What it Takes?*, 6 DUKE ENVTL. L. & POL'Y F. 105, 148 (1996). The author suggests that this accord lacks "the teeth" necessary to assure compliance with the obligations of the participating countries.

[10] *II Cumbre de la Tierra: avanzando hacia atrás*, CHILE FORESTAL, Aug. 1997 at 52; *see also* Yolanda Kakabadse, *Las agencias inter-gubernamentales y las ONGs en búsqueda de una nueva relación*, INTER-AMERICAN DEVELOPMENT BANK, ENVTL. DIV., 1993, at 8. According to this author, if the impact of the Earth Summit were evaluated in Latin America and the Caribbean, it would be clear that "the memory of this event has virtually disappeared." *Id.* Very few institutions, neither public nor private, deserve credit for having promoted one or more significant actions within this framework, concluded Kakabadse.

[11] Jorge Valenzuela, *Bosques: hacia dónde va el debate?*, DIPLOMACIA, Jan.-Mar., 1998, at 15-20. In the second Earth Summit, convened in New York in 1997, a central topic involved the establishment of a legally-binding instrument that would regulate the intervention in the forests and the commerce of forest products. This goal, however, was not reached due to two concerns presented by the developing nations. First, the fear that the convention, for all practical purposes, would become a strong limitation to the development of forest activity, an important component of the global economic development of many of these nations. Second, these same countries manifested their discontent over the non-fulfillment by the developed states of their former promises to contribute resources and transfer technology. As a result, it was resolved that the discussions about an international convention would be postponed, and, in their place, the Intergovernmental Panel on Forests was formed. This group is in charge of identifying elements which would permit advancement toward a consensus regarding international mechanisms, such as a legally-binding instru-

Although the second instrument has been adopted in more than 100 countries, it has been as unsuccessful as the Forest Principles. Through the articulation of a set of Criteria and Indicators of SFD, the Montreal Process established six campaigns concerning the forests in distinct regions which have attempted to put into practice Forest Principles established at the Earth Summit by applying them at a national level.[12] Specifically, these initiatives seek to transform the fundamental elements of the Criteria and Indicators into regional schemes "where specific measures of conservation, development, and sustainability are truly needed."[13] As a member of the Montreal Process, Chile has obligated itself to implement the seven corresponding criteria.[14] In spite of its pretensions, this instrument has not proven effective in impeding the destruction of the native forest for two main reasons: the absence of legal force[15] and the flexibility in its application.[16]

The third instrument, the major international trade treaties involving Chile, has also not managed to substantially diminish the eradication of the native forests. It is argued that, in many in-

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ment. The Panel is scheduled to present an official report in the year 2000 and, on the basis of its findings, will decide if the negotiations over a convention or another instrument of legal value will be initiated.

[12] *Unánime toma de conciencia*, CHILE FORESTAL, Mar. 1998, at 52. The initiatives and their corresponding applications include: (1) the Montreal Process—the temperate forests, (2) the Helsinki Process—the forests of Europe, (3) the Tarapoto Initiative—the natural resources of the Amazon, (4) the Lepaterique Process—the Central American forests, (5) the Wona Seca of Africa, and (6) the Far East Process.

[13] Carlos Leal, *Desarrollo forestal sustentable: todo un imperativo*, CHILE FORESTAL, July 1997, at 22.

[14] CANADIAN FORESTRY SERVICE, CRITERIA AND INDICATORS FOR THE CONSERVATION AND SUSTAINABLE MANAGEMENT OF THE TEMPERATE FORESTS; THE MONTREAL PROCESS (1995). The seven criteria in the Santiago Declaration are: (1) conservation of biological diversity, (2) maintenance of the productive capacity of the forest ecosystems, (3) protection of the health and vitality of the forest ecosystems, (4) conservation of water resources, (5) preservation of the contribution of the forests to the global carbon cycle, (6) improvement of the long term social-economic benefits of the forests in order to fulfill societal needs, and (7) establishment of an institutional and legal framework for the conservation and sustainable management of forests. *Id.*

[15] *Id.* at Preamble.

[16] *Id.* at Section 1.3. The vast differences existing between the states with regard to the characteristics of their forests, population, economic development, scientific capacity, and political structure are explicitly recognized in the document. It is established, in particular, that "given the substantial differences between the countries in relation to their natural and social conditions, the specific application and the periodic measuring of the Criteria and Indicators will be distinct from country to country in accordance with the national circumstances." *Id.* at Section 1.3.

stances, they have actually served to augment the pressure over these natural resources. For example, the General Agreement on Tariffs and Trade (GATT) has been labeled a "failed paradigm" in environmental terms because the concept of comparative advantage on which it is founded provokes an exaggerated pressure over natural resources. This is especially true in developing nations characterized by economies based on the export of raw materials.[17] Furthermore, it is contended that the ineffectiveness of the GATT in protecting the environment reveals a fundamental contradiction:

> [A]ll states have accepted a responsibility for the protection of the world's forests, but at the same time [they] have kept in place a trade regime that not only protects the right of producer states to clearcut their last stands of old-growth, but also can be interpreted as forcing consumer states to engage in trade that contributes to the last clearcut.[18]

The native forests are also not safeguarded under the North American Free Trade Agreement (NAFTA) model. Every national law's principal purpose to regulate the collection, extraction, or exploitation of natural resources for commercial reasons is excluded from the trade accord.[19] Treaties such as NAFTA

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[17] Paul Stanton Kibel, *Reconstructing the Marketplace: The International Timber Trade and Forest Protection*, 5 N.Y.U. ENVTL. L.J. 735 (1996).

[18] Andre Nollkaemper, *Protecting Forests Through Trade Measures: The Search for Substantive Benchmarks*, 8 GEO. INT'L L. REV. 389, 420 (1996).

[19] North American Free Trade Agreement (NAFTA)—Environmental Side Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 45, 32 I.L.M. 289, 605 (1993) (entered into force Jan. 1, 1994). *See also Davidow asegura que Chile tiene abierto el NAFTA o acuerdo bilateral*, EL MERCURIO, Apr. 19, 1998, at C3. In fact, it was recently announced that Chile will be united with the northern market, whether through NAFTA or by means of a bilateral accord. According to the former Adjunct Secretary for Latin American Affairs, if a bilateral agreement is signed between the United States and Chile, "this would constitute a virtual NAFTA given the fact that Chile already has a free-trade treaty with Canada and Mexico." *Id.* The representative affirmed, in addition, that the "the methodologies . . . are details while the important thing is the trajectory that both nations are bound to take." *Id. See also Chile cambia estrategia comercial con EE.UU.*, EL MERCURIO, Oct. 7, 1998, at A1. Although after approximately five years of negotiations, Chile has yet to be formally incorporated into NAFTA. However, Chile has not surrendered hope; recently proposing new strategies to obtain admission. Specifically, the Ministry of Foreign Relations of Chile has introduced the idea of establishing ad hoc groups to handle particular topics instead of awaiting the approval of "fast-track" authority. Members of this ministry explained the measure in the following manner: "It appears better to take the bull by the horns during this moment of crisis in which the country finds itself. We are going to place the cards on the table and see where it takes us." *Id. See also* Andy Bowcott, *Firme como roca*, CHILE FORESTAL, Oct. 1997, at 52-53. The author explains that the environmental cooperation agreements

allegedly restrict the environmental coverage of agreements to industrial areas without contemplating the protection of forest resources. This is a fundamental factor in the case of Chile.[20] With regard to the Southern Cone Common Market (MERCOSUR), after various years of negotiations only recently has the topic of environmental protection been considered.[21] Although a political framework in which the member-States would guarantee an environmental scheme oriented toward the sustainable management of renewable resources has been proposed, the approval of each state's respective norms will not occur in the near future.[22] Although the environmental dimension tends to be a central issue in recent international accords, "this preoccupation has not been evidenced in the case of MERCOSUR, the majority of whose members, although not lacking the relevant norms, have demonstrated a weak capacity in implementing them."[23]

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in NAFTA and the Chile-Canada accord "have key characteristics which are very similar, and the functions and responsibilities [of the parties] are essentially identical." *Id. See also Canada Signs Environment and Labor Agreements With Chile*, CANADA NEWSWIRE, Feb. 6, 1997. The article states explicitly that "[t]he Canada-Chile Agreement on Environmental Cooperation is closely patterned on the North American Agreement on Environmental Cooperation." *Id.*

[20] Sara Larraín, *Libre comercio, regulación ambiental y medio ambiente*, AMBIENTE Y DESARROLLO, Sept. 1994, at 22. Larraín explains, in accordance with the redaction of NAFTA, the sovereign right to the management and sustainable use of natural resources is supreme; an aspect that would prove "very grave" in the case of Chile because its economy is based primarily on the export of these resources. *See also* Sanford Malman, *Los temas ambientales en un tratado de libre comercio entre Chile y Norteamérica*, AMBIENTE Y DESARROLLO, Sept. 1994, at 7. The author contends that the subject of natural resources in Chilean exports is crucial because NAFTA does not include clauses related to the management of natural resources.

[21] Lilian A. Duery, *MERCOSUR en busca de mayor interés por medidas ambientales*, EL MERCURIO, June 18, 1998. In the context of MERCOSUR, various environmental priorities have been established: (1) harmonization of the non-tariff restrictions with the environmental components, (2) attending to environmental aspects raised by the energy, agriculture and industry subgroups, (3) elaboration of a legal document in order to optimize the application of the environmental mechanisms in each nation, (4) design of a transnational environmental information system, and (5) definition and formalization of an ecological certification program.

[22] HERNÁN BLANCO & NICOLA BORREGAARD, MERCOSUR Y MEDIO AMBIENTE, 9 (Centro de Investigación y Planificación del Medio Ambiente, Santiago, Chile, 1998). Based on the abundance of nation-wide disparities in the environmental field, the authors argue that "there is a need to advance in the cooperation between the nations of MERCOSUR in order to harmonize the environmental legislation and, more importantly, to maintain a constant exchange of information about the implementation and supervision of these norms." *Id.*

[23] Eladio Suseata, *MERCOSUR: Implicancias ambientales de la demanda por infraestructura*, AMBIENTE Y DESARROLLO, June 1998, at 18.

The relevant Chilean legislation represents the fourth mechanism that, as of this date, has failed to counteract the eradication of the native forests.[24] This legislation is the focus of this Article. As a result of the obligations reflected in the aforementioned instruments (the Forest Principles, the Montreal Process, and the international trade treaties), Chile is attempting to implement SFD, a concept which undoubtedly entails the protection of the native forests.[25] Chilean legislation related to the forestry sector is plentiful,[26] yet only the Environmental Framework Law (Ley Marco) introduced in 1994 is applicable to virtually all projects and activities likely to impact the environment. On the basis of a detailed analysis of the Ley Marco, this article will conclude that the existing national legislation is inadequate to protect the native forests. Moreover, given the inefficiency of the international instruments, it is arguable that there presently exists "a crisis" in the Chilean forestry sector, a position that enjoys support from diverse circles.[27]

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[24] Gracia Curtze Pinninghoff, *Legislación sobre fomento forestal*, TESIS—PONTIFÍCIA UNIVERSIDAD CATÓLICA DE CHILE, 169 (1995). In the words of the author, the large quantity of forest-related legislation which exists in Chile is really "a double-edged sword since instead of contributing in an adequate manner to the fomentation of the forestry sector, it produces counterproductive effects for being so complicated and drastic, generating antipathies in the landowners which makes them lose interest in sustainable management." *Id.*

[25] Andrés Meza, *La coherencia, un requisito*, CHILE FORESTAL, Apr. 1998, at 20, 22. The author argues that, in Chile, the principal actors agree that in order to reach the SFD it is necessary to establish a national and international relationship between the diverse regulatory instruments.

> [O]n one hand, the administration of instruments such as the Management Plans and the System of Environmental Impact Evaluation, must be impregnated with this reality. On the other hand, this means that all of the normative processes in course and those generated in the future may be enriched by incorporating the elements that reach important levels of consensus on a global level.

Id.

[26] To examine all of the legal instruments applicable to the forestry sector in Chile, both national and international, see Enrique Gallardo, *Recopilación de legislación forestal y áreas silvestres protegidas*, Corporación Nacional Forestal (CONAF), Aug. 1998.

[27] *No hay plazo que no se cumpla*, CHILE FORESTAL, Jan./Feb. 1998, at 17. According to the author, the majority of the people are hoping that the project will organize the fundamental aspects of the forestry incentives, especially when "we are facing a crisis in this sector." *Id. See also*, Juan C. Moya, *CONAF: Conservación y producción, los difíciles desafíos de la Ley de Bosque Nativo*, AMBIENTE Y DESARROLLO, Oct. 1992, at 14, 16. Moya contends that the discussion about the Native Forest Law project needs to be viewed not as a crisis, but rather "as a unique oppor-

This Article is organized in the following manner. First, the history of the Chilean native forests is briefly analyzed, placing special emphasis on the forces which have traditionally generated their destruction. Second, the Ley Marco is examined in detail, explaining its major functions as well as the reasons for which it has not managed to provide adequate protection of the native forests. Specifically, this Article will focus on problematic areas which undermine the overall effectiveness of this new piece of legislation: public participation, general pitfalls with the system of environmental impact evaulation, the grievance procedure, and the Chilean institutions. Additionally, the Río Cóndor project of the North American forestry company Trillium (the first major timber project to submit itself to the Ley Marco mandated System of Environmental Impact Evaluation (SEIA)) is analyzed in this segment with the objective of examining the Ley Marco's application to the forestry sector. Finally, while recognizing that the Ley Marco is only in its first stage and that it has significantly contributed to the improvement of environmental regulation in Chile, this Article concludes that, irrespective of such contributions, as it is currently written and applied, the Ley Marco is not capable of guarding the native forests in Chile. Therefore, in allusion to the second-part of this Article, it will be suggested that timber certification represents a feasible alternative solution in the case of Chile.

I

THE NATIVE FORESTS OF CHILE: A BRIEF HISTORY

The development of the native forests in Chile can be divided into five principal stages. First, during the "glacial period," the native forests were isolated from other ecosystems on the continent by the physical barriers which surrounded them, for example: the Atacama Desert to the north, the Andes Mountains to the east, the Pacific Ocean to the west, and the Antarctic region to the south. The effects of glacial formations such as landslides, superficial freezing, and erosion affected a large part of southern Chile. As a result, the temperate forests were principally located on the protected slopes of the Andes near the coast. After the last glacial period the forest "extended itself progressively from

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tunity, probably impossible to repeat for many years, to achieve a substantial advance in the forestry legislation." Moya at 16.

the glacial refuges until it occupied a territory coincident with its present dimensions."[28] During the second stage named the "indigenous period," the inhabitants were concerned with subsistence, dedicating themselves principally to hunting, gathering, elementary agriculture and fishing. The native forests, consequently, did not suffer significant damage in this period because the wood was merely utilized for fuel, and to make arrows and simple boats.

The "colonial period" represents the third stage, during which the Spanish began extracting large amounts of wood for construction purposes. These Europeans tended to burn the forests with the objective of opening territories for the grazing of animals and for cultivation. From the Spanish perspective, the native forests constituted "a barrier against the European colonization," an attitude that fomented the massive destruction of the forests.[29] Due to the increase in urbanization during this stage, firewood became the principal source of energy in the cities.

The fourth stage, named the "selective exploitation period," lasted from the middle of the 19th century until the 1950s. During that period, the use of the native forests was based on selective cutting; that is, the exploitation of highest-quality trees. Although numerous sawmills were installed in Chile during this period, it is suggested that a formal forest industry did not exist because the work was seasonal and there was little interest in the regeneration of the exploited species. The principal result of this phase, according to experts in the field, was "a large quantity of degraded and secondary forests."[30]

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[28] Juan Armesto et al., *La historia del bosque templado chileno*, AMBIENTE Y DESARROLLO, Mar. 1994, at 66-72.

[29] *Id.*

[30] *Id. See also* Gabriel Del Fávero Valdés, *Orientaciones y efectos de la legislación forestal en Chile*, DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL (Fundación Facultad de Derecho-Universidad de Chile ed.) 345, 347 (1998). During this period, mining constituted another activity of importance in Chile which took priority over the protection of the forests. As an example, the author explains that the legislation in effect at that time granted the mining companies the following rights: (1) to build any structure necessary to the mining operations, (2) to allow the animals to graze freely in both public and private lands, (3) to utilize without cost the firewood of the common mountains, and (4) to exploit without limitations the forests near the mines in order to fuel the machines, merely paying the "just price" to the owner of the exploited land. *Id.*

The fifth stage, the "industrial period," began in 1950 and continues to the present. It has been characterized by higher levels of destruction of the native forest. During this time, the selective harvesting of native species of greater value was extended to even the most remote areas of the country. Numerous forestry companies were formally established, and they immediately installed large plantations of rapid-growth exotic species such as pine and eucalyptus. These plantations were originally situated in abandoned or eroded lands; however, they were soon expanded via increased selective cutting and intentional fires.[31] In the 1960s, during the administration of President Frei Montalva, the government introduced an industrial policy designed to foment, among other things, forest production through plantations of exotic species. This policy was intensified during the military regime with the promulgation of the Decree Law 701 of 1974, a piece of legislation that subsidized seventy-five percent of the costs of reforestation for commercial plantations.[32] As a result of

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[31] Antonio Lara, *La Conservación Del Bosque nativo En Chile: Problems y Desafíos*, *in* ECOLOGÍA DE LOS BOSQUES NATIVOS CHILE 351 (Juan Armesto ed., 1995). The author explains that one of the important causes of the destruction of the native forests are the fires which are normally started intentionally. It is estimated, for example, that approximately 88% of the fires are caused by persons.

[32] A.J. Leslie, Sustainable Management of Chilean Indigenous Forests, (MSc dissertation, University of Edinburgh, United Kingdom) *available in* <http://helios.bto.ed.ac.uk/ierm/research/current.htm>.

The current Chilean forestry policy based on Decree Law (DL) 701 contains the following elements: (1) 75% subsidy and tax exemption programs in the private sector, (2) authorization to export forest products in any state of processing, (3) subsidies for administrative costs such as surveillance, maintenance of fences, and fire breaks, (4) pruning grants for plantations of exotic species, (5) transfer of land and forests from the public to the private sector at below market prices and with favorable credit schemes, and (6) support to international marketing activities for exotic species. *Id. See also* Roger Alex Clapp, *Creating Competitive Advantage: Forest Policy as Industrial Policy in Chile*, 71 ECON. GEOGRAPHY 273 (July 1995). As leader of the military regime, General Augusto Pinochet appointed to key economic positions a group of Chilean economists that had studied under Milton Friedman at the University of Chicago. Although the economic ideas of the "Chicago Boys" included open market theories and privatizations, when the Chilean government adopted its new neoliberal economic policy, the reforestation subsidies were already established, with a 20 year guarantee. The military rulers determined that they could not compete with the developed world in manufacturing unless they could take advantage of reliable and inexpensive raw materials. Therefore, the regime promoted the few industries in which Chile possessed such resources, and DL 701 was introduced. According to Clapp, DL 701 was a political intervention as much as an economic measure through which the government signaled its commitment to Chile's capitalists that forestry "was a regional growth sector, chosen with a few other select areas of the economy to be guaranteed profitable." *Id.* at 291.

the expansion of the forest industry based on exotic tree plantations designed for exportation, a serious degree of pressure was perceived in the native forests in certain regions of Chile.[33]

According to ecologists, these native forests are essential to the well-being of Chile for several reasons. For instance, the native forests moderate the local climate and avoid extreme temperatures, regulate hydrological cycles, prevent soil erosion, attenuate flooding, maintain the habitat of the fauna, and provide the ingredients for medical products, fibers, oils, waxes, rubbers, etc. Furthermore, the natural forests represent an important element for tourism and are an invaluable source of beauty, relaxation, and inspiration for the arts and spirituality.[34] It is contended, likewise, that the native forests have significant productive capacity since their surface coverage is approximately five times larger than that of the plantations. However, their current contribution to the gross domestic product is inappreciable. It is estimated that the price of native wood will come to triple that of exotic timber, a reason for which the ecologists warn that "if the nation wants to be a powerful force in the forestry sector, it must introduce greater diversification."[35] Various studies conducted in southern Chile have corroborated these assertions regarding profitability, indicating that the exploitation of native trees with protective cutting methods has allowed foresters to triple the volume of wood harvested per acre.[36]

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[33] Nelson Soza, *Desarrollo sectorial desde 1974: radiografía de dos décadas*, CHILE FORESTAL, May 1995, at 46-48. The enlargement of the private activity within the framework of a State minimized in its regulatory role left the environment "defenseless." During that period, the deficit of qualified people and materials in the country prevented public intervention, and in the case of the forests, it permitted "the cutting of important zones of native forest in response to the foreign demand for wood chips." *Id.*

[34] COMITÉ NACIONAL PRO DEFENSA DE LA FAUNA Y FLORA (CODEFF), OBSERVACIONES DE CODEFF AL PROYECTO DE LEY SOBRE RECUPERACIÓN DEL BOSQUE NATIVO Y FOMENTO FORESTAL (July 1992).

[35] Pablo Villaroel, *Proyecto de ley de recuperación de bosque nativo y fomento forestal: la ley que todos esperaban?*, AMBIENTE Y DESARROLLO, Oct. 1992, at 8.

[36] Eliana Chong, *Descongelamiento en cuenta regresiva*, CHILE FORESTAL, Jan./Feb. 1995, at 8. *See also* Hernán Cortés, *El debate forestal en Chile*, Colegio de Ingenieros Forestales A.G., 1996, at 130; Llorente A. Saenz, *Bosque de Lenga, cosecha y regeneración: un caso práctico*, BOSQUE NATIVO: EXPERIENCIAS Y DESAFÍOS, 170 (1996); Harald Schmidt, *Impactos del manejo forestal en bosques nativos*, CORMA, Sept./Oct. 1996, at 23. On the basis of the results of this 1989 Austral University workshop, it is argued that with the implementation of sustainable management techniques, the Chilean native forests are capable of yielding wood "of high quality and with an extraordinarily elevated level of production." Cortés at

During the dictatorship of General Augusto Pinochet, although multiple economic advances were accomplished, the environment continued to suffer the negative ramifications.[37] It is claimed, for example, that the zeal for national economic growth eliminated the motivation for an effective application of the environmental laws, and Pinochet basically allowed businesses to contaminate and exploit the natural resources without restrictions.[38] Specifically, in accordance with his priority of "economic growth at all costs," Pinochet eliminated price controls, liberalized investment regulations, reduced trade barriers, privatized the majority of state-owned enterprises and, in environmental terms, "allowed businesses to operate unfettered."[39] For these reasons, in 1990 Pinochet was labeled a "catalog of ecological disaster."[40]

In March 1990, with the entrance of the new government of Patricio Aylwin, environmental issues were officially incorporated in the national agenda for two main reasons.[41] First, both

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130. It is suggested, furthermore, that management of the natives species in Chile "is economically more favorable than with pine or eucalyptus." Cortés at 130.

[37] José Antonio Urrutia, *Sistema de evaluación de impacto ambiental en Chile*, *in* DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL 8 (Fundación Facultad de Derecho—Universidad de Chile ed., 1998). The author explains that during this period the objective of the Chilean society consisted of producing the greatest quantity of goods and services in order to provide a higher standard of living to its inhabitants. Unfortunately, the environmental effects caused by such production were not considered as limiting factors for two reasons, (1) the natural resources were relatively abundant and, to a certain extent, they were considered limitless, and (2) the tragedy of the commons had occurred. According to this theory, for the individual person it is more convenient to contaminate and to let society in its totality pay the costs, as opposed to assuming the costs personally. In other words, the damage generated from contaminating is divided among all of the members of the Chilean society, allowing the polluter to pay a mere fraction of the cost.

[38] Clapp, *supra* note 32, at 273. In addition to permitting non-compliance with the laws, it is suggested that the persistent attempts by Chile to establish an industrial policy have coincided with the creation of forest plantations. In accordance with the forest policy of the military government, "the Chilean government studied, established, managed, and subsidized plantations; it bribed . . . and threatened landowners to plant trees;" and financed, nationalized, and privatized the industries that processed the wood resources. Clapp, *supra* note 32, at 290.

[39] Scott C. Lacunza, *From Dictatorship to Democracy: Environmental Reform in Chile*, HASTINGS INT'L & COMP. LAW REV. 539, 544 (1996). The author explains that Chile was "notoriously lax" in the enforcement of environmental laws.

[40] *Id.* at 547.

[41] *Id.* at 550. As the first democratically elected leader in 17 years, President Aylwin initially focused more on stabilizing the political situation and demonstrating that economic growth could be maintained under a democratic government as opposed to imposing drastic changes in the environmental area.

the World Bank and the government of the United States were imposing environmental conditions in their programs, particularly those programs related to the integration of Latin American countries in commercial treaties.[42] Therefore, Chile found itself obligated to evaluate this variable in all of the areas related to international commerce which necessarily included the forestry sector. Second, the environmental movement had formed a considerable part of the opposition to Pinochet and, as a result, the new government was forced to seriously analyze the positions of these groups.[43] Due to these factors, the Aylwin administration introduced various environmental measures, including the Ley Marco in 1994.

Since attaining the presidency in 1995, like his predecessor Aylwin, President Eduardo Frei has devoted an appreciable amount of governmental effort to environmental protection. However, as explained in detail in the following section, neither the political maneuvering nor the legislation enacted in recent years has managed to effectively introduce the concept of Sustainable Forest Development in Chile.[44]

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[42] DAVID FREESTONE, THE WORLD BANK AND THE ENVIRONMENT (1997). *See also* Jill A. Kotvis, *Environmental Issues in International Project Finance*, PRACTICING LAW INST. 243 (Oct. 1996).

[43] Eduardo Silva, *Conservación, desarrollo sustentable y juego político de los bosque nativos en Chile*, SÍNTESIS 1994, at 79. The author suggests that the President, despite his personal desires to the contrary, was forced to reduce his assistance to the ecological sector due to the power of the private forestry companies. The influence of these companies was attributable to three sources: (1) its privileged position in the social-economic system since its investments were vital to rapid and continuous national growth, (2) the powerful allies that this sector had in the national senate, and (3) the President's own Concertación party had expressly committed itself to conserving the market policies that constituted the foundation of accelerated economic growth in Chile.

[44] Alberto Peña & Armando Sanhueza, *Elementos conceptuales y políticos para el desarrollo forestal*, 17 BOSQUE NATIVO 11 (1998). The author contends that, notwithstanding the significant changes that the forestry sector in Chile has recently experienced, there still exist numerous problems, for example: (1) thirty million acres of land appropriate for forestation are in a state of serious erosion, (2) forty million acres are in the process of desertification, (3) the national system of protected areas is incomplete, (4) the legislation related to the native forests is not fully applied, a reason for which this national patrimony "is practically unprotected and . . . affected by different factors such as intentional fires, illegal cutting, and substitution," (5) a tendency to practice monocultivation which leads to diseases, and (6) the national institutions have been repeatedly questioned regarding their capacity to enforce the legal requirements. *Id.*

II

CHILEAN LEGISLATION

A. Environmental Framework Law (Ley Marco)

1. Introduction to the Ley Marco

Prior to 1994, a growing preoccupation with environmental issues was evident in the Chilean social agenda, national politics, and commercial treaties. However, the government was incapable of resolving these problems with the legislation and institutions in existence at that time.[45] A 1992 survey of Chilean environmental legislation identified approximately 1,200 norms dispersed in separate legal bodies. As was expected, many of the laws were obsolete or inapplicable, others "were too broad and subject to the interpretation and discretion of the administrative authorities, and . . . finally there existed numerous gaps in the legislation which made the entire system ineffective."[46] As a result, the country decided to create a new legal body which would incorporate all of the principles that supported an adequate level of environmental protection.[47] From the perspective of the National Environmental Commission (CONAMA), the 1994 Ley Marco filled a prominent gap in the judicial order of the nation and marked the beginning of a true system of environmental

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[45] Patricio Aylwin Azocar, Message to Congreso Nacional el Projecto (Sept. 14, 1992) *in* Ley de Bases del Medio Ambiente, 1994, at 17-31 (Chile) [hereinafter *Message of the President*]. The President recognizes that the study entitled *Repertory of Relevant Environmental Legislation in Our Country* elaborated by CONAMA verified "the large dispersion, incoherence, and lack of organization of the current legislation in this sector which has provoked considerable ignorance about the scope of the norms, uncertainty about the legal effect of the original texts, and a high level of non-compliance of such legislation. Furthermore, it is evident that the public agencies with competence in environmental issues are disperse, operating in an inorganic and uncoordinated manner, [and] with parallelism and ambiguity of functions and responsibilities." *Id.*

[46] COMISIÓN DE RECURSOS NATURALES, BIENES NACIONALES Y MEDIO AMBIENTE, DESAFÍOS A LA INSTITUCIONALIDAD Y LAS POLÍTICAS AMBIENTALES 22 (Chile, 1997) [hereinafter COMISIÓN DE RECURSOS NATURALES].

[47] COMISIÓN NACIONAL DEL MEDIO AMBIENTE, GESTIÓN AMBIENTAL DEL GOBIERNO DE CHILE 13-14 (Chile, 1997) [hereinafter COMISIÓN NACIÓNAL]. It is argued that the environmental policy expressed in the Ley Marco is founded on "seven principles which provide coherence and permeate the law, institutions, and instruments utilized in the environmental management of the State." *Id.* The principles include, for example, realism, prevention, responsibility, efficiency, accountability, and public participation.

norms.[48] This law, however, does not intend to cover all of the environmental materials alone, explicitly affirming that the laws of each particularly complex sector will remain in effect.[49]

With respect to the instruments of environmental management, the Ley Marco contains the System of Environmental Impact Evaluation (SEIA) through which it should be possible to identify, in the diverse stages of a potentially threatening project, the environmental impacts in order to minimize, attenuate or counteract the significant adverse effects.[50] The Ley Marco creates a system called the "single window" which incorporates all of the environmental requirements of each sector. The law establishes, moreover, a series of criteria designed to estimate the degree of environmental risk associated with each of these. If the project or activity presents at least one of the potential negative repercussions which are listed, the government must compose an Environmental Impact Study (EIA) while a project's proponent is obligated to present an Environmental Impact Declaration (DIA). According to this structure, the procedures associated with this process are coordinated by CONAMA, and supported by the Regional Environmental Commissions (COREMA).

Various Articles in the Ley Marco relate to the forestry sector. Article 9 establishes that the proponent of every project or activity contemplated in Article 10 must present a DIA or elaborate an EIA, as necessary. In part, Article 10 enumerates the projects susceptible to causing an environmental impact, thereby obligating their proponents to submit themselves to the SEIA. Included in this list are all the "development or forest exploitation projects in fragile soils or in terrain covered by native forests, paper industries, wood-chip plants, and sawmills."[51] To conform with Article 11, all of the aforementioned projects must formulate an EIA if they will have various effects, characteristics, or circumstances, including: (i) significant adverse effects on the quantity or quality of the natural renewable resources, (ii) location proxi-

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[48] *Id.* at 30. The Ley Marco departs from the premise that no activity, regardless of its legitimacy, may be effectuated at the expense of the environment.

[49] Ley de Bases del Medio Ambiente, 1994, art. 1 (Chile). In Article 1, it is established that environmental topics "will be regulated by the provisions of this law, without prejudice to the other legal norms which are established over this material." *Id.*

[50] COMISIÓN NACIÓNAL, *supra* note 47, at 94.

[51] Ley de Bases del Medio Ambiente, 1994, art. 10(m) (Chile).

mate to a population, resources, or protected area susceptible to being affected, and (iii) significant alteration, in terms of magnitude and duration, to the landscape or tourist value of a particular zone.

According to various experts in the forestry sector, because the Ley Marco controls the environmental dimension in virtually every project proposed in Chile, it must function as a system which takes into account the "interdependence and interrelationship of all the parties."[52] It is therefore necessary to simultaneously analyze the legislation and main public institutions associated with the forest sector with the objective of highlighting that the Ley Marco still is not law capable of adequately protecting the native forests.[53] This article will examine the functioning of the Ley Marco during the last few years.

2. *Principal Problems With the Ley Marco Public Participation in the SEIA*

In a democratic system, public participation provides the population with the capacity to intervene in the national decision-making process for establishing obligations and rights. In Chile, the concept of public participation, especially in the environmental area, is novel and any massive interest in the topic is "a phenomenon of recent years."[54] However, the increasing global deterioration of the environment, the increase of press coverage of the issue and Chile's desire to incorporate itself in various multilateral trade accords which contain environmental provisions have generated a higher level of ecological consciousness. Thus, presently "the public is moving from passivity to activity as it confronts situations that threaten the quality of life in Chile."[55]

As a result, the Ley Marco establishes a basic platform while delegating to the local authorities the responsibility to guarantee the informed participation of the public. The spirit of the Ley Marco on this matter is clear, indicating in its initial articles that "it is the duty of the State to facilitate public participation and to promote . . . campaigns oriented toward the protection of the

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52 Enrique G. Gallardo, *Aspectos legales referidos a la silvicultura y al medio ambiente. Parte I*, ACTAS XV—JORNADAS FORESTALES, 1994, at 87.

53 *Id.*

54 COMISIÓN NACIÓNAL, *supra* note 47, at 111.

55 COMISIÓN NACIÓNAL, *supra* note 47, at 111.

environment."[56] According to CONAMA, in order to execute environmental programs in conformity with these guidelines, it is first necessary to comprehend the objectives of facilitating public participation. These objectives include: complying with environmental legislation in force, assuring the transparency of the system, increasing the quality of environmental decisions through the efficient use of information, facilitating the acceptance of the decision by the impacted community, avoiding conflicts originating in misunderstood decisions or those perceived as imposed on the community, and creating a viable platform in order to resolve disputes through negotiation.[57]

In spite of the supposed clarity of the law's explicit provisions regarding public participation, after approximately four years of functioning, these provisions have revealed gaps in the Ley Marco multiple and inconsistent interpretations of the legislative language, practical difficulties in the application of the laws norms, limitations presenting obstacles to expeditious resolutions, bipolar positions of the principal actors and, above all, the need to modify the Ley Marco in order to improve it.[58] In the following pages, the most polemic aspects to date will be analyzed.

3. The Suitable Moment to Initiate Public Participation

According to the Ley Marco, the projects denoted in Article 10 may only be executed or modified subsequent to presenting an EIA or a DIA. In such cases the project's proponent is in charge of conducting the ecological analysis, which is normally

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[56] Ley de Bases del Medio Ambiente, 1994, art. 4 (Chile).

[57] COMISIÓN NACIÓNAL, *supra* note 47, at 111.

[58] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 238. In accordance with the conclusions of a panel of environmental experts in 1997, the Ley Marco and its regulations must be reformulated in order to guarantee public participation, parting from a basic level of informative transparency and including the right to opine, to be heard, to receive written answers from governmental authorities, to participate in the decisions, and to observe the application of the decisions which are made. *See also* Fernando Agüero, *La participación ciudadana en la protección del medio ambiente*, *in* DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL (Fundación Facultad de Derecho—Universidad de Chile, ed. 1998). The author contends that the great exception to the development of environmental policies in conformity with the Ley Marco has been public participation. He claims, particularly, that in this area "there have been more mistakes than advances [and] the provisions established in the Ley Marco have been misunderstood or ignored." *Id.* As a result, the nation has witnessed environmental confrontations that, in reality, have been resolved outside the boundaries set forth in the legislation in force.

achieved by a group of contracted experts.[59] Although the Ley Marco requires that CONAMA establish mechanisms to insure informed public participation, in reality, the affected community may only intervene after the presentation of the EIA.[60] Furthermore, according to Article 10, even though the projects which may cause an environmental impact must be submitted to the SEIA, this initial decision is made by the sponsor of the project or by the governmental entities. Thus, throughout the entire process the potentially affected community has a minimal amount of formal participation; that is, "the community does not count on formal channels to demand the elaboration of an EIA when they consider it necessary."[61]

Obligating the community to postpone its participation until the formal presentation of the EIA has been labeled "a grave error," since the delay often makes people "full of prejudices, suspicions, rumor and fears" and impregnates the discussion "with emotional elements."[62] In reality, upon presenting the EIA, the company has already invested a large quantity of money to acquire the property in question, to contract the experts needed to complete the scientific study, and to investigate its potential uses.[63] Thus, with such economic resources at stake, a company will probably advance the project, regardless of envi-

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[59] Comisión Científica Independiente, *Recomendaciones ecológicas para el proyecto forestal Río Cóndor*, AMBIENTE Y DESARROLLO, Dec. 1995, at 75. In the Trillium case, an independent scientific committee was created to comply with the legal requirements and to allay public anxieties concerning a large-scale intervention the Tierra del Fuego forests, a zone which, prior to the arrival of this North American company, had never been commercially exploited. The commission was composed of some of the most well-known local experts, for example: Dr. Mary Arroyo, Italo Serey, and Juan Armesto—University of Chile; Dr. Claudio Donoso and Roberto Schlatter—Austral University; and Edmundo Pisano—University of Magallanes.

[60] Reglamento del Sistema de Evaluación de Impacto Ambiental, art. 50 (1997) (Chile). The Ley Marco stipulates that CONAMA and/or COREMA shall "establish the mechanisms which *assure* informed participation . . . in the process of the analysis of the Environmental Impact Studies." *Id.* However, it does not explain precisely when such mechanisms must be provided, stating that they will be established "specifically for each case, depending on the characteristics of the project or activity." *Id.*

[61] Hernán Blanco, *Comparación de la legislación en Chile con la experiencia inglesa*, AMBIENTE Y DESARROLLO, Mar. 1996, at 24.

[62] Sofía Torey, *La participación ciudadana en la evaluación de impactos ambientales*, AMBIENTE Y DESARROLLO, Mar. 1996, at 8.

[63] *Predicen pérdidas para Trillium*, LA EPOCA, Apr. 21, 1998, at 2. Prior to cutting even one tree, Trillium had already invested approximately $70 million in the acquisition of the property, the completion of the technical studies, the planning, etc.

ronmental concerns. In this sense, the affected communities have complained that they are generally consulted only in a superficial manner during the final stages of a given project, a situation which prevents them from any influence in the critical decisions.[64]

Due to the unique knowledge that certain community members frequently possess, various groups have advocated the incorporation of public participation prior to the presentation of the EIA.[65] Accordingly, it is argued that the value of the information that a community can contribute to the project has been underestimated in Chile since "nobody knows more about the flora and the fauna of a specific place than the persons who have lived there for years."[66] It is suggested, for example, that from a remote location it is difficult for an environmental consultant to collect all of the relevant information about a particular area, a reason for which the collaboration of local actors would facilitate this process.[67] In particular, the community would be able to identify during the preliminary stages a projects effects on the local quality of life through things such as the symbolic value of the land, an increase in the collective anguish, or other sociocultural variables which prove problematic to measure by formal procedures.[68] In addition, one should consider the commitment that such people naturally have with the place in which they live,

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According to the executives of this forestry company, the completion of the project will have a total cost of around $200 million. *Id.*

[64] María Isabel du Monceaau de Bergendal, *Evaluación Social y Participación Local en el Proceso de Evaluación de Impacto Ambiental*, AMBIENTE Y DESARROLLO, Mar. 1998, at 16.

[65] Sara Larraín, *Un Caso en que el Sistema de Evaluación de Impacto Ambiental no Funcionó*, AMBIENTE Y DESARROLLO, Mar. 1996, at 9. The author suggests that public participation must incorporate the community as a valid actor throughout the entire process. In this way, "the project would be conducted in an integral fashion with the participation of the community, instead of being imposed on it." *Id.*

[66] Torey, *supra* note 62, at 9.

[67] Torey, *supra* note 62, at 9. It is argued that there are numerous examples of the "highly valuable information that the local persons possess and that it is improbable that a consultant, from his/her desk in the metropolitan area, would be capable of acquiring and accurately assessing the alternatives of a project." Torey, *supra* note 62, at 9.

[68] UNITED NATIONS, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (CEPAL), U.N. Doc. LC/L. 519 (1989). INFORME DEL SEMINARIO SOBRE LAS EVALUACIONES DEL IMPACTO AMBIENTAL COMO INSTRUMENTO DE GESTIÓN DEL MEDIO AMBIENTE: SITUACIÓN Y PERSPECTIVAS EN AMÉRICA LATINA Y EL CARIBE [hereinafter CEPAL (1989)]. On the basis of this unique knowledge, the author argues that the important role of the local community in the environmental evaluation process must be recognized due to its traditional under-

a dedication which makes them ideal candidates to ensure authentic protection of the environment. According to various ecologists, "the populations affected by the environmental problems are more clearly committed to sustainable development than any other group or sector, because those who live in a place, especially in the marginal neighborhoods, have a high level of simultaneous interest in economic growth, environmental conservation, and equity."[69]

B. Specifics: Promotion vs. Permission

In accordance with the Ley Marco, the State must facilitate public participation by promoting environmental protection campaigns.[70] Despite this explicit duty, it is argued that this provision was only included as a legitimizing strategy of the SEIA, because in reality, the government has not introduced mechanisms to assure that the public has influence in the projects.[71] According to other critics, since the Ley Marco is the first Chilean legislation which endeavors to clarify the confusion associated with the abundance of provisions in this area, it should have also generated a consultative mechanism to consider public opinion. However, in its current form, popular participation is contemplated "basically in terms of providing the community information related to the projects [and] waiting subsequently for observations."[72]

The decision to avoid addressing this subject in the Ley Marco with a higher degree of specificity may minimize the influence of public participation.[73] It is calculated, for instance, that approximately 150 projects were submitted to COREMAs during the

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standing of the region and its resources. He states, "its contribution is essential during the production of the EIA." *Id.*

[69] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 117-18. For these reasons, the author argues that it is necessary to provide the community with a voice and a certain degree of decision-making power from the beginning, since the local residents "constitute the most balanced persons."

[70] Ley de Bases del Medio Ambiente, 1994, art. 4 (Chile). It is "the duty" of the State to promote public participation in environmental issues.

[71] Torey, *supra* note 62, at 9-10.

[72] Torey, *supra* note 62, at 9.

[73] Torey, *supra* note 62, at 9. The author explains that if one were to contrast the state's obligation to promote public participation with that now in existence, it would be clear that if the legislators do not provide greater detail in the material and if the government does not initiate complementary programs, the concept of participation will be virtually nonexistent.

voluntary system[74] and, although the government denies the existence of detailed statistics regarding this matter, it is estimated that in the large majority of these cases, public participation never occurred.[75] Furthermore, this negligible amount of participation could even be considered a violation of Chile's international obligations.[76]

For its part, CONAMA has acknowledged the scarcity of public participation, and as a result, this governmental organization formulated a number of suggestions which the municipalities should implement.[77] Instead of limiting itself to promoting the

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[74] COMISIÓN NACIONAL, *supra* note 47, at 101. In Chile, there have existed three distinct systems of environmental impact evaluation: (1) the *antique system* which functioned without legal regulations or instructions — prior to 1994, (2) the system that operated under the indications of the Presidential Instructive entitled *Pauta para la Evaluación del Impacto Ambiental de Proyectos de Inversión* — from 1994 to 1997, and (3) the system of the regulation which operates in accordance with the Ley Marco — from 1997 to the present.

[75] Torey, *supra* note 62, at 10. *See also* Sylvia Hormazábal, *Evaluación de impacto international: la experiencia internacional*, AMBIENTE Y DESARROLLO July 1993, at 10. This national pattern is contradictory to that which occurs in the developed nations where the incorporation of public opinion is typically greater than that required by the law due to the fact that both the private companies and the governmental institutions are aware that an open process lends more credibility to the results of the SEIA. On this basis, it is argued that the Chilean government needs to enhance its tactics of involving citizens in the process since it would at least "achieve a reasonable level of understanding with respect to the conflictive points included in a project." *Id.*

[76] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, U.N. Doc. A/Conf. 151/26/Vols. I, II, and Corr. 1, and III (1992) (on December 22, 1992, the U.N. General Assembly adopted Resolution 47/190, which endorses the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, as adopted by the U.N. Conference on Environment and Development on June 14, 1992). With respect to the role of the State, this document establishes that "[g]overnments should *promote* and provide opportunities for the participation of interested parties, including local communities and . . . non-governmental organizations . . . in the development, implementation and planning of national forest policies." *Id.* (emphasis added).

[77] Torey, *supra* note 62, at 14-15. Pablo Daúd, director of the Environmental Impact Evaluation Unit of CONAMA, admitted that until this date the levels of public participation have been inferior to those which were expected. Additionally, Daúd recognized that in other countries with greater levels of development, the government facilitates environmental consultants, information, and resources in order to assure massive participation. However, Daúd clarified that, in Chile, they have decided to attempt to improve this situation first on a local level through the municipalities, utilizing the following mechanisms: (1) stimulation of responsible participation, (2) permanent information to the public about the changes in the proposed action in the environmental decisions and in the advances of the ecological study, (3) anticipation of conflicts and the establishment of accords in order to overcome them in the early stages, (4) incentives for participation in the processes of

involvement of the populace, other experts have assumed a more polarized posture since, from their perspective, "in order for the SEIA to have validity [the State] should not only permit the participation of its citizens, but it must also consider it a *requirement* for the approval of a project."[78]

1. Economic Factors Which Impede Public Participation

While the Ley Marco may stipulate that the affected persons may participate in the process by formulating observations about the EIA, as with virtually all legal or administrative procedures, such participation implies certain costs. Article 53 of the Regulation of the Ley Marco, for example, establishes that if the interested parties desire to learn the contents of an EIA, they may solicit, at their own cost, partial or total reproductions of the documents presented by the companies.[79] Furthermore, the observations formulated by the community must be done in written form and contain well-founded arguments.[80]

The entire process requires economic resources, from the simple paperwork in the office, to the search for information, to the translation of documents and the consultations regarding the en-

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revision and in the attainment of comments through meetings, workshops, speeches and other forms of communication, and (5) utilization of mediators capable of channeling public participation to obtain greater benefits.

[78] Torey, *supra* note 62, at 10. *See also* Blanco, *supra* note 61, at 11-12. According to Torey, irrespective of the modifications implemented in order to improve the Ley Marco through public participation, certain cultural traits prevail in the majority of the Latin American countries that perpetuate the established pattern of deficient participation. In the case of Chile, it is argued that the historic, political, social, economic and cultural realities play a transcendental role in the effectiveness of public participation. This nation does not have a tradition of including the public in the elaboration of policies. This is because Chile is reviving its democratic institutions subsequent to an extended period of military dictatorship in which the participation both at the local and national levels was minimal. In other countries with distinct degrees of development, such as England, there exists a high level of participation in associations, societies, clubs, and NGOs. This contributes to a more effective participation of the community in the decision-making process. In contrast, in Chile these types of groups are rare, new, and function under serious budgetary restrictions.

[79] Reglamento del Sistema de Evaluación de Impacto Ambiental, art. 54 (1997) (Chile). *See also* Torey, *supra* note 62, at 10. If the project is large in scope, the company tends to present multiple volumes of thick documents. The price of these reproductions, especially in a case involving a marginal population, can be very large.

[80] Reglamento del Sistema de Evaluación de Impacto Ambiental, art. 54 (1997) (Chile).

vironmental obligations.[81] For many people public participation is therefore virtually impossible. Just as numerous countries in Latin America, Chile is characterized by severe economic inequalities, a reality which is evidenced in the appreciable percentage of the population that live in conditions of extreme poverty. These groups frequently suffer from the prejudicial ramifications of the large projects. Due to their economic incapacity to acquire the necessary assistance, their opportunity to participate in the SEIA is quite limited.[82] Normally, those affected by the projects are disperse groups whose experience in formal organization is minimal. Furthermore, they lack funds and the technical personnel capable of dedicating themselves to the defense of their interests. The companies that propose the projects, in contrast, usually have substantial budgets assigned to this area, an imbalance that places the population "in a relative disadvantage in comparison with the investors of the projects."[83]

2. *The Inadequate Dissemination of the Information*

As discussed previously, the Ley Marco specifies that the State has the legal duty of promoting educational and informative campaigns about the environment to keep Chileans informed.[84] Furthermore, Article 26 dictates that CONAMA or COREMA shall implement mechanisms that assure the *informed* participation of the community. In order to comply with this requirement, the government demands that a project's proponent publish both in the Diario Oficial (Official Record) and in a newspaper of national circulation an extract of the EIA that contains, among other things, an indication of the type of project involved as well as the principal environmental effects and proposed mitigation

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[81] Torey, *supra* note 62, at 10. If the new company is foreign, the financial problems for the affected community could be increased. While the documents presented to CONAMA are drafted in Spanish, it is likely that the other relevant documents are written in a foreign language, a situation which generates certain complications. As one participant explained, "nobody can imagine the cost and the time that is spent in the translations of information only available in English." Torey, *supra* note 62, at 10.

[82] Blanco, *supra* note 61, at 28.

[83] César Ormazábal, *Análisis crítico desde la perspectiva de los actores y su responsabilidad en los EIA*, AMBIENTE Y DESARROLLO, Sept. 1997, at 58. In addition to purely economic barriers, on certain occasions the affected groups encounter participation difficulties due to ethnic, religious, and racial barriers. Such impediments become more complex in places where low levels of education and poverty hinder the adequate application of formal mechanisms of participation.

[84] Ley de Bases del Medio Ambiente, 1994, art. 4 (Chile).

measures.[85] If this information is insufficient, the community organizations and natural persons directly affected have the right to discover the content of the EIA and the accompanying documents.[86]

In spite of numerous provisions which attempt to provide the public the information necessary to contribute to the process, in reality, the interested parties are excluded due to the technical nature of the facts presented by the proponent. For example, various community representatives have argued that the EIAs utilize highly technical and scientific data with the underlying intention to elude authentic public participation.[87] Complex information must necessarily be included in order that COREMA may arrive at an appropriate conclusion, however, due to the countless number of people affected by a project who do not possess an expertise in the area, the utilization of more elementary terminology has been repeatedly urged.[88] The goal, simply stated, is to deal with the environmental issues using clear terms instead of highly specialized information in order to assure "the opportune, founded, and competent public participation."[89]

In the alternative, the government should provide the communities with gratuitous technical support so that they may elaborate their own particular EIA.[90] In this manner, the often emotional reactions of the communities would be replaced by an

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[85] Ley de Bases del Medio Ambiente, 1994, art. 27 (Chile).

[86] Ley de Bases del Medio Ambiente, 1994, art. 28 (Chile).

[87] José Luis Zavala Ortiz, *Análisis jurídico del Sistema de Evaluación de Impacto Ambiental*, AMBIENTE Y DESARROLLO, Mar. 1998, at 26. *See also* COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 134. The author recognizes that the information employed in the SEIA is expressed in a particular language and that many aspects require a certain degree of translation in order to be comprehensible to a lay person. Therefore, the author urges all of those involved in the process to become aware of the problem: "I hope that my colleagues visit the community meetings and establish contact with the people. Then, they would realize that the technical language which we use in the material is extremely difficult to understand for the people who are not environmental specialists." Zavala Ortiz, *supra* note 87, at 26.

[88] In order to see the complexity of a typical EIA, see JORGE MORELLO, ANÁLISIS COMPARATIVO DE LA SEGUNDA EVALUACIÓN DE IMPACTO AMBIENTAL DEL PROYECTO RÍO CÓNDOR, (Oct. 1997).

[89] Sofía Torey, *La percepción de la gente subee la gestión ambiental en Chile*, AMBIENTE Y DESARROLLO, Sept. 1996, at 64.

[90] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 114. In isolated communities, public participation is commonly characterized by prejudices and emotional elements. However, it is argued that with the dissemination of larger amounts of clear information about a project "the myths, prejudices, and unfounded emotional outbursts will be diluted." COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 114.

analysis based on objective, relevant information.[91] Another option would be environmental education programs in the potentially affected areas to provide the public with the knowledge necessary to analyze the proponent's EIA.[92] Finally, consciousness-raising campaigns, especially if carried out using straightforward terminology, could serve the same purpose.[93] Regardless of how the information is spread, the spirit of the Ley Marco makes it essential that the citizenry not be involuntarily excluded from the process. In this sense, it has been argued that "although the information is very technical and some people do not understand it, they still have a right to participate."[94]

3. *The Representation of the Affected Communities*

In conformity with Article 28 of the Ley Marco, the community organizations and persons directly affected by the proposed projects have the right to participate in the SEIA. On the basis of this provision, the intervention of the Non-Governmental Organizations (NGOs) is justified, a form of popular participation that has generated controversy on various occasions and that, according to experts, makes the representative nature of the groups that appear under the auspices of defending the affected community questionable for recovery. During the initial years of the Ley Marco, sometimes there existed a harmony of interests between the local affected communities and the national environmental organizations or NGOs. Other times the postures of the local community have been "diametrically opposite of those ex-

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[91] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 137.

[92] *Message of the President*, *supra* note 45. Underlining the fundamental role of education in community participation, the President explained that "the ability of the persons to participate in the solution of the problematic area corresponds directly to the level of consciousness about the topic." *Message of the President*, *supra* note 45.

[93] CEPAL (1989), *supra* note 68. In this seminar, the participants arrived at the conclusion that when an EIA is conducted, the participation of the communities and the environmental groups is of utmost importance. It was suggested that "a fluid participation will avoid future conflicts derived from the ignorance [or] the distortions of environmental and socioeconomic risks, situations which are all attributable to the lack of information and opportune communication between the actors involved. Thus, the consciousness-raising campaigns, especially when they are performed using plain terms, play an important role." CEPAL (1984), *supra* note 68.

[94] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 119. According to the author, the following scene must be avoided in which the companies "realize that we are the technical experts and we have everything under control, so you do not need to worry about it."

pressed by the environmentalists."[95] This occurs, for example, when the local residents support a particular project for the economic benefits that it provides, while the NGOs limit themselves to analyzing the project from an ecological perspective, thereby creating an internal conflict.

The issue becomes still more complicated due to the recent decisions emitted by the Chilean Supreme Court on this matter. For example, in the case of Trillium's Río Cóndor project which is subsequently analyzed in detail, the judges announced that the right to live in a contamination-free environment is a "human right of constitutional rank." This presents a double character: the subjective/individual public right and the collective right.[96] With respect to the latter collective right, the court provided the following:

> Such a right is designed to protect the interests of the entire community at both the local and national level . . . because it constitutes the foundation of a society and a nation, because upon damaging the environment and the natural resources the possibility of life and development is limited not only for the present generations but also for the future ones.[97]

This decision would appear to clarify the debate regarding which parties, according to the Ley Marco, possess the ability to turn to the courts in order to protect the environment. However, because the decision was made in a country which uses a civil instead of common law system, as in the USA, the decision does not establish a legal precedent which is transformed immediately into binding law, thus severely limiting this decision's applicability.[98] For this decision to become law, it must be formally codified and approved by the Chilean Congress, a process which

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[95] César Ormazábal, *Análisis crítico desde la perspectiva de los actores y su responsabilidad en los EIA*, AMBIENTE Y DESARROLLO, Sept. 1997, at 58.

[96] Decision No. 2.732-96 [Chilean Supreme Court] (March 17, 1997).

[97] Decision No. 2.732-96 [Chilean Supreme Court] (March 17, 1997).

[98] Agustín Squella, LA CULTURA JURÍDICA CHILENA 35 (Corporación de Promoción Universitaria ed., 1992). According to this Chilean jurist, the sources of law in Chile are arranged in a hierarchical order, with the law as the supreme source, followed by legal custom, jurisprudence, the doctrine of renowned authors and sometimes even contractual clauses. Conversely, the majority of the Chilean legal experts claim that "the judges do not produce law, rather they merely apply the preexisting law to the relevant legal cases in an invariable manner." *Id.* It is argued, moreover, that the "judge is a slave to the law, which means that the he/she, both in the interpretation and application of the laws established in the Chilean Codes, must proceed, always and invariably without differing on even one point, since a personal interpretation of the text of the law . . . is prohibited." *Id.*

typically takes several years. Furthermore, the validity and constitutionality of this legal resolution have been repeatedly questioned.[99] For these reasons, in spite of the Trillium verdict, the issue of which parties have the legal right to protect the environment still constitutes, for all practical purposes, an unsettled issue.

4. Insufficient Time for Public Participation

According to the Ley Marco, if the community organizations or persons directly affected want to formulate observations regarding the EIA, they have a period of 60 days, counted from the day of publication of the proponent's EIA extract in a newspaper of national circulation.[100] This period, it is argued, is insufficient because "in the case of a project whose elaboration has taken two to three years, how could it be seriously questioned and analyzed in 60 days?"[101] Additionally, those who are obligated to demonstrate the defects of a given project must perform an environmental impact counter-study, a task extremely difficult, if not impossible, to accomplish in the case of larger projects.[102] As discussed earlier, when a sizable project is involved, the EIA tends to occupy numerous volumes, which presents complications for the affected community.[103]

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[99] Felipe Ecclefield, Recurso de protección y medio ambiente: consideraciones en torno a la legitimación 34-53 (unpublished thesis on file with Pontifícia Universidad Católica de Chile). On the basis of six major legal decisions made since the enactment of the 1980 constitution, the author concludes that the Chilean courts almost unanimously agree that the Protective Injunction may not be used by an individual in order to preserve generic or collective environmental interests due to the fact that this duty is assigned to the State in Article 19 of the constitution. Article 19 provides that "[i]t is the duty of the State to insure that the right to live in an environment free of contamination is not affected and to protect the natural resources." However, with the verdict in the Trillium case, the author argues that the applicability of the Protective Injunction has been excessively broadened since it would appear that now *any* Chilean may seek such legal remedy for any contaminating act, regardless if the individual is personally affected. This legal resolution, in summary, is contrary to a decade of precedents and "has lead to grave constitutional confusion." *Id.*

[100] Ley de Bases del Medio Ambiente, 1994, art. 29 (Chile).

[101] Torey, *supra* note 62, at 10-11.

[102] Torey, *supra* note 62, at 10-11.

[103] Torey, *supra* note 62, at 10-11. According to the author, "it suffices to see how voluminous the EIAs usually are, replete with information, in order to estimate the amount of time and professional resources involved in the analysis of the documentation and the elaboration of a coherent plan of community participation." Torey, *supra* note 62, at 10-11.

Furthermore, this short amount of time could permit fraud by the investors since possibly damaging aspects of the project could be intentionally buried between hundreds of pages full of impertinent and overly-technical information. In fact, one of the most frequent problems that the governmental authorities and the communities confront upon reviewing the EIAs is the excess of irrelevant data, a situation which "has transformed itself into a habitual practice of numerous consulting firms in order to thicken the reports, as if the evaluation depended on the number of pages that it contained."[104]

The disparity between the number of opportunities which project proponents and effected communities have to add information to the EIAs, to extend periods, and to interact with the evaluative organisms, has also been criticized. In conformity with the Ley Marco, the communities may only present written observations about the EIA during a non-extendible 60-day period, the majority of which, contend the ecologists, is spent soliciting methodological clarifications and additional information about the EIAs. Once the proponent has answered these solicitations through an addendum, the SEIA does not allow new opportunities for participation. This limitation diminishes the effectiveness of the public participation.[105]

5. *The Conflictive Nature of the Public Participation Mechanism*

The incorporation of public opinion in the Ley Marcos procedures was aimed at legitimizing the decisions of CONAMA, thereby preventing controversies between the communities and

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[104] César Ormazábal, *Análisis crítico desde la perspectiva de los actores y su responsabilidad en los ESIA*, AMBIENTE Y DESARROLLO, Sept. 1997, at 57. It is argued that such an excess of information epitomizes the old saying "can't see the forest for the trees," in the sense that this excess only serves to distract the attention of the reviewer, diminishing his/her time and concentration to study more essential components.

[105] Claudia Sepúlveda, *El Sistema de Evaluación de Impacto Ambiental uesto a prueba*, AMBIENTE Y DESARROLLO, June 1998, at 8. *See also* Ley de Bases del Medio Ambiente, 1994, art. 16 (Chile). Once the public solicits additional information, COREMA sets a reasonable period, based on the type and/or amount of information required, during which the proponent must present the solicitor such data. Although the 60-day period for public participation is temporarily suspended, once the new information is presented, the public is *not* granted additional time to analyze, make comments to CONAMA, etc. This strict lapse of time for public participation is designed to avoid the use of questionable solicitations as a tactic to frustrate a particular project.

the companies.[106] In precise terms, the idea was that "to the extent that there was participation by the potentially affected community in such decisions, the conflicts rooted in the prevalent mistrust of foreign investors could be mitigated to a large degree."[107] Logically, then, the exclusion of opportunities to express opinions would generate increased conflicts. This, however, perhaps is not imputable to the participation in itself,[108] and thus the mere presence of opportunities excuses CONAMA decisions.

In the existing SEIA, the concept of public participation constitutes merely an informative process in which the community has the right to ascertain the details of a project only after it has already been defined by the company and presented to the State for approval. This procedure, it is claimed, "favors a confrontational dynamic with projects perceived to be . . . foreign to the reality of the local community."[109] Instead of centering the debate on the chicken-before-the-egg dilemma, several other suggestions have been made to reduce future battles. First, establishing instruments of environmental dispute resolution between the community and the businesses has been recommended.[110] Specifically, instead of having CONAMA and the

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[106] *Id.* at 7. The author explains that, on a political level, the preventative objective of the SEIA is to avoid the eruption of environmental conflicts and, for this reason, there exists the instrument of public participation. It has been recognized, however, that this preventative function has not been completely achieved by the SEIA.

[107] Francisco Sabatini, *Cinco dilemas sobre participación ciudadana y evaluación de impacto ambiental*, AMBIENTE Y DESARROLLO, Mar. 1996, at 17.

[108] *Id.* Sabatini contends that there is a relationship, not causal, between popular participation and the discrepancies regarding the environment. He explains, in particular, that if adequate institutional channels to satisfy the demand exist, then the frequency of the conflicts decreases. However, he adds that "this fact should not lead to blaming public participation for the conflicts." *Id.* at 17.

[109] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 114. *See also* Vivianne Blanlot, *Participación ciudadana y evaluación de impacto ambiental en el caso del gasoducto*, AMBIENTE Y DESARROLLO, Sept. 1996, at 25. According to Blanlot, the ex-director of CONAMA, "it is inevitable that conflict is a condition of the process of public participation, [but] that does not necessarily mean that participation generates the conflict, rather it simply illuminates it." *Id.* From Blanlot's point of view, the confrontations are attributable to two principal factors. First, the process is new in Chile and the idea of massive participation is novel, the channels are limited, and the intermediaries are diffused. Second, in the country there is "a high degree of social dissatisfaction that will direct itself to the few mediums of expression or participation that are available." *Id.*

[110] Blanlot, *supra* note 109, at 25. According to the author, the absence of such formal instruments of conflict resolution indicates a serious shortcoming of the State

Chilean courts resolve conflicts, the SEIA could include a period of informal negotiations between the project proponent and the community. In this manner, the mistrust, confusion, and perhaps anger between the two groups would be remedied more quickly.[111] Second, the NGOs could adopt a more cooperative attitude instead of limiting themselves to instigating altercations.[112] Third, the concept of public participation must be clarified: is it a constitutional right or simply a formal ingredient in the environmental decision-making process? The lack of comprehensibility in this area has led to frustrated expectations which, in turn, have generated violent protests.[113] If none of

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in its role as the protector of the rights and interests of its citizens. Moreover, she suggests that if the system is not made more appropriate soon, there will continue to be a "serious crisis of government [and] precedents of the imposition of projects by way of public force, a situation which is unacceptable in a democratic regimen." Blanlot, *supra* note 109, at 25. *See also* Fernando Agüero, *La participación ciudadana en la protección del medio ambiente*, *in* DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL 89, 90 (Fundación Facultad de Derecho—Universidad de Chile ed., 1998). In Chile, those who feel that the legal avenues of public participation established in the Ley Marco are inadequate tend to employ conflictive tactics, including public manifestations, blocking roads and bridges, chaining themselves to objects, and participating in hunger strikes. These actions, suggests Agüero, "must be radically rejected by both the authorities and the public." *Id.* Lamentably, until this moment the nation has not adopted such an attitude and, consequently, there exists "a confrontational environment that generates tensions, pointlessly impedes projects, and worse yet, opens spaces to groups with non-environmental interests . . . that seek to interfere with projects for ideological reasons or with commercial competition motives." *Id.*

111 Francisco Sabatini, *Negociacion ambiental, participación y sustentabilidad*, AMBIENTE Y DESARROLLO, Sept. 1996, at 19.

112 COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 111. It is suggested that the NGOs should collaborate with the businesses and the government in order to identify concrete solutions to environmental problems instead of restricting their action, as some have traditionally done, to impeding the execution of projects, interposing international denouncements over supposed aggressions against the environment or promoting illegal protests. *See also* Yolanda Kakabadse, *Las agencias intergubernamentales y las ONGs en búsqueda de una nueva relación*, *in* INTER-AMERICAN DEVELOPMENT BANK, ENVTL. PROTECTION DIV., 1993, at 6. Kakabadse argues that the conduct of certain NGOs is to be expected due to the limited involvement opportunities which they are granted in some Latin American countries. According to the author, these groups have traditionally been considered supervisors of the projects, yet not as participants in the planning processes or in the identification of environmental priorities. Consequently, "it should not surprise the governments that the NGOs assume such critical positions."

113 Sepúlveda, *supra* note 105, at 8. From Sepúlveda's perspective, a clear definition of the roles is fundamental. She explains that if the opening of avenues of participation in the SEIA is interpreted as the recognition of a constitutional right, then it should be guaranteed and protected before the powers and interests of those who put it at risk. On the contrary, if participation in the SEIA is merely an admin-

these recommendations are adopted, it is quite possible that public participation will become stigmatized with the image of groups of people with signs yelling "no" instead of it being a mechanism for the project improvement.[114]

Accepting that there is a relationship between public participation and the conflicts, does this jeopardize foreign investment and the economic development of the nation? On one hand, mass participation in the SEIA could risk the attraction of foreign capital "upon conceding a portion of the decision to a mechanism which is not technical, and therefore, unpredictable."[115] On the other hand, although in certain cases the participation is capable of temporarily obstructing some investment projects, in the long run, it may increase the legitimacy of the decisions regarding potentially harmful projects.[116] Based on the relevant texts available, the latter posture enjoys greater support because investors understand that, regardless of the number of governmental permits they obtain, in the absence of community approval the project will not be carried out efficaciously.[117] For example, if the controversial project manages to materialize against the will of the local population, it is likely that this will produce "a social fracture . . . that could drag on for years and create permanent tension in the community-company relationship."[118]

Therefore, due to the necessary coexistence of both parties, it is argued that public participation should be considered a positive aspect of the SEIA that benefits the investors. In other words, because the public will eventually participate with or without formal mechanisms, appropriately administering such participation "could represent the factor that transforms a potential rejection . . . into the simple redesign of a project."[119] Moreover, it is estimated that in the long run the early inclusion of concerned citizens will save money since, if they are omitted, that

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istrative mechanism of consultation that does not influence the decision of the environmental authorities, then this limited character needs to be revealed from the start.

[114] Torey, *supra* note 62, at 15.

[115] Sabatini, *supra* note 107, at 21.

[116] Sabatini, *supra* note 107, at 21.

[117] Sylvia B. Hormazábal, *Evaluación de impacto ambiental: la experiencia internacional*, AMBIENTE Y DESARROLLO, Mar. 1996, at 15.

[118] Torey, *supra* note 62, at 15.

[119] Sabatini, *supra* note 107, at 21.

which presently appears to be a tranquil approval "could generate a large volume of conflictive situations in the future."[120]

B. General Problems with the SEIA

1. The SEIA is Restricted to "Environmental" Issues

According to the Regulations of the Ley Marco, if the project requires the presentation of an EIA or DIA, the governmental entity must dictate a resolution that classifies the project as favorable or unfavorable, "taking into consideration, *among other antecedents*, the opinion of the [State] organizations with environmental competence."[121] On the basis of the textual language, in theory, extra-environmental factors may be examined in order to determine the viability of a project.[122] In fact, some former State employees allege that current decisions are purely political since CONAMA "is neutralized by the pressures from other governmental organizations and the private business sector."[123] In such cases, as a matter of equity, it is recommended that the affected community should also be allowed to consider non-environmental factors upon formulating their observations. This argument, however, has met notable opposition. For instance, it has been proposed that public participation in the SEIA must be limited to environmental impacts of the projects under evaluation since, to the contrary, there is a risk that the

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120 Sabatini, *supra* note 107, at 21.

121 Reglamento del Sistema de Evaluación de Impacto Ambiental, art. 36 (1997) (Chile).

122 Gabriel Del Fávero Valdés, *Protección Ambiental*, CORMA, June 1997, at 30. According to the author, "given the need to make compatible the concepts of development and environmental protection . . . the decision is political and not exclusively technical."

123 Hugo Córdova, *Cualquier personero de gobierno tira el mantel de la CONAMA*, QUE PASA, July 11, 1998, at 4. Rigoberto Valdivia, former lawyer of CONAMA, explains that the current SEIA is totally political due to the fact that the technical reports are not binding, a situation which permits companies to have more influence via lobbying than the members of the State environmental organizations. According to Valdivia, if somebody wants to get a project approved, he/she must look for the votes in COREMA. Valdivia suggests, furthermore, that every project generates controversy because the conclusions are arrived at politically and not in conformity with the law. As an example, he cites the Trillium case in which, according to this government attorney, the decision to approve the project despite the multitude of protests was completely political. "When there exists an environmental authority as weak as CONAMA and the project in question is significant, the conversations are sustained directly between companies and the political authorities since a business that is considering the investment of millions of dollars in Chile is not going to converse with the current director of CONAMA," Valdivia concludes.

SEIA "will be taken advantage of by the potentially affected communities that attempt to obtain compensations for interests which have no connection to the environment."[124]

Another problem involves the difficulty in precisely defining the environmental repercussions because a project's results tend to be intermingled. In the case of a landfill, for instance, the environmental impacts include unpleasant odors, the migration of methane gas and the contamination of the subterranean waters. There also exist other effects that perhaps are not classifiable as environmental, thereby excluding them from the SEIA, such as the lowering of the image of the neighborhood and property depreciation. On this basis, therefore, it is argued that it is unjust to limit public participation strictly to environmental factors and that it is "healthy economically and just socially that the projects encompass *all* of the negative externalities which they cause in their setting."[125]

2. *The Constitutionality of the Regulation*

According to the Constitution, the State may only establish the manner of obtaining, using and enjoying private property by means of a law.[126] Furthermore, the Constitution guarantees all citizens the right to perform any economic activity, provided that

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[124] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 18.

[125] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 19 (emphasis added).

[126] CONSTITUCIÓN DE LA REPÚBLICA DE CHILE (Republic of Chile Const.) art. 19, number 24. A hierarchy of laws and enabling legislation govern environmental issues in Chile. In order of priority these include: (1) constitución de la República de Chile/Constitution of the Republic of Chile (it takes precedence over the interpretation of all other laws, decrees and resolutions), (2) Leyes Orgánicas/General Laws (eight general laws which constitute the fundamental rules addressing the organization of the State), (3) Códigos/Codes (a systematic set of laws focused on one particular area), (4) Leyes/Laws (the laws are introduced upon the approval by 50% plus one vote of the congress and the processes, regulations and standards which describe the application of such laws are subsequently enacted in the form of decrees or resolutions), (5) Decreto Supremo/Supreme Decree (these decrees, signed by the president or by a minister on behalf of the president, are instruments describing one or many aspects of the functioning of a law which take legal effect upon publication in the Diario Oficial, the official congressional report), (6) Reglamento/Regulation (the purpose of the Regulation is similar to that of the Supreme Decrees, but it is issued by means of the signature of a minister without reference to the president), (7) Decreto Simple/Simple Decrees (these refer to a particular situation of lesser legal importance, i.e., the nomination of a senior civil servant), and (8) Resoluciones o Instrucciones Administrativas/Resolutions or Administrative Instructions (instruments, issued by the directors of the ministerial services, attempt to further define a process, regulation or standard pursuant to a decree or law).

it does not contravene public policy or national security.[127] Article 19 of the Constitution, however, affirms that "the law may establish specific restrictions of the exercise of determined rights and freedoms in order to protect the environment."[128] This provision signifies that, with the objective of conserving, for example, the native forests, the State has the power to fix certain limitations of fundamental rights, but such constraints may only be created by a *law*.[129]

Article 32 of the Ley Marco establishes that "through a Supreme Decree . . . the primary norms of environmental quality will be promulgated" and that "a Regulation will establish the procedure to follow in the dictation of the norms of environmental quality."[130] It is contended that these norms affect the constitutional right to conduct any legitimate economic activity by imposing restrictions on the right to property and, as a result, the norms must be established in a law approved by the national congress.[131] This posture has been accepted by numerous Chilean

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[127] *Id.* at number 21. All citizens have the right "to develop any economic activity which is not immoral, or contrary to public policy or national security." *Id.*

[128] *Id.* at number 26. This clause stipulates, however, that such constitutionally permitted restrictions may not affect the individual rights in their essence.

[129] Julio Lavín, *Constitución y ley general del medio ambiente*, AMBIENTE Y DESARROLLO, Mar. 1993, at 13. On this matter, the author indicates the following: (1) such an attribution is conceded exclusively to the legislators and, as a result, it cannot be delegated to an administrative authority, (2) the establishment of such restrictions may not affect the essence of the fundamental rights and cannot impose excessive requirements and taxes which would impede the free exercise of such rights, (3) only those rights related to the development of contaminating activities may be restricted, and (4) the legislators may not establish extraordinary regimens of provisional restrictions unless an exception to the constitution is invoked. *See also* Enrique Pérez Silva, *Bases constitucionales del derecho del medio ambiente*, REVISTA DEL ABOGADO, Nov. 1996, at 30. According to Pérez Silva, "from the constitution it is inferable that the State may also restrict the rights and freedoms whose exercise could endanger the quality of the environment." *Id.* at 76.

[130] Ley de Bases del Medio Ambiente, 1994, art. 2(ṅ) (Chile). A primary norm of environmental quality is defined as that which "establishes the values of the concentrations and periods, permissible maximums and minimums of elements and substances . . . whose presence or absence in the environment could constitute a risk to the life and health of the population." *Id.*

[131] María de los Angeles Pérez, *Ley Marco del medio Ambiente: Las normas de calidad ambiental y la responsabilidad civil*, AMBIENTE Y DESARROLLO, Mar. 1993, at 23. By not demanding that the norms be promulgated by the congress, this attorney argues that "the elaboration of the norms of environmental quality [will correspond] to the Executive Power [and] the norms will continue being elaborated and dictated by the administrative authority without exercising any limitation on behalf of the legislator." *Id.* *See also* TOLEDO TAPIA, LEY SOBRE BASES GENERALES DEL MEDIO AMBIENTE: HISTORIA FIDEDIGNA Y CONCORDANCIAS INTERNAS 130-31

jurists who argue that permitting the restriction of fundamental rights without a corresponding law, in addition to clearly violating legal competencies, constitutes "a true fraud to the Constitution."[132]

Likewise, it is argued that Article 13 of the Ley Marco, which grants the power through regulation to dictate the norms necessary to "elaborate and classify" an EIA, is also unconstitutional. Specifically, on the basis of the Constitution, it is suggested that the regulatory authority of the president may only create two types of regulations: (i) autonomous regulations located outside of "legal dominion," and (ii) executory regulations necessary for the implementation of a particular law.[133] In the case of the Regulation of the Ley Marco, it is claimed that the norms that regulate Articles 10 and 11 (regarding the SEIA) must be approved by laws because "they are not limited to clarifying ambiguous expressions contained in the law; rather, they supplement them, amplifying a norm of general and obligatory character which sets the essential basis of judicial order."[134] Therefore, a presidential

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(CONAMA 1996). During the preparation of the Ley Marco, this aspect was intensely discussed by the environmental commission of the senate, which arrived at two divergent opinions. On one hand, the complexity of environmental problems demands a flexible judicial system capable of rapidly adapting itself to new requirements. Thus, some senators contended that it is preferable that the environmental quality standards not be established by law. On the other hand, it was suggested that such norms must be consecrated by law for two fundamental reasons. First, such a ranking within the Chilean legal system would give them a higher level of social legitimacy. Second, based on the fact that the Ley Marco should be considered on the same level as the constitution, the quality norms must necessarily be established by law. In this manner, it was argued, "we will create a system of greater stability . . . that will favor the national productive activity through clear and permanent rules." *Id.* at 131.

132 Antonio Ortuzar, *Chile ingresa al derecho ambiental*, REVISTA DEL ABOGADO, July 1994, at 21. According to Ortuzar, Article 32 of the Ley Marco is unconstitutional because the regulation of human rights is given to the legislators. In addition, with the objective of clarifying that it is the legislator who determines the regulations, Article 61 of the Constitution stipulates that he/she is prohibited from delegating these legislative attributions. The author concludes, therefore, that the restrictions of fundamental rights may not be done via a Regulation with mere revision by the legislators, stating "the Constitution has granted *only the law* the faculty to impose the mentioned restrictions, thus these may not be consecrated by norms of inferior rank." *Id.*

133 Eliana Carrasco, *Reglamentación de los artículos 10 y 11 de la Ley No. 19.300 que aprueba la Ley sobre Bases Generales del Medio Ambiente*, *in* 270 LA LEGALIDAD DE LA REGLAMENTACIÓN DEL SISTEMA DE EVALUACIÓN DE IMPACTO AMBIENTAL 4 (July 1997).

134 *Id.* According to this law professor, if the Ley Marco does not specify certain concepts in such a manner that the application of the law is feasible, then the legal

decree which approved the Regulation in 1997 arguably infringes on both the Ley Marco and the Chilean constitution.

In the absence of the resolution of these constitutional problems, the effective application of the Ley Marco could find itself hindered by legal actions.[135] In particular, if the constitutional norms are exceeded, "the process will be obstructed, lengthened and the price will rise enormously due to eventual legal complaints . . . which will lead to trials and to the uncertainty of these [environmental] laws."[136]

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norm should be judged incomplete and must be supplemented by the form in which it was introduced; that is, by a law.

[135] *Id.* at 7. It is contended that the regulation is fundamental since, without it, the SEIA would be unable to function and the country "would see environmental management subject to disparate criteria, political capriciousness or completely subjective perceptions." *Id.* Furthermore, it is explained that it is probable that the controversy related to the Ley Marco will continue in the national courts due to the fact that the arguments over the unconstitutionality of the regulation are "only illustrative of a debate whose scope greatly exceeds the particular case analyzed [and] the problem will be debated again." *Id.* *See also* Javier Vergara Fisher, *El futuro del derecho ambiental*, *in* DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL 535 (Fundación Facultad de Derecho—Universidad de Chile ed., 1998). An example of the debate over the constitutionality of the restrictions occurred with Trillium's Río Cóndor project. In this case, the Supreme Court held that the duty of the State to protect nature means "maintaining *the original conditions of the natural resources*, reducing to a minimum the human intervention." *Id.* According to Vergara, some jurists have interpreted this phrase to signify that the native forests may not be touched for commercial purposes and that, albeit sustainable in the long run, no exploitation project may be performed in such areas. This would represent, explains the author, the deprivation of "the legitimate use of natural resources that are absolutely part of private property," thereby affecting the constitutional right to property "in its essence." *Id.* Other experts, however, have argued that the Supreme Court ruling constitutes a minor use-restriction and is by no means an expropriation since Trillium could use the land in question for other purposes, i.e., ecotourism, national parks, scientific studies, etc.

[136] María de los Angeles Pérez, *Las normas de calidad ambiental y la responsabilidad civil*, AMBIENTE Y DESARROLLO, Mar. 1993, at 25. According to the author, what is occurring is "a distancing from the sought goal and the creation of confrontations between diverse and important nuclei of society." *Id.* *See also* Julio Lavín, *Constitución y ley general del medio ambiente*, AMBIENTE Y DESARROLLO, Mar. 1993, at 16. Unlike the norms of environmental quality, Lavín argues that the obligation to submit a project to the SEIA does not produce a conflict of constitutional rights. According to the author, the demand could restrict various rights, for example, the right to develop economic activities (if the EIA is rejected) or the right to private property (due to the conditions the State authority may impose). Nevertheless, Lavin indicates that there is no constitutional conflict because the legislator regulates, leaving only the job of monitoring the compliance to the administrator. Moreover, the author points out that the rights in question are not affected.

3. The Starting Point of the SEIA

According to Title II of the Ley Marco, all of the projects contemplated in Article 10 are obligated to present a DIA or an EIA as necessary. In part, Article 10 establishes that the projects susceptible to causing an "environmental impact" must be submitted to the SEIA.[137] With respect to the native forests, the Ley Marco clearly requires submission to the SEIA for forest exploitation projects in fragile soils or in terrain covered with native forest, as well as for activities involving the paper industry, sawmills or wood producers.[138] The analysis becomes more complicated, however, when deciding whether a particular project must elaborate an EIA or simply present a DIA.

The presentation of a DIA or the elaboration of an EIA involve distinct costs and time periods for an investment project. Consequently, it is necessary to know with the highest degree of certainty possible, which option should be selected in order to quantify the costs and intervals, both of which influence the feasibility of a project. Arguably, the criteria established in the Ley Marco are insufficient to achieve the desired degree of certainty and, in the opinion of various attorneys, "a great effort of designation and quantification will be required to improve this situation."[139] For certain types of projects, the conditions with which a project must comply in order to be submitted to the SEIA are explicit, in other cases, the definitions are so general that they could be interpreted as subjecting *all* projects to the SEIA. As a result, it is argued that the present regulation per-

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[137] José Antonio Urrutia, *Sistem de impacto ambiental en Chile*, *in* DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL 13-14 (Fundación Facultad de Derecho—Universidad de Chile, ed., 1998). This environmental attorney suggests that one of the major problems with the Ley Marco is that it lists the projects that must enter the SEIA in such a broad and extensive manner that it encompasses "virtually any project imaginable." *Id.* Urrutia explains, for example, that the Ley Marco requires that "residential projects in saturated zones" must be submitted to the SEIA. This situation produces assorted problems. Santiago, the capital, is undoubtedly a saturated zone, yet an enormous number of residential projects, i.e., the construction of apartments, are performed on a daily basis. Thus, if one were to read the legal text literally, virtually every construction or modification activity would necessarily be subjected to the SEIA, "a practice that would cause such a back-up that the entire system would collapse." *Id.*

[138] Ley de Bases del Medio Ambiente, 1994, art. 10(m) (Chile).

[139] Jaime M. Undurraga, *Criterios para determinar cuando se requiere una declaración o un estudio de impacto ambiental*, *in* 226 ALGUNOS LINEAMIENTOS PARA EL REGLAMENTO DEL SISTEMA DE EVALUACIÓN DE IMPACTO AMBIENTAL 5 (Center of Public Studies, Santiago, Chile, 1994).

mits multiple interpretations, including some absurd ones.[140] Other critics indicate that the clarifications attempted in the regulation were partial and vague regarding the qualitative criteria for "alterations of protected areas," the "tourist value of a zone," and the "sites of cultural patrimony."[141] As a result of this ambiguity, it is suggested that the regulation, in effect, transfers the responsibility to the proponent of a project to judge, based on his/her own convictions and criteria, as to whether a particular project should enter the SEIA. Certain environmental lawyers contend that this "creates a conflictive situation since it is possible to have a considerable difference of opinion among the respective COREMAs."[142]

It has been argued that three fundamental reasons to distinguish between the DIA and the expensive EIA exist: (i) it is not worth the effort for every investment project, (ii) if every project were obligated to elaborate an EIA, it would paralyze the investment process and economic development in general, and (iii) the State bureaucracy in Chile is just starting to implement the SEIA and it is necessary to grant it time to learn from this apprenticeship.[143] For these reasons, the presentation of a DIA instead of an EIA, should be the general rule. However, the problem lies in that Articles 10 and 11 are unsuitable to determine the necessary submission, a situation that may transform the EIA into the general rule due to the lack of clear criteria.[144]

Specifically, the criteria in Article 11 are almost entirely subjective in nature, lacking sufficient objective, quantitative, and qualitative standards. First, it is argued that if the criteria are not clarified, the DIA will not constitute the general rule, thereby permitting "the collapse of the entire system of environmental evaluation" due to a lack of the human and technological resources needed to handle all of the work that the EIAs involve.[145] Consequently, the breakdown of the described system would represent high costs for the country through the paralyzing of projects that should be submitted to the SEIA in order

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[140] César Ormazábal, *Análisis crítico del marco legal y su reglamento*, AMBIENTE Y DESARROLLO, Sept., 1997, at 47.

[141] *Id.*; *see* Undurraga, *supra* note 139, at 5.

[142] José Luis Ortiz, *Análisis jurídico del Sistema de Evaluación de Impacto Ambiental*, AMBIENTE Y DESARROLLO, Mar. 1998, at 24.

[143] Undurraga, *supra* note 139, at 5-6.

[144] Undurraga, *supra* note 139, at 8.

[145] Undurraga, *supra* note 139, at 8.

to accomplish sustainable development "which would be, to say the least, an irony."[146] Secondly, it is contended that if the DIA is not the general rule, future legislation could possibly fall into discredit and non-compliance, "losing its judicial efficiency which would bring extremely negative environmental consequences to the country and [damage] its relations with the rest of the world."[147]

4. The Conditional Approval

According to the terms set forth in the Ley Marco, the evaluation process concludes with a resolution which classifies the environmental compatibility of the proposed project, establishing, when necessary, the environmental conditions or exigencies that must be complied with in order to execute the project.[148] The use of the conditional approval method contemplated in the Ley Marco has been questioned for three main reasons. First, it is contended that the lack of specificity transforms such demands into unconstitutional prerequisites. In the Trillium case, which is examined in detail in subsequent pages, COREMA demanded that the company provide a guarantee of the sustainability of the project for a period of 110 years, a warranty which would be used in two situations: (i) for abandonment or closure of the project, irrespective of the cause, or (ii) for a regeneration rate of native trees insufficient to insure the conservation of the forest mass. As a result, a legal complaint was raised against CONAMA in the court of appeals of Santiago in which the timber company argued, among other things, that such a condition is unconstitutional because "such a measure is not within the faculties of CONAMA."[149] It is alleged, furthermore, that the State may not by itself impose a condition if it is not regulated legally. In the case of the environmental guarantee, this measure was not established in the Ley Marco nor in the Forestry Law.[150] Due to the fact that the company subsequently retracted the complaint, the

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[146] Undurraga, *supra* note 139, at 8.

[147] Undurraga, *supra* note 139, at 8-9.

[148] Ley de Bases de Medio Ambiente, 1994, art. 25 (Chile).

[149] Rolando Martínez, *Por exigencia ambiental: Trillium Llevaría a CONAMA a la Justicia*, EL MERCURIO, July 5, 1998, at C8.

[150] Rolando Martínez, *Ante Justicia: Trillium Cuestionó Garantía Ambiental*, EL MERCURIO, July 7, 1998, at C1.

question of the constitutionality of the conditions still remains unsettled.[151]

Second, the conditional approval method has been criticized because it creates conflicts between the project's proponents and the communities attacked. It is argued that the this type of approval is, in fact, an authorization of the projects, and the proponents see it as such. However, those who find themselves affected by the imposed conditions "face a decision which, in large part, has already been made, with the aggravating factor of not having the opportunity to be informed and to opine."[152] As a result, the creation of conflicts of considerable intensity are foreseeable. It is asserted, therefore, that when the conditions for the approval of a project call for highly significant modifications, a new EIA incorporating the technical recommendations of CONAMA should be required, thereby opening the opportunity for public participation to those newly affected persons. In this manner, many conflicts caused by community perceptions of pretentious companies hiding behind conditional approvals would be avoided. Moreover, there would be advances in the assurance of equality in participatory opportunities for all the citizens affected. According to experts, "both factors are key to avoid a crisis of legitimacy of the current environmental institutions in Chile."[153]

Third, utilizing the Río Cóndor case as an example, it is argued that the conditional approvals are contrary to conventional wisdom. Currently, the conditions are imposed on the project subsequent to its approval, which, according to various Chilean legislators, reflects an important weakness in the Ley Marco. This situation, it is suggested, is comparable to the attainment of a driver's license:

> When a person goes to obtain the license, he/she has to comply with certain technical requirements, as is the case with the environmental impact evaluations. One must submit to an auditory and vision test. It would be very strange if they said to the candidate, 'Look, I will give you the license now, but come

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[151] *No hubo un acuerdo extrajudicial con Trillium*, EL MERCURIO, Aug. 20, 1998, at C5. Trillium retracted its complaint against CONAMA because its legal team concluded that if the resolution were rejected by the Board of Directors of CONAMA, the environmental certification granted to the project would be left without effect. Thus, because an environmental resolution constitutes a single administrative act, it is not susceptible to partial acceptance.

[152] Sepúlveda, *supra* note 105, at 16.

[153] Sepúlveda, *supra* note 105, at 16.

> back in two or three weeks and bring me the results of the auditory test and demonstrate that you have a pair of glasses because you are half blind.'[154]

5. *The Presentation of Alternatives*

The Ley Marco provides that if the DIA or EIA is rejected, the proponent of the project may present it again, a subsidiary opportunity which permits, in effect, the presentation of alternative actions.[155] Compliance with this procedure, however, tends to substantially prolong the environmental evaluation process. Furthermore, the Ley Marco, as it is currently drafted, does not obligate the proponent to include in the EIA a review of other alternatives and a justification for the adequacy of the option ultimately selected.[156] Arguably, such requirements would facilitate the participation of the community and create a higher level of transparency in the decision-making process. Others contend that the inclusion of diverse alternatives in the EIA should be considered obligatory in Chile since such a requirement forms part of various instruments of international law to which Chile is a signatory. For example, according to certain documents approved by the United Nations the EIA must include at a minimum: (i) a description of the practical alternatives and (ii) the identification and description of the available methods to mitigate the environmental impacts in the proposed activities and alternatives.[157]

On the basis of these multilateral agreements, it is suggested that the Chilean legislation should require that the EIA contain viable alternatives regarding the project, a measure that "would permit greater mobility in the search for solutions and in the execution of the project."[158] The alternatives should be presented in terms of the technology to be employed and the proposed physical location of the project, since the environmental conflicts tend to be tightly linked to these issues. Typically, the projects are

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[154] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 217.

[155] Ley de Bases del Medio Ambiente, 1994, art. 21 (Chile).

[156] Blanco, *supra* note 61, at 26.

[157] *Goals and Principles of Environment Impact Assessment*, Governing Council of the United Nations Conference on Environment and Development (UNCED) A/42/25 (dec. 14/25) (1987).

[158] COMITÉ NACIONAL PRO DEFENSA DE LA FAUNA Y FLORA, SEGUNDO ESTUDIO LEGISLATIVO SOBRE LA LEY DE BASES DEL MEDIO AMBIENTE 14 (1993) [hereinafter COMITÉ NACIONAL PRO DEFENSA].

submitted to the SEIA once the pre-feasibility and/or analysis of alternatives is already completed; that is, "when the fundamental decisions concerning location and technology have already been made."[159]

6. *The Environmental Insurance Policy*

If the proponent of a project submits, in conjunction with an EIA, an insurance policy which covers the risk of environmental damage, he/she may obtain a provisional authorization to initiate the project.[160] The policy must contain, among other things, the valuation of the object insured and the maximum amount of coverage available. To achieve this effect, the Regulation of the Ley Marco establishes that "the natural and artificial environmental elements will be valued in economic terms, utilizing the most appropriate methodology."[161] As discussed earlier, the Ley Marco contains various provisions which permit the interposition of legal complaints, but these take effect only *after* the damage has been generated.

Despite methods designed to facilitate legal reparation after environmental damage, such a system is arguably insufficient since "it is difficult to identify the extent to which the insurance policy will cover the risk."[162] In addition, according to ecologists, the concept of insurance is not applicable to the environmental field due to the fact that it is based on two equivocal presumptions: that (i) the environmental impacts are always reversible[163] and that (ii) all damages are measurable in economic terms.[164] It is suggested that the fact that the proponent may initiate a project without possessing an authoritative approval from the envi-

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159 Francisco Sabatini, *Negociación ambiental, participación y sustentabilidad*, AMBIENTE Y DESARROLLO, Sept. 1996, at 20.

160 Ley de Bases del Medio Ambiente, 1994, art. 15 (Chile).

161 Regulamento del Sistema de Evaluación de Impacto Ambiental, art. 100(c) (1997) (Chile).

162 COMITÉ NACIONAL PRO DEFENSA, *supra* note 159, at 15.

163 FERNANDO TOLEDO TAPIA, LEY SOBRE BASES GENERALES DEL MEDIO AMBIENTE: HISTORIA FIDEDIGNA Y CONCORDANCIAS INTERNAS, 92 (CONAMA 1996). The senators opposed to allowing an insurance policy argued that this would, in effect, establish the principle that through the attainment of insurance a company may cause damage which is, in many cases, irreparable. Because a project with the necessary insurance coverage may be initiated prior to obtaining the approval of its EIA, in theory, "it could occur that, despite the policy, the project generates an irreparable and permanent environmental injury and, subsequently, the project ceases to function due to the rejection of its EIA by CONAMA. *Id.*

164 Blanco, *supra* note 61, at 24.

ronmental authority "absolutely disregards that which the affected community has to contribute."[165] Therefore, because of the uncertainties related to the valuation and the recuperation of the damaged environment, no project should be allowed to begin without an approved EIA, regardless of the existence of an insurance policy.

III

THE GRIEVANCE PROCEDURE

Another aspect of the Ley Marco that has been the target of multiple criticisms is the grievance process. The grievance process can be pursued in four principal manners. First, on the basis of Article 51, one may seek indemnification for any environmental damage caused with culpability or malice.[166] Second, if a particular action is an "illegal or arbitrary act" and contravenes a constitutional right, one may seek a temporary injunction.[167] Third, in accordance with Article 56, the injured person(s) may solicit the application of administrative sanctions such as an official warning, fines, and the suspension of those projects that have transgressed the norms of environmental protection. Finally, in-

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[165] *Id. See also* TAPIA, *supra* note 163, at 90-91. During the congressional debate over the Ley Marco, various senators argued against the possibility of an environmental insurance policy, claiming that "insurance produces the effect of transferring the environmental evaluation from CONAMA to the insurance company, thereby frustrating the principle of public participation that the project should inspire." TAPIA, *supra* note 163, at 91.

[166] Ley de Bases del Medio Ambiente, 1994, art. 51 (Chile). This provision establishes that every person that "culpably or maliciously" provokes damage to the environment will be liable. However, the norms of civil liability for environmental damage contained in the special laws will prevail over the provisions in the Ley Marco. In those cases unforeseen by the Ley Marco or by the special laws, the provisions of the Chilean Civil Code will be applicable.

[167] Felipe Ecclefield, *Recurso de protección y medio ambiente: consideraciones en torno a la legitimación*, *in* TESIS—PONTIFÍCIA UNIVERSIDAD CATÓLICA DE CHILE 5 (1998). According to the Chilean constitution, the right to present a protective injunction arises when "the right to live in an environment free of contamination is affected by an 'illegal and arbitrary' act (conduct that threatens, perturbs or deprives another of his/her ability to exercise a legitimate right) imputable to a specific authority or person, physical or legal." The author justifies the need to establish concurrently that the conduct was both illicit and arbitrary because: (1) for environmental protection there usually exist other administrative mechanisms to seek redress, (2) there are many people extraordinarily sensitive to the contamination, thus presenting the risk of an indiscriminate use of the injunction, and (3) all of the national industries pollute to a certain extent. Therefore, if not for the requirement of the concurrence of these elements, the government would be in danger of having to close the majority of the companies in Chile.

jured persons may turn to the municipality in which the incident occurred so that it may be charged with taking the appropriate action. An effective grievance procedure is important. If people and/or organizations are unable to protect their legal rights, and if the state entities lack the political will necessary to facilitate the process, it is likely that the Ley Marco will not fulfill the purpose for which it was allegedly enacted: environmental protection in Chile. Below, several problems with the grievance procedure are examined, all of which directly or indirectly contribute to the inadequate protection of the Chilean native forests.

According to Article 54, the public, instead of initiating an individual action to protect the environment, must first consult the corresponding municipality.[168] Due to the enormous burden placed on the local authorities, this mechanism has been labeled "inadequate."[169] In contrast, the proponent of the project may first approach the Board of Directors of CONAMA and, if the rejection is confirmed at this level, the proponent is then given direct access to the judicial system. This structure is inequitable because "while the executor of a project is granted all types of legal actions against the decision of the authority until arriving at justice, the affected community is barely given the opportunity to make an administrative complaint, without the possibility of appealing to other state institutions."[170] As a result, the only way to create an unbiased system may be to grant the public direct legal action against the CONAMA decision in the ordinary court system.[171]

The limited access to legal compensation is also highly blameworthy because of its discriminatory effect. According to Article 54 of the Ley Marco, only certain groups are able to bring an action for compensation. For example: the proponents of a project; the individual(s) directly affected; and the state. Third par-

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[168] Ley de Bases del Medio Ambiente, 1994, art. 54 (Chile). Once requested by the injured person, the municipality will bring a legal complaint within 45 days and, if the municipality opts not to do so, the municipality must provide a founded resolution in which it is explained to the affected person reasons why the action was not pursued.

[169] Antonio Ortuzar, *Chile ingresa al derecho ambiental*, REVISTA DEL ABOGADO, July 1994, at 21. According to the author, this process is totally inadequate given that it imposes excessive responsibility on the municipalities, requiring that they initiate massive amounts of legal complaints in order to avoid legal sanctions for noncompliance with delegated duties.

[170] COMITÉ NACIONAL PRO DEFENSA, *supra* note 158, at 21.

[171] COMITÉ NACIONAL PRO DEFENSA, *supra* note 158, at 21.

ties, on the contrary, are only allowed to intervene indirectly through the city mayor.[172] Due to this disparity, the current structure substantially restricts the participation of the NGOs since they are compelled to act through a mayor who is not always willing to assume such an obligation.[173] This limited access, according to certain NGOs, constitutes "a blatant regression from the existing legislation in which a third party not directly affected by the environmental damage may present a legal action without requiring the assistance of a local authority of inferior rank."[174]

A third criticism of the civil liability system for environmental damage concerns the burden of proof in such cases. According to the Ley Marco, it is legally presumed that the author of the injury is liable *only* if she commits an infraction of, among other things, the norms of environmental protection, preservation, or conservation.[175] However, the person affected must prove that the project's proponent culpably or maliciously generated the environmental damage.[176] In effect, it must be demonstrated that the author of the act or omission behaved in a negligent manner,

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172 Ley de Bases del Medio Ambiente, 1994, tit. III (Chile). Members of the local community who seek compensation due to personal or environmental damage caused by a particular project must, as a first step, present the complaint to the mayor of the municipality in which the alleged damage occurred.

173 COMITÉ NACIONAL PRO DEFENSA, *supra* note 158, at 29.

174 COMITÉ NACIONAL PRO DEFENSA, *supra* note 158, at 29.

175 Ley de Bases del Medio Ambiente, 1994, art. 52 (Chile). *See also* Enrique Barros Bourie, *Responsabilidad Civil en Materia del Medio Ambiente*, *in* DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL, 47, 54 (ConoSur Ltda. ed., 1998). Barros Bourie argues that the observance of the legal norms regarding for example, national emissions standards, is not an absolute guarantee that a company may avoid civil liability. Although a business demonstrates that it is strictly complying with such obligations, it could still be held liable if the judge determines that, in spite of the compliance, such conduct is negligent under the circumstances. The case of the SEIA, however, may be distinguished. According to Barros Bourie, a company may avoid liability if it has acted in accordance with the conditions "especially designed to prevent eventual environmental damages," established in approval of the EIA. Nevertheless, Barros Bourie recognizes that the Chilean legislation has not expressly validated this legal excuse, yet "it is reasonable to expect that the tribunals will incorporate it provided that the information provided by the company to the environmental authorities was complete and correct." *Id.*

176 Ley de Bases del Medio Ambiente, 1994, art. 51 (Chile). *See also* TAPIA, *supra* note 163, at 44-45. According to the text, by requiring proof of malice or guilt, the special rules concerning the environment fit within the general rules in the Chilean system regarding extra-contractual liability. This article explicitly rejects the idea of objective/strict liability for being considered a criteria very unfamiliar to the judicial reasoning of the Chilean judges and, consequently, it would be inappropriate to distance them too much from their legal training, particularly when this topic

in addition to proving the remaining elements of civil liability: capacity, damages, and causation.[177] According to numerous ecologists, proving culpability is so troublesome that "the current system of subjective liability ends up protecting the author of the damage," instead of the victim.[178] Therefore, two possible modifications have been proposed. First, it is suggested that the Ley Marco incorporate some presumptions of proponent culpability such that the burden of proof is switched. Such legal suppositions would contribute "to the achievement of higher efficiency in search of the desired goal; that is, an environment free of con-

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[civil liability for environmental damage] is likely to continue to become more relevant.

[177] María de los Angeles Pérez, *Las normas de calidad ambiental y la responsabilidad civil*, AMBIENTE Y DESARROLLO, Mar. 1993, at 26. The text indicates that in practice, proving culpability is extremely difficult and that it becomes even more onerous if one considers that normally the project that contaminates is acting legally; that is, it is operating with all of the required administrative permits. *See also* CÉSAR LORENTE AZNAR, EMPRESA, DERECHO Y MEDIO AMBIENTE: LA RESPONSABILIDAD POR DAÑOS AL MEDIO AMBIENTE 44 (J.M. Bosch ed., 1996). According to Lorente, proving culpability is complicated when the company in question, despite the damaging effects that are being generated, is operating in accordance with the permits and licenses required by the applicable environmental legislation. Lorente argues that although accused businesses commonly try to "protect themselves behind the administrative shield" for having caused an injury in the civil sphere, the court system always has jurisdiction over such matters. *See also* Barros Bourie, *supra* note 175, at 58. This environmental attorney argues that Chile finds itself in a stage of development in which it is imperative to establish the specific principles and rules applicable to environmental accidents. Despite such a need, Barros claims that due to prolonging the traditional system of subjective liability in the Ley Marco, the difficulties of proof still exist, leading to "a dead-end street" for the judges that deal with this material.

[178] COMITÉ NACIONAL PRO DEFENSA, *supra* note 158, at 7. *See also* Antonio Ortuzar, *Chile ingresa al derecho ambiental*, REVISTA DEL ABOGADO, July 1994, at 21. The author contends that the norms regarding the presumption of liability are ineffective since, while the burden of proof is inverted, it is still necessary to prove causation, a task which is "extremely difficult, if not impossible, in environmental material." With environmental issues, the following situations commonly present themselves: (i) causes sincerely difficult to identify, (ii) a variety of contaminating agents, (iii) a multitude of affected persons, and (iv) diverse personal situations of those affected which make certain persons more vulnerable to injury than others. *See also* Hernán Corral Talciani, *Daño Ambiental y Responsabilidad Civil del Empresario en la Ley de Bases del Medio Ambiente*, 23 REVISTA CHILENA DE DERECHO, 143, 170 (1996). Corral argues that the option to maintain the classic system of civil liability has one major disadvantage. That system places the victims in a complex procedural situation given that they "rarely will . . . be in conditions to legally prove culpability or malice, [especially] when the environmental damages often come from large business conglomerates whose individual actions are difficult to identify." *Id.*

tamination [and] the preservation of nature."[179] Second, in conformance with current tendencies in both international and Chilean law, the Ley Marco could adopt a regimen of objective/strict liability.[180] In this manner, the country would enjoy a higher level of environmental monitoring.[181]

The Ley Marco is also criticized for failing to include a penal provision. Based on the value of nature recognized in both the national constitution and the Ley Marco, it is argued that the environment deserves greater protection.[182] In particular, because certain conduct such as the over-exploitation of the native forests may place the life and health of the population in danger, various Chilean attorneys have contended that it is essential to transfer this issue from the civil to the criminal field, thereby assigning this conduct "a negative stigma that would be of utility in the defense of the ecology."[183]

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[179] María de los Angeles Pérez, *Las Normas de Calidad Ambiental y la Responsabilidad Civil*, AMBIENTE Y DESARROLLO, Mar. 1993, at 26.

[180] COMITÉ NACIONAL PRO DEFENSA, *supra* note 158, at 8. This group claims that the tendency to use objective/strict liability is present in the national legislation of Chile. For example, in the Law 18.302 regarding nuclear damage, Articles 49 and 56 establish that the author of the damage will be liable, even in the case of unforeseeable consequences. Likewise, in the Decree Law 2222 concerning maritime navigation, the author of the damage is held civilly liable, unless he/she is able to prove that such injuries were the result of "fuerza mayor" (force mayor). On the basis of these laws, the following modification has been proposed for the Ley Marco: "Without prejudice to the sanction that the Ley Marco establishes, each person, individual or legal, that causes damage to the environment will be obligated to repair it at his/her own cost, restoring it if possible." *See also* Pedro Zelaya Etchegaray, *La Responsabilidad Civil Hoy*, 3 REVISTA DE DERECHO Y JURISPRUDENCIA, 124-25 (1993). The author suggests that although the concept of objective civil liability has not yet been formally incorporated in the 1855 Civil Code of Chile, the national courts use certain "objectifying jurisprudential mechanisms" in an attempt to introduce the idea of no-fault liability. According to Zelaya, these mechanisms may be defined as "ingenious legal interpretations . . . which extend the codified norms in order to make businesses increasingly strictly liable and to help the victim obtain the corresponding indemnity." *Id.*

[181] María de los Angeles Pérez, *supra* note 179, at 26. The author argues that if environmental civil liability does not become more objective, the nation "will be left almost exclusively with the intervention of the State in terms of regulation and monitoring, since for such control to be shared by the individuals, it is essential that they are effectively indemnified for the damage caused to their property." María de los Angeles Pérez, *supra* note 179, at 26.

[182] Carlos L. Kunsemüller, *Protección legal del medio ambiente*, TEMAS DEL DERECHO, 1996, at 5.

[183] *Id.* at 12. As a result of the present uncertainty associated with various environmental topics, the author claims that the debate over criminal law and the ecology must proceed with caution, without forgetting that criminal sanctions must be "the last resort . . . employed solely when it is strictly necessary." *See also* Nancy

Finally, it is claimed that the Ley Marco defines environmental damage as a personal instead of a collective issue. On the grounds of the clear terms of Article 1, it is understood that the duty to repair the environment is nothing more than a manifestation of the fundamental right of all persons in Chile to live in a contamination-free nation.[184] In order that there exist liability for damage to the environment, it is necessary to demonstrate the violation of the rights of at least one particular person. In other words, in its present form, the Ley Marco does not contemplate environmental damage susceptible to generating liability "which affects only physical resources [such as the native forest], future generations or nature."[185]

IV

THE SEIA AND THE ENVIRONMENTAL INSTITUTIONS

In regards to the institutions carrying out Chilean environmental law, a United Nations Economic Commissions stated,

> environmental jurisdiction is distributed and dispersed in a multiplicity of public organizations of different rank that operate in an inorganic manner, compartmentalized, with parallelism and ambiguity of functions . . . which makes the application of the norms more precarious. In other words, the

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Riffo Zúñiga, La función ambiental de la propiedad 27 (1997) (unpublished thesis, Pontifícia Universidad Católica de Chile) (on file with author). The author confirms the absence of environmental regulations in the criminal field in the Chilean legislation. Despite such a lack of explicit norms in the Penal Code, there do exist several special laws that have a penal connotation because they sanction certain conduct which is damaging to the environment, thereby providing indirect protection. According to Riffo, the degree of criminal sanctions for protection of the environment in Chile is "unsatisfactory for the present needs, insufficient, and in large part obsolete. Consequently, [we] need to create a system of crimes against the environment within the Chilean legal framework." *Id.*

184 Ley de Bases del Medio Ambiente, 1994, art. 1 (Chile). "The right to live in a contamination free environment, the protection of the environment [and] the preservation of nature . . . will be regulated by the provisions of this law, without prejudice to the other legal norms which concern the issue." *Id.*

185 Corral Talciani, *supra* note 178, at 168-69. According to the author, the Ley Marco would appear to suggest that liability exists for environmental damage even when nobody is directly affected, given that the Ley Marco grants the power to the municipalities and to the State to raise environmental causes of action. However, in each hypothesis discussed in the development of this law, the existence of a person was included. Therefore, this author concludes that the drafters intended to make the capacity to sue more flexible, "but did not want to concede an action . . . when damage to at least one individual person is not demonstrated." Corral Talciani, *supra* note 178, at 168.

> absence of clarity and order in the objectives is the cause of an appreciable degree of disorganization.[186]

This quotation reflects the prevailing situation in Chile at the beginning of the 1990s, a period which, in terms of environmental protection, has been described as "chaotic."[187]

With the objective of organizing and improving the environmental institution functioning, the Ley Marco introduced the key concept of the "single window" to the SEIA. As explained previously, the general idea is to create a system which integrates all of the environmental requirements of the diverse laws, designating CONAMA as the principal institution. The function of CONAMA is to coordinate the State agencies that have environmental competency to assure that such power is exercised fully, yet within the context established by the national environmental policy.[188] Despite the intentions of the SEIA and its associated institutions to refine the environmental processes in Chile, various problems have been detected with its application during the last four years.

In the first place, confusion exists regarding the appropriate place to initially submit the environmental evaluations. Article 9 of the Ley Marco dictates that such documents shall be placed at the disposition of COREMA in the region where the material works contemplated in the project will occur. However, if the

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[186] Enrique Gallardo, *La Legislación e Institucionalidad en Chile*, *in* CHILE ANTE EL NAFTA Y OTROS ACUERDOS COMERCIALES: UNA PERSPECTIVA AMBIENTAL 133 (Economic Commission of the United Nations for Latin America and the Caribbean (CEPAL)) (1994).

[187] José Leal, *Nuevo Desafío de Eficiencia para el Sector Público*, AMBIENTE Y DESARROLLO, June 1993, at 12. It is suggested that, in 1993, the requirements and review criteria of the EIA in Chile were chaotic. For example, the spontaneous actions by different State agencies which imposed diverse requirements for the EIA and a lack of common criteria conspired against the effectiveness of the system. In the opinion of the author, "each agency has a distinct understanding of the EIA and their varied requirements are typically caused by inexperience, intuition, institutional zeal, and the excessive enthusiasm of certain workers."

[188] Ley de Bases del Medio Ambiente, 1994 (Chile) (intervention of the Executive Secretary of the National Environmental Commission, Rafael Asenjo Zegers). This national expert explained that the structure based on numerous ministries which has traditionally been employed in Latin America constitutes one explanation for the "emphatic failure of environmental management in [the] continent in the last few decades." Specifically, Asenjo contends that the use of multiple departments in such a broad and diverse field leads to "a disruption of the State structure, the development of unnecessary tensions, and it impedes the creation of efficient mechanisms to resolve legitimate discrepancies that frequently occur when a particular environmental issue is evaluated from a variety of different perspectives."

project may possibly cause an environmental impact in multiple regions, the documents must be presented to the Executive Director of CONAMA. This obligatory transfer to Santiago, the capitol city in which CONAMA is located, has been categorized as "another deficient aspect" of the Ley Marco because, in effect, it involves authorities that do not possess the appropriate details about a determined area.[189] Instead of this procedure, arguably a committee composed of representatives of all COREMAs involved would be preferable given that "the regional environmental workers, in general, are the ones who best know their regions."[190]

The second criticism relates to possible conflict of interests within the governmental institutions. In certain circumstances, the State is both the judge and a party simultaneously. Article 22 of the Ley Marco stipulates that "public sector projects" must be submitted to the SEIA, thereby subjecting themselves to the same technical exigencies, requirements and environmental criteria applicable to private sector initiatives.[191] Consequently, it could occur that the Ministry of Public Works promotes infrastructure projects that must be submitted to the SEIA. In this type of case, although it would be the project's proponent, the governmental entity would also participate in the approval of the EIA by means of the Technical Committee and, subsequently, in the Board of Directors of CONAMA. This multiplicity of roles could lead to a conflict of interest as well as skepticism regarding the objectivity of the environmental entities.[192]

Third, numerous complications associated with the SEIA grievance procedure have emerged. In the Trillium case, for example, a legal complaint was raised in the tribunals of Punta Arenas questioning the decision made by COREMA of Region XII to approve the EIA submitted by the timber company. At the same time, this group presented an administrative appeal regarding the identical issue. This duality of actions, according to the president of Trillium, caused a large amount of uncertainty regarding the precise effect that a judicial resolution supporting the

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189 Ormazábal, *supra* note 140, at 47.

190 Ormazábal, *supra* note 140, at 47.

191 Ley de Bases del Medio Ambiente, 1994, art. 22 (Chile).

192 Ormazábal, *supra* note 140, at 60.

determination of COREMA would have. The question remains, who governs?[193]

The fourth problem associated with the institutions of the SEIA involves the tensions existing between regional authorities and the State legislature. According to environmental workers, in CONAMA there is a strong tendency to defend projects which is almost involuntary, unconscious, and not necessarily reflective of the official institutional posture.[194] Allegedly, the difficulty lies in facing a legislative assembly which harshly attacks a project that CONAMA "knows is not so bad" and, consequently, these environmental specialists who possess a greater amount of technical information commonly become defensive. As one Commentator put it, "[t]his attitude, lamentably, creates an atmosphere that makes dialogue nearly impossible."[195] The situation is intensified by the manner in which authority is exercised in Chile, since traditionally the public sector has operated with a high level of discretion in the application of the environmental legislation. In other words, all of the public services with the power to grant environmental permits are not accustomed to being required to publicly explain their reasons for making certain decisions, which "makes the process highly difficult and, at the same time, very conflictive."[196]

Fifth, the concept of the "single window," in reality, does not exist.[197] In conformity with Article 24 of the Regulation, the State institutions directly associated with the protection of the

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[193] Robert Manne, *Aspectos Positivos and Negativos del Sistema de Evaluación de Impacto Ambiental en Chile*, AMBIENTE Y DESARROLLO, Mar. 1997, at 26.

[194] Blanlot, *supra* note 109, at 26.

[195] Blanlot, *supra* note 109, at 26.

[196] Blanlot, *supra* note 109, at 28. *See also* COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 138-39. It is well-known that both the field of environmental protection and its institutions are recent developments in Chile. Therefore, according to Blanlot, the installation of a new institution such as CONAMA in the state structure is not an easy topic in this nation since "it provokes conflicts between the existing State agencies that lose a portion of their jurisdiction." The interdisciplinary nature of CONAMA, claims Blanlot, necessarily conflicts with the historic divisions: "On various occasions, environmental conflicts have surged due to the divergent interpretations and application of the legal norms by the authorities, instead of as a result of the actual characteristics of a particular project." Blanlot, *supra* note 109, at 28.

[197] Victor Renner, *Sugerencias prácticas para mejorar el sistema de evaluación de impacto ambiental*, CORMA, Dec. 1996, at 39. It is argued that, in theory, the "single window" mechanism is a positive solution. However, in reality, depending on the region, the application is performed in distinct forms. Renner states that "in some cases the single window has become a mere intermediary between the invest-

environment, preservation of nature, use of a natural resource, and/or the monitoring of compliance with the norms and conditions have the power to participate in the SEIA.[198] Because of the breadth of this provision, if a project were to obtain a favorable resolution from COREMA, arguably nothing would impede another institution with environmental competency from demanding that the proponent submit a new EIA as a prerequisite to granting the necessary permit.[199] In theory, a favorable resolution from COREMA is not alone sufficient to execute a particular activity due to the absence of a legal precept in the Ley Marco which restricts the exercise of the powers granted to the governmental entities with environmental competency.[200] On these grounds, it is argued that "it is clear, then, that presently the SEIA . . . finds itself with some legal snags."[201]

The sixth problem with the institutional application of the SEIA deals with CONAMA, the principal organization in this material which has encountered difficulties due to various factors. For instance, according to the Economic Commission of the United Nations for Latin America and the Caribbean (CEPAL), the functioning of the SEIA depends almost entirely on the efficacy of the environmental authority in every stage. Thus, it is necessary to reinforce this entity, assigning it the hierarchy and appropriate financial and human resources such that CONAMA may comply with its objectives.[202] Despite the importance of the role played by CONAMA, this entity suffers from a scarcity of

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ing company and the State agencies, which adds an unnecessary and, therefore, bureaucratic step in the evaluation process."

198 Regulamento del Sistema de Evaluación de Impacto Ambiental, art. 24 (1997) (Chile).

199 Rodrigo Guzmán, *Inquietudes jurídicas sobre el sistema de evaluación de impacto ambiental*, AMBIENTE Y DESARROLLO, Mar. 1998, at 30.

200 *Message of the President*, *supra* note 45, at 17-31. According to the Chilean ex-president, the magnitude of this potential problem is amplified upon realizing that "for all practical purposes, there does not exist a Ministry or Service that does not possess, to a certain extent, competency in the environmental field."

201 Guzmán, *supra* note 199, at 30. *See also* Urrutia, *supra* note 37, at 12. In contrast to these criticisms of the "single window," various Chilean attorneys have praised the new methodology introduced in the Ley Marco, claiming that "[t]his new process of SEIA represents a significant advancement over the traditional system. Previously, the investors had to obtain permits from a large number of local and national authorities. Considering the fact that the requirements imposed by the diverse authorities were usually contradictory, the process of obtaining environmental permits required an enormous effort."

202 CEPAL (1989), *supra* note 68, at 21. The CEPAL affirms that the functioning of the SEIA depends on "a rigorous effort by the environmental authorities in moni-

adequately trained personnel, a factor which undermines its effectiveness in the approval and monitoring of projects submitted to the SEIA. For example, the number of employees is disproportional to the tasks which are delegated to CONAMA, because a worker is only able to perform approximately six complete processes per year. This slowness inspires statements, such as the SEIA "may be overly complicated in administrative terms and excessive in the demand of man-hours."[203] In addition, the low salaries offered in CONAMA dissuade qualified persons from dedicating themselves to public service.[204] Together these factors lead to a process of environmental evaluation and supervision that has been questioned for its veracity. For instance, as a result of the scarce resources, the physical evaluation of a territory by CONAMA is commonly performed in a superficial manner since, in many cases, not even all of the agents of the organization with environmental competency visit the entire area in question.[205]

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toring the project in each one of its stages. To the contrary, all of the efforts and resources utilized in carrying out the SEIA will be null and void."

[203] Ricardo Katz, *Análisis de dos aplicaciones del sistema de evaluación de impacto ambiental*, 242 ESTUDIOS PUBLICOS 3-4 (1996). It is estimated that the analysis of each project submitted to the SEIA requires approximately 173 professional hours and, as a result, a person is capable of evaluating around nine EIAs per year, if he/she is dedicated exclusively to this task. However, if the person must also elaborate the Terms of Reference, it is calculated that he/she could only complete five or six processes per year. This estimate contemplates only the work of CONAMA. The quantity of professional hours that the SEIA demands is significantly greater when all the public services involved in the process are taken into account. In precise terms, each day a CONAMA employee works between one and three additional hours which are not remunerated there is an absence in the budget for this excess work. This situation leads some to question the sustainability of the SEIA in terms of human resources. It is recommended, therefore, that modifications be introduced which would permit CONAMA to be part of "an efficacious system of environmental protection." *Id.*

[204] COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 206. The Commission suggests that CONAMA's legal department is inadequate and insufficient. Moreover, the salaries offered by this agency are "absurdly detached not only from the general market conditions in Chile, but also from other public institutions comparable to CONAMA. This situation, in the best case scenario, threatens to convert the institution into a training center with a high turnover rate. In the worst case, it will become a center of professionals with weak qualifications, minimal experience, and little motivation." COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 206.

[205] Ormazábal, *supra* note 140 at 57-58. Ormazábal claims that the normal verification is insufficient due to the fact that CONAMA is not granted the human, material, or economic resources required to be able to effectively perform its new functions. Furthermore, due to low pay, it is argued that once a state employee develops some skill and begins to stand out for his/her professional excellence, he/she is tempted by better offers from private environmental consulting firms, a situa-

In an attempt to rectify this, several suggestions were offered such as ecological orientation, the training of the State workers associated with the SEIA, and continual investigation.[206] Arguably, the ideal situation would be that CONAMA were a multifaceted organization capable of handling each topic without assistance. However, in light of the current limitations, counting on the services of specialized, independent individuals is an apt solution.[207]

The seventh problem related to the institutions of the SEIA involves the Technical Committee which is composed of the regional directors of the public services competent in the environmental field.[208] On this matter, three major complaints have materialized. First, the process tends to become complicated because, despite the explicit language in the Ley Marco regarding the status of Committee members, in reality the Committee is not composed of the regional directors, but rather by their subordinates who do not possess legal authority to make binding decisions. The problems that this could generate in work sessions have been avoided until this time because, subsequent to Committee meetings, the Final Report of the Technical Committee was formally ratified by the directors. However, conflicts could still arise if the superiors were to object to the decisions made by the subalterns, thus causing additional delays in the evaluation process.

The Technical Committee is also criticized for its reckless review of EIAs, a situation causing redundancies and unnecessary

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tion which leaves CONAMA with employees that must complete very important functions with a scarcity of tools to use.

206 Christopher Wood, *Evaluación de impacto ambiental: Un análisis comparativo de ocho sistemas de EIA*, 61 ESTUDIOS PÚBLICOS 115 (1996). *See also* Urrutia, *supra* note 37, at 17. According to Wood, because CONAMA and the COREMAs are granted certain discretional powers to accept or reject the possible investment projects, it is extremely risky to concede such discretion without previously providing technical training to those who make such decisions.

207 Gutengerg Martínez, *La etapa de las políticas sectoriales y el ajuste a los compromisos internacionales*, AMBIENTE Y DESARROLLO, June 1997, at 25. Martinez indicates that the SEIA loses effectiveness when the capacity to oversee the forms of regulation does not exist. Therefore, it is argued that the state should develop its monitory capabilities, a process which entails "the recruitment of the correct amount of qualified persons, permanent training of those who occupy supervisory positions in order that they are fully up to date with the topic in which they work, and the contracting of third parties, when necessary." *Id.*

208 Ley de Bases del Medio Ambiente, 1994, art. 81 (Chile).

obstacles.[209] In order to avoid this, the initial governmental review needs to be exhaustive in order not to overlook relevant aspects that would have to be reexamined in subsequent stages "with the sensation of stagnation and regression that are generated among the distinct actors of the SEIA, especially the proponent."[210]

Finally, the precise role of the Technical Committee is questioned because its role is not explicit in the Ley Marco.[211] From the perspective of the State institutions, the absence of an express explanation of the powers of this committee implicitly allows CONAMA to use its complete discretion when analyzing projects in the SEIA.[212] According to public opinion, however, the fact that the evaluation and recommendations of the Technical Committees are not binding on the CONAMA constitutes "a clear act of illegality that contradicts the preventative objective of the Ley, in spite of the fact that legal gaps or errors . . . permit it."[213] This difference of opinions debilitates the effectiveness of the SEIA and, in various cases, has triggered a conflict between the citizens and environmental authorities.

V

CORRUPTION OF THE ENVIRONMENTAL INSTITUTIONS

Another problem is the potential for corruption within CONAMA. Although the accusations are numerous, a few examples suffice to illustrate the situation. In 1988, as a result of a payment by foreign companies to an ex-environmental consultant, an investigation of the "probable vices in the approval of the

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209 *Id.* It is affirmed that during the SEIA process, solicitations for clarifications, corrections and amplifications of the EIA are common, generating many repetitions.

210 *Id.*

211 Ormazábal, *supra* note 140, at 47. The author suggests that the Regulation should have made explicit the role and attributions of this Committee, especially after the fierce conflicts that emerged as a result of some of the decisions made by the COREMAs which were contradictory to the technical reports, as in the Trillium case.

212 COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 220. When consulted about the Trillium case, the director of CONAMA explained: "This needs to remain clear: when there exists a norm that is not complied with in the EIA, COREMA is unable to approve the project. But, if there is no such norm, what exists is only an opinion of the Technical Committee [and] COREMA has the power to conditionally approve a project. That is exactly what COREMA did, it acted within the established legal framework." COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 220.

213 COMISIÓN DE RECURSOS NATURALES, *supra* note 46, at 115.

EIAs" was initiated.[214] It was alleged, that while working on the review and approval of the EIAs, the person simultaneously received payments from the same companies whose projects were under analysis. However, according to the defendant, he limited himself to reviewing the resolutions of COREMA and made the modifications that, in his judgment, "were pertinent in the circumstances."[215]

In another case which questioned the ethics of the State environmental authorities, the ejection of the president of COREMA was requested for publicly announcing his personal approval of a large forestry project. This action undermined the veracity of the State institution given that, according to the allegation, a manifestation in favor of the cited forestry initiative prohibited the director of COREMA from "maintaining the adequate equanimity that he must possess at the moment of resolving the classification of a project."[216] While allegations of corruption within a governmental agency are not uncommon, in the case of environmental permits and the Chilean native forests, the situation is worse. For example, once a corrupt state employee grants a permit allowing the destruction of the native forests, this resource, for all practical purposes, is *permanently* lost, regardless of the sanctions which the responsible person may subsequently face.

VI

THE ROLE OF CONAF WITHIN THE LEY MARCO

As explained previously, the Ley Marco attempts to establish the general guidelines concerning environmental protection while explicitly including the laws and functions of the various relevant sectors. For instance, Article 1 establishes that the Ley Marco will enter into effect "without prejudice to the other legal norms established over the material."[217] Article 42 explains that the public entity which regulates the use and exploitation of native forests must demand the presentation of and compliance with a Management Plan.[218] In the same provision, it is further clarified that the contents of the Ley Marco should be inter-

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214 *Indagan si hay vicios en estudios ambientales por pagos a asesor*, EL MERCURIO, July 5, 1998, at C9.

215 *Contraloría investiga cargos de corrupción*, EL MERCURIO, July 1998, at C1.

216 *Piden Inhabilitar a Intendente*, EL MERCURIO, July 1998, at C8.

217 Ley de Bases del Medio Ambiente, 1994, art. 1 (Chile).

218 Ley de Bases del Medio Ambiente, 1994, art. 42 (Chile).

preted "without prejudice to that established in other legal bodies concerning Management Plans of natural renewable resources."[219] On the basis of these interrelated and perhaps overlapping environmental competencies, the role of the National Forestry Corporation (CONAF) must be examined in order to adequately highlight the institutional problems associated with the protection of the native forests. Although the polemic aspects in this area are numerous, this section focuses on two principal points: the monitoring by CONAF and the Management Plans.

For many years CONAF was criticized for its inability to prevent the destruction of the native forests due to a scarcity of trained personnel, technical equipment, and coordination.[220] In particular, the infrequency of the payment of the fines imposed by CONAF for violations has been repeatedly condemned. A study involving approximately 340 cases in Region X was performed with the objective of understanding the development of the judicial actions, detecting the failures in the procedure, and determining the degree of efficiency of both the law and the professionals involved.[221] This study centered on the cases initiated by CONAF for the illegal exploitation of the native forest, or cases of noncompliance with the Management Plans. It produced several conclusions: (i) more than 60% of the cases ended without the imposition of a sanction and the rest with the payment of trivial fines which were considerably inferior to the amount proposed by CONAF, (ii) there does not exist a follow-up of the cases by CONAF, an agency that limits itself to presenting the legal complaint "after which the process becomes an orphan of the attorney defending the native forests," (iii) there exists no true defense of the native forest which would impede the destruction caused by the infraction of the laws in effect and,

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219 *Id.*

220 Imme Scholz, *Medio ambiente y competitividad: el caso del sector exportador chileno*, *in* INSTITUTO ALEMÁN DE DESARROLLO (IAD) 47 (Berlin, 1994). The current structure of CONAF makes it difficult to avoid the extractive methods of natural resources that endanger the environment. Specifically, it is argued that this agency is capable of promoting methods of sustainable management, but only in particular cases and within the existing legal context. Furthermore, Scholz alleges that the sanctions at CONAF's disposal are ineffective because the imposition of fines is left to the "competency of the community authorities [who] do not assume this task with sufficient determination." *Id.*

221 Pedro Bitterlich Fernández, *Estudio de Infracciones a Leyes Forestales*, *in* COMITÉ NACIONAL PRO DEFENSA DE LA FAUNA Y FLORA (CODEFF) (Aug. 1993).

as a consequence, "the native forest mass of the country finds itself without efficient protection," and (iv) CONAF is not assuming the role that the law has assigned it of supervising the compliance with the forest legislation.[222]

For its part, CONAF recognizes that the non-payment of fines impairs the effectiveness of the agency and, therefore, it has proposed two improvements. First, a legal modification regarding the Local Police Courts has been suggested, whereby the latter would take on the enforcement of fires.[223] Secondly, a new system was introduced in 1997 which utilizes technological equipment in the application of the law.[224] Despite its innovative character, it is still too early to confirm that such changes have refined the protection of the native forests, especially regarding the fundamental problem of the non-payment of the fines.

With respect to the second problematic of the role of CONAF within the Ley Marco, certain complications associated with the Management Plans have been identified. First, the precise competency of the State institutions involved has been questioned given that, as currently stipulated, there exists a possible conflict

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[222] *Id.* With regard to the non-payment of fines, the study shows that the judges tend to favor the evidence presented by the defendant, deciding in the majority of the cases to absolve this party. If there is not a total absolution, in many cases the judge of the local police suspends the fine or fixes a reduced amount. As evidence, the study cites the following examples: (1) in Region IX, only 12% of the complaints ended with the application of a fine, and (2) in Region X, the reductions conceded by the judges allowed the defendants to pay 85% less than the amount proposed by CONAF, a situation which "converts the sanction into something nominal without any punitive effect." *Id.*

[223] *Legislación Forestal Ha Sido Superada*, CHILE FORESTAL, May 1996, at 32. The directors of CONAF recognize that many of the fines demanded by this agency are ignored by the courts of local police due to multiple causes, including: (1) the difficulty in identifying the precise amount of wood illegally extracted in order to fix the size of the fine, (2) the fact that CONAF officially complains, but does not attentively follow the development of the process and, therefore, before a fierce defense by the defendant, the fine is usually reduced substantially or declared null, and (3) the applicable law grants broad discretionary powers to the judge, whose knowledge of this activity is usually quite limited.

[224] *Freno a la Tala Ilegal*, CHILE FORESTAL, Oct. 1997, at 17. Among the principal measures of the system are: (1) members of the Department of Forest Control have immediate access to all Management Plans, (2) personnel works according to flexible schedules which permit nocturnal monitoring and increased supervision during the weekends, and (3) the acquisition of advanced equipment such as vehicles, radio systems, computers, cameras, permanent legal assistance, etc. According to CONAF, these measures will provide greater assurance that the native-forests products sold by the companies have effectively come from areas with approved Management Plans.

between CONAMA and CONAF. Pursuant to Article 8 of the Ley Marco, the projects indicated in Article 10 "may only be executed or modified subsequent to the evaluation of their environmental impact," with Article 8 furthermore establishing that the administration of the SEIA will correspond to CONAMA.[225] For its part, Article 42 indicates that the public entity designated by law to regulate the use or exploitation of the natural resources shall require the presentation of and compliance with the Management Plans. However, this latter provision clarifies that such an exigency will not be applicable to those projects which have been approved by means of an EIA or a DIA.[226]

On one hand, based on article 1 of the Ley Marco, "it appears logical, unquestionable, and absolutely coherent with the harmonious purpose of the [Ley] that in those activities that, by virtue of the Decree Law 701, correspond to the exclusive competence of CONAF, should remain expressly outside of the scope of the Ley Marco."[227] Such activities, it is argued, include the Management Plans for forestation, improvement or exploitation of native forests and plantations in fragile soils. From the perspective of CONAF, any attempt to surpass the limits set forth in the Ley Marco by means of the Regulation is unconstitutional.[228]

Conversely, it is arguable that the Ley Marco does not deprive CONAF of its forestry faculties. For example, the SEIA provides clear signals that even if a project has obtained the approval of CONAMA, when the productive stage begins it is still necessary that the appropriate Management Plans be submitted to CONAF.[229] It is argued, moreover, that the Management Plans constitute the fundamental tool in assuring sustainability. Thus, it is inconceivable that the approval of the EIA eliminates the need to present the Plans. As one commentator has stated, "[t]his is an erroneous position since it is just at the moment of

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225 Ley de Bases del Medio Ambiente, 1994, art. 8 (Chile).

226 Ley de Bases del Medio Ambiente, 1994, art. 42 (Chile).

227 *Reglamento de Ley 19.300 y Accionar de CONAF: juntos, pero no revueltos*, CHILE FORESTAL, March 1996, at 38.

228 *Id.* Moreover, CONAF asserts that when the regulation includes provisions regarding the Management Plans regulated in the Decree Law 701, "it is not only declaring the derogation of a large portion of this legal body in an unconstitutional manner, but it is also contradicting the spirit and the letter of the Ley Marco, leading to an inescapable conflict between numerous members of the environmental administration." *Id.*

229 Ernesto Lagos, *Proyecto Río Cóndor: cara y sello de una polémica*, CHILE FORESTAL, Jan.-Feb. 1996, at 13.

production that the environmental reality of the forests is known, and, therefore, there must exist an adequate inventory of the resources."[230] Although other experts have supported this argument, they emphasize that as a result of the duality of competencies with native-forest projects, it is likely that conflicts will occur. For instance, if the Management Plans contain highly objectionable material, CONAF is not obliged to approve it, thereby generating litigation despite the fact that the project in question already obtained CONAMA's authorization.[231] For these reasons, it is claimed that the Ley Marco has demonstrated that it contains various failures.[232]

The second complication related to the Management Plans is that they are not yet an effective mechanism in protecting the native forests. It is sustained, in particular, that there exists a broad consensus that the Plan has been converted into a simple "cutting permit" instead of incorporating the most relevant environmental considerations.[233] According to members of CONAF, these plans have become "a necessary evil . . . whose finality is to comply with the legal texts which permit the landowner to obtain an authorization to exploit the forests and not an authentic planning instrument that guarantees a rational management of the forest resource."[234] Among the shortcomings detected in the Plans are partiality, imprecision, a focus on the short term, and an overly administrative orientation.[235] Intent on overcoming

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230 *Id.*

231 *No se puede tener D.L. 701 sin Ley de Bosque Nativo*, CHILE FORESTAL, June 1997, at 8.

232 *Id.*

233 *Reformulación del Plan de Manejo forestal: con visión ecosistémica*, CHILE FORESTAL, Oct. 1996, at 5.

234 *Id.* According to Fernando Olave, director of CONAF's office of Technical Norms and Forestry Regulations, the many deficiencies in the Management Plans "make it practically impossible to evaluate the effects of the management in the evolution of the forest masses." *Id.*

235 *Id.* The deficiencies revealed in the Management Plans are described as follows: (1) partiality (the Management Plans do not consider the totality of the existing forest resource, rather they contemplate only the area in which the proponent desires to intervene, omitting the integration of all resources, (2) imprecision (in the absence of a precise definition of the objectives, it is practically impossible to evaluate the effects of the management during its entire evolution), (3) shortness of term (the Management Plans are directed only at the period during which the intervention will occur, without being linked to the long term concept), (4) administrative orientation; (the current Management Plans have been simplified to such a point that they are far from being a tool that landowners may effectively use to manage their forest resources, and (5) easy cutting authorization (the majority of the Man-

some of these problematic areas, CONAF recently reformulated the Plans to coincide with the pertinent forest legislation; for example, the Forest Law of 1931, the Decree Law 701, and the Ley Marco.[236] According to this institution, the new Plans constitute an ordering tool centered on the entire ecosystem as opposed to being a mere cutting permit.[237] Notwithstanding the affirmations of CONAF, it is still too early to determine if the new Plans have managed to improve the deficiencies that characterized their predecessors.

VII

LESSONS FROM A RECENT CASE: TRILLIUM'S RIO CONDOR PROJECT

A. Background

Wanting to initiate a project to exploit native forests in Tierra del Fuego, Forestal Trillium S.A., the Chilean subsidiary of a large North American timber company based in Washington, purchased approximately 260 acres of land from a Canadian company, an acquisition that was not without controversy.[238] In

agement Plans do not seek to accomplish sustainable management, but rather they simply comply with the legal requirements in order to attain the necessary permit. *See also* Gracia Curtze Pinninghoff, Legislación sobre fomento forestal 169 (1995) (unpublished thesis, Pontifícia Universidad Católica de Chile). In addition to these deficiencies, this author adds that these are extremely varied and "only in exceptional cases do there exist workers at CONAF who are adequately trained to judge all aspects of a plan." *Id.*

[236] *Reformulación del Plan*, *supra* note 233, at 6. Members of CONAF have indicated that the new Management Plans include the Ley Marco's concepts concerning the protection of natural resources and they are expected to be "congruent with the demands of the Ley Marco in such a manner that, if the exigencies are adequately complied with, there will be no doubt about the respect for environmental considerations in the private sector." *Reformulación del Plan*, *supra* note 233, at 6.

[237] *Reformulación del Plan*, *supra* note 233, at 5. CONAF assures that the Plans contain an "ecosystemic vision" of the forest resources. That is, not only are they concerned with the forest from a perspective of wood protection, but also in regards to how this resource acts in a multiple-function ecosystem.

[238] Pablo Villaroel, *Proyecto Río Cóndor: explotación forestal en el confín del mundo*, AMBIENTE Y DESARROLLO, Dec. 1994, at 30. The manner in which Trillium obtained the cited property bothered various environmental groups. In 1988, the Chilean government sold the majority of Tierra del Fuego to the Canadian company, Cetec-Sel. The sale was at a price below the commercial value, costing only $1.50 per acre. The peculiarity of this situation increased even more when, after the change of government in 1990, some of the Chilean officials who had approved the sale became directors of Cetec-Sel. Subsequently, just as with Cetec-Sel, Trillium managed to obtain the property in question at below-market price, paying just $117 per acre.

1994, although the Ley Marco had not yet entered into force, Trillium voluntarily presented the first draft of its plans to COREMA, attempting to attain its approval.[239] Later, in the middle of the same year, the company formed a scientific commission of renowned national and international professionals in order to perform the environmental studies.[240] In addition to contracting this study, Trillium initiated a publicity campaign to persuade both ecologists and the general public that the project would be effectuated in a sustainable manner.[241] According to Trillium (with the aim of improving their global image) they committed themselves to a project that would not damage the forest.[242]

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[239] Antonio Ortuzar, *Chile Ingresa al Derecho Ambiental*, REVISTA DEL ABOGADO, July 1994, at 21. When Trillium presented its first environmental study, the regulations of the Ley Marco had still not entered into legal effect and only the Presidential Instructive of 1993 existed. In this presidential document, the EIA's evaluation guidelines for the public sector included the following: (1) a voluntary process for the evaluation of projects that had a "significant influence" in the environment, (2) adjusted instructions to the legal norms in effect which would be valid until the promulgation of the regulation, and (3) employment of the instruction only to the extent that the public institutions were in need of guidance to evaluate a project.

[240] Resumen del Informe Comisión Científica Independiente, *Recomendaciones ecológicas para el proyecto forestal Río Cóndor*, AMBIENTE Y DESARROLLO, Dec. 1995, at 83. Subsequent to performing the two month investigation, the Commission concluded:

> [T]he implementation of these recommendations [included in the Commission's report], in conjunction with the commitment of the company to support the long term investigation of adaptive management, constitutes without a doubt an unheard-of accomplishment in Chilean forestry practices and an example of the value of the interaction between scientists and private industry.

Id.

[241] Hugo Córdova, *Accidente en la Recta Final*, QUE PASA, Mar. 28, 1997, at 298. Trillium hired the services of Crisis, a Chilean company that assumed the task of creating a positive image of the foreign forestry company in the public sector. Meanwhile, with the purpose of acquiring more political support, Trillium's directors affiliated themselves with various Chilean senators, the Ambassador of the United States in Chile, and representatives of ecological groups in the affected region.

[242] Jack Epstein, *Managing Forests of Remote and Pristine Tierra del Fuego*, CHRISTIAN SCIENCE MONITOR, Aug. 23, 1995, at 10, *available in* 1995 WL 6395967. Epstein explains that during the last seven years, Trillium, a company that possesses properties in 18 North American states, two Canadian provinces, and in Argentina, has been strongly attacked by environmental groups for the destruction of forests, construction of improper roads, and the use of dangerous herbicides. The vice-president of Trillium, Ken Hertz, recognized these charges by stating, "[w]e made some mistakes." *Id.*

In April 1996, despite the technical committee signaling in their reports that there "did not exist sufficient elements to approve the environmental viability of the project," COREMA declared Trillium's initiative feasible.[243] As a result of this blatant disregard of the technical reports, various so-called "green party" senators decided to interpose a complaint in the court of Punta Arenas, a legal action which was rejected unanimously by this tribunal.[244] On the basis of this resolution, CONAMA approved the Río Cóndor project, an authorization that led to two simultaneous actions by the ecologists: the presentation of another legal grievance, this time in the courts of Santiago,[245] and the interposition of a complaint before the Executive Director of CONAMA.[246] After a period of analysis, the supreme court classified the action of CONAMA as "illegal and arbitrary" for having made decisions prior to the publication and commencement of legal effect of the Regulation of the Ley Marco.[247]

This judicial pronouncement generated divergent reactions.[248] On one hand, the verdict established a precedent that had ecologists "euphoric" because, according to the judges, every organi-

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[243] *Trillium Logging Project Gets the Green Light*, AMERICAN POLITICAL NETWORK—GREENWIRE, April 12, 1996, *available in* WL 4/12/96 APN_GR 18. COREMA approved the project by a vote of seventeen to one. The environmentalists impugned the favorable determination, alleging that Trillium "was more preoccupied with satisfying the needs of the timber industry than with protecting the integrity of the Chilean native forests." *Id.*

[244] *Trillium Podría Ejecutar Su Proyecto con Simple Trámite*, EL MERCURIO, Mar. 22, 1997, at C1.

[245] Brief of Fernando Dougnac Rodriguez for Lidia Amarales and independent third parties (No. 2.732-96). This attorney argues that, from the examination of the EIA debate transcripts of the Río Cóndor project, it is unequivocally observed that the sole variable considered was the economy and, in no way, the environment.

[246] *Big Forestry Project Fights Challenge From Environmentalists*, 13 LAGNIAPPE LETTER, at No.18 (1996) *available in* 1996 WL 8394833. Just as they had in Chile, Trillium faced strong opposition in Argentina since, from the perspective of the environmentalists in this neighboring country, the project will contaminate a river supplying drinking water. Moreover, there exists anxiety for the excessive use of a port that the Mitsubishi company is currently constructing in southern Argentina.

[247] *De Forestal Trillium: Suprema Vetó Aprobación de Estudio de Impacto Ambiental de Río Cóndor*, EL MERCURIO, Mar. 10, 1997, at C4. According to the Article, the verdict made it clear that "one must wait for the promulgation of a Regulation in order that CONAMA has the possibility to emit a certificate of environmental viability, and this legal instrument has not been dictated. Thus, a project may not surpass the law through the use of the [Presidential] Instructive." *Id.*

[248] Gabriel Del Fávero Valdés, *Protección ambiental*, CORMA, June 1997, at 30. It is claimed that the most transcendental aspect of the verdict is the paradox that it leaves in evidence. According to the author, although the environmentalists congratulated themselves for supposedly having protected the native forests, in reality,

zation and individual person may turn to the tribunals if their right to live in a contamination-free environment is violated.[249] On the other hand, the representatives of Trillium were visibly disillusioned with the decision, warning that all of the parties involved had lost.[250] Trillium's posture enjoyed the support of various business and governmental sectors in Chile.[251] In the opinion of multiple experts, the verdict was an embarrassment for the current presidential administration, because it had previously openly endorsed several investment projects.[252]

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their solution represented "a victory in which the environment and sustainable development were the big losers." *Id.*

[249] Hugo Córdova, *Accidente en la recta final*, QUE PASA, Mar. 28, 1997, at 4.

[250] Jonathan Friendland, *Chile Court Rules Against U.S. Firm in Logging Case*, THE WALL STREET JOURNAL, Mar. 20, 1997, *available in* 3/20/97 Dow Jones News Serv. 22:32:00. According to manifestations of Robert Manne, president of Trillium, absolutely everyone lost as a result of the verdict. Specifically, as Manne explained, "Chile lost . . . the ecology lost . . . the image of Frei's government lost." *Id.* Manne claims that with this legal precedent any citizen or company is able to effectuate a project in Chile without first obtaining the approval of the EIA.

[251] *Madereros califican de 'muy grave' situación por fallo contra Trillium*, LA SEGUNDA, Mar. 20, 1997. Fernando Léniz, president of the Wood Corporation (CORMA), suggests that the verdict creates a framework of uncertainty that goes beyond the forestry sector because now the entire voluntary system of the SEIA is questionable. As a result, Léniz explains that "the projects that are forming a line in CONAMA to be evaluated could find themselves involved in a perfectly useless procedure." *Id.* *See also Temen que Caso Trillium Desincentive Inversiones*, EL MERCURIO, Mar. 21, 1997, at A1. The General Secretary of the president, Juan Villarzú, indicated that the message that is sent by the verdict is that "we are dissuading investors from adhering to procedures that cause them set-backs and obligating them to negotiate environmental conditions." *Id.* Moreover, Villarzú signaled that the judicial decision damaged the credibility and reputation of the nation because, from this moment forward, "foreign investors are going to investigate in greater detail whether they really want to direct their resources toward Chile." *Id.* According to the president of the Confederation of Production and Commerce, Walter Riesco, the verdict will economically damage the nation given that "the investors need to have clear and stable rules in order to develop their projects. And, certainly, at this stage we should have an environmental legislation that would provide guarantees to all since we are in a moment of instability." César Rodríguez, *Nos Perjudica Carecer de Legislación Ambiental*, LA NACIÓN, Mar. 22, 1997, at 44.

[252] *Court Ruling Against Forestry Project Creates Apprehension for Investors*, LATIN AMERICAN INFORMATION SERVICES LAGNIAPPE LETTER, Apr. 4, 1997, at 19. It is suggested that the verdict is an embarrassment for the government, especially in view of the public support of the Chilean president for the Río Cóndor project and other controversial investments. It is argued that the government has always believed that it possesses the ability "to exercise a certain degree of political discretion in authorizing projects. But its failure in the Trillium case, at least according to the Supreme Court, has undermined faith in the government's promise to strike a balance between economic development and environmental protection." *Id.* During a Pro-Trillium discourse, President Frei announced that the Trillium project would bring progress to the zone through employment and he also warned that if the ecolo-

Subsequent to the supreme court decision, Trillium announced that, notwithstanding the unfavorable circumstances, it would not withdraw the project.[253] In April 1997, after three years of legislative debates, the Regulation of the Ley Marco was published, finally putting into effect this environmental norm. Consequently, in an attempt to obtain the required permits, Trillium resubmitted its project to the SEIA,[254] accompanied by the presentation of a Management Plan to CONAF.[255] The additional studies, at that time, were thought to represent the "last administrative step of environmental character."[256] As it had done previously, COREMA approved the plans of Trillium. However, various environmental groups attempted to again halt the project, interposing legal complaints against the State authorities in the courts of Punta Arenas. From their point of view, Trillium's

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gists "persisted in their position, they could prejudice Tierra del Fuego, and with it, the entire region of Magallanes." *Presidente Frei Apoyó Proyecto Trillium*, CORMA, Oct. 1996, at 16 [hereinafter Presidente Frei].

253 Rachel Prentice, *Trillium stays fast in Chile*, BELLINGHAM HERALD, Mar. 25, 1997, at A1. Trillium gave an energetic reaction to the Supreme Court's verdict stating that "[w]e are not going to be exhausted by our opponents, said Robert Manne, Chief executive of bayside ltd. . . . We came to this region and we're going to stay." *Id. See also Trillium: Reacciones Contrapuestas Tras Fallo*, LA EPOCA, Mar. 21, 1997, at 12 (Robert Manne affirmed that "we came to Magallanes to stay [and] none of our adversaries will exhaust us."). The president of Trillium announced that the company was trapped in a legal maze where a small group of environmentalist extremists [is] capable of impeding and attacking large projects. Despite the legal obstacles, Manne expressed his determination to advance the project: "I am determined to remain in Chile and find another path." *Si Hubiese Sabido que no Existían Reglas Claras Habría Invertido en Otro País*, ESTRATEGIA, Mar. 21, 1997, at 10.

254 *Según Reglamento: Trillium Deberá Someterse a Nuevo Estudio Ambiental*, EL MERCURIO, Apr. 12, 1997, at C1. On the basis of the uncertainty related to the EIA presented prior to the publication of the Regulation, Trillium threatened to start the project without adhering to the legal process. The Chilean officials, however, expressed "their confidence that Trillium was going to renew all the procedures in order to attain the approval of its EIA through an entirely new process." *Id.*

255 Jessica Henríquez, *Trillium Presentará Nuevo Estudio*, LA EPOCA, Aug. 14, 1997, at 21. The directors of Trillium explained that the delay in presenting the new study constituted, in effect, a precautionary measure. They indicated, in particular, that "during the last few months the company has been dedicated to reformulating the forestry project on the basis of the information included in the technical reports and in the regulations of the existing environmental legislation." *Id.*

256 *Nueva Propuesta de Trillium Desestima Instalación de Aserradero en Porvenir*, LA PRENSA AUSTRAL, Mar. 19, 1997, at 5. According to Trillium's representatives, the modifications were attributable to the judicial delay "which caused important economic losses, in addition to the loss of trust of the investors, the financial institutions, and of the market that was awaiting the commercialization of this resource." *Id.*

second EIA was practically identical to the first, thus "it can be categorically affirmed that the antecedents presented are not nearly sufficient to assure the sustainability of the proposed exploitation."[257]

Faced by pressure from the environmentalists, Trillium decided to temporarily suspend the project with the objective, according to the company, of preparing itself to defend its forestry project "until the very end."[258] While they waited, the ecologists increased their efforts to impede the exploitation, this time soliciting an international boycott of the products of this timber company.[259] Although the conditional approval contained a series of 100 elements with which Trillium must comply prior to beginning the timber exploitation, after more than four years of legal battles CONAMA finally authorized the project pursuant to the Ley Marco and its corresponding Regulation.[260] Notwithstanding this apparently definitive permission, it is probable that the controversy will continue because, according to the "green party" plans in the legislature, new legal actions against the Río Cóndor project are expected.[261] In fact, subsequent to the approval by the foremost environmental institution, multiple com-

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257 Jorge Morello, ANÁLISIS TÉCNICO COMPARATIVO DE LA SEGUNDA EVALUACION DE IMPACTO AMBIENTAL DEL PROYECTO RÍO CÓNDOR 8 (Oct. 1997).

258 *Trillium Reorienta Estrategia de Plan Forestal Río Cóndor*, EL MERCURIO, Apr. 3, 1998, at A1. It is contended that the provisional halting of the project was due to a readjustment of the company's strategy to defend its project in Tierra del Fuego, both legally and politically. They denied, however, that such a maneuver was an attempt to pressure the Chilean authorities, explaining that "it is a reality of the company. We have spent four years investing millions of dollars without one positive result." *Id. See also* María Luisa Robleto, *El Ambientalismo y Trillium*, LA EPOCA, Apr. 8, 1998, at 6. Despite the declarations of Trillium, in the opinion of the ecologists, suspending the project was nothing more than a media trick to make the national authorities and local community feel that they faced the dilemma of accepting the project as proposed or losing it.

259 Ruben Clunes C., *Greenpeace Intensifica Campaña Contra Trillium*, LA EPOCA, Apr. 21, 1998, at 43.

260 *Aprobado Trillium: 100 Condiciones Para Explotar Lenga Austral*, EL MERCURIO, May 30, 1998, at A1. If Trillium decides to go ahead with its project, in accordance with the conditions of CONAMA, the company must obtain a guarantee designed to insure the sustainability of the project for a period of 110 years.

261 Ormazábal, *Análisis crítico desde la perspectiva de los actores*, *supra* note 83, at 52. It is predicted that such judicial measures will continue for an extended period of time since, taking advantage of the structure of the Ley Marco, the environmental organizations will attempt to fortify their negotiating position through the presentation of legal actions intended only to delay the project.

plaints were recently presented before the court of appeals of Santiago[262] and the Executive Director of CONAMA.[263]

B. Illustration of the Problematic Aspects of the Ley Marco

Irrespective of the final resolution, the Trillium controversy represents an opportunity to examine the functioning of the SEIA in cases involving the Chilean native forests.[264] On the basis of the previously explained problems with the Ley Marco, in this section some specific difficulties will be enumerated. First, it is suggested that CONAMA, upon making the initial decision to approve the Trillium forest exploitation plan, ignored the studies done by the Technical Committee which were themselves not released to the public.[265] In their defense, representatives of CONAMA declared that the reports were not released due to the absence of a legal requirement of such exposure and that the opinions of the consultants and the public are not authoritative.[266] Moreover, the public officials argued that, "from a strict

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[262] *Contra CONAMA: Tres Nuevos Recursos Por Trillium*, EL MERCURIO, July 10, 1998, at C8.

[263] Reclamación entregada por Carmen Rodríguez Villa, Director of Greenpeace, Chile (1998). According to the complaint, during the approval of Trillium's EIA "the observations made by the citizen groups were not debated and, better said, they were openly ignored. In this manner, the group [COREMA] exceeded the powers granted to it by the Ley Marco and delegated by CONAMA, making an absurd analysis." *Id.* It is argued that, pursuant to the Ley Marco, COREMA may coincide or disagree with the observations of both the public and the Technical Committee, yet it must clearly indicate the reasons for which they arrived at a particular conclusion.

[264] Pablo Villaroel, *CONAMA dio ≪luz verde condicionada≫ a proyecto de Forestal Trillium*, AMBIENTE Y DESARROLLO, Dec. 1996, at 14. From a critical analysis of this particular case several aspects have been highlighted. First, there is a need to have the Terms of Reference well elaborated and, later, to count on the political will necessary to assure compliance with such guidelines. Second, CONAMA is shackled by a rigidity of options to evaluate a project. This organism is unable to suggest modifications and must limit itself to classifying the project as approved, rejected, or conditionally approved. Third, CONAMA needs to contract independent scientific consultants when required. In the Trillium case, for example, the most competent national investigators were incorporated in the Technical Committee, which caused the evaluation to lose its independence. Finally, environmental wood certification, a market instrument that would inform consumers regarding the compliance of the seller/producer with the national and international obligations of sustainable development must be put into practice in Chile.

[265] *≪Si se cumplen las condiciones que puso CONAMA significa que el proyecto se estará realizando con un criterio de sustentabilidad aceptable≫*, AMBIENTE Y DESARROLLO, Dec. 1996, at 20 (interview with Viavianne Blanlot, previous executive director of CONAMA).

[266] *Id.* at 22.

legal perspective, CONAMA is able to make a decision completely different from that of the opinion of the Technical Committee."[267]

Secondly, the Trillium case questioned the efficacy of the Ley Marco due to the extensive delay that Trillium faced despite having complied with all of the requirements established in the Ley Marco.[268] On one hand, it is contended that since 1994, the date on which Trillium presented its initial draft of the project to COREMA, the company attempted to demonstrate its willingness to conduct a forestry project that would be a model of environmental sustainability, obeying all of the applicable laws in force and "placing the project on the table for whoever was interested in seeing, applauding, or criticizing it."[269] Furthermore, certain members of CONAMA have verified the quality of the project because its environmental protection measures surpassed those traditionally employed.[270] Other experts have gone even further, arguing that because the project initiated "measures of environmental conservation unheard-of in forestry projects in the country," if Trillium is not worthy of CONAMA's approval, it is difficult to envision what would be.[271] On the other hand, numerous persons have criticized the possible environmental effects of the project. For instance, one expert from Spain warned that the project is a "barbarity," while chiding Chilean authorities for "a mentality focused only on the present and not on the future."[272] Other members of the opposition have preferred to follow the legal route, raising repeated complaints in the court

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[267] *Id.* at 21.

[268] *Chile's Lack of Environmental Law May Thwart Its Entry Into NAFTA*, BNA INTERNATIONAL TRADE DAILY, Oct. 3, 1995, at 1.

[269] Pablo Villarroel & Valeria Torres, *Conama dio ≪luz verde condicionada≫ a proyecto de Forestal Trillium*, AMBIENTE Y DESARROLLO, Dec. 1996, at 7.

[270] *≪Si se cumplen las condiciones que puso Conama significa que el proyecto se estará realizando con un criterio de sustentabilidad aceptable≫*, *supra* note 266, at 21.

[271] Pablo Villarroel, *Proyecto Río Cóndor: explotación forestal en el confín del mundo*, AMBIENTE Y DESARROLLO, Dec. 1994, at 27, 32-33. With regard to the measures taken by Trillium, Villarroel indicates the following: (1) Trillium has been characterized by its complete informative openness, sending copies of its projects and studies to all the interested groups, (2) the company contracted a scientific committee to conduct an independent study, (3) it created a *fideicomisario*, a type of environmental ombudsman to supervise each step of the project, and (4) the company publicly committed itself to conducting a sustainable project through the voluntary signing of the Letter of Environmental Commitments. *Id.*

[272] Malta Sierra, *Autoridad Ambiental Española Advierte: Proyecto Trillium es una Barbaridad*, LA EPOCA, Apr. 5, 1998, at 16.

system.[273] Irrespective of which of these positions is correct, the undeniable fact is that the controversy has been prolonged for over four years in the national courts, an episode that allows the effectiveness of the SEIA process to be questioned.[274]

Moreover, the effectiveness of the SEIA was questioned due to the incongruity of the messages emitted by the diverse actors. On one hand, the Trillium initiative enjoyed substantial support in the affected area given that the multi-million dollar investment would assist the zone economically. The president of Chile, for his part, declared his total support for the project, claiming that it would bring "progress to the zone due to the number of persons that it would employ."[275] On the other hand, notwithstanding the general support of the potentially affected community, various NGOs became involved in the issue, raising both legal and administrative complaints. Although opinions vary considerably on this matter, according to these groups, such actions were done to protect the native forests, fortify the SEIA, and assist the persons least prepared to defend themselves.[276]

According to the general manager of Trillium, with regard to public participation, the public discussion was both positive and negative. On one hand, the "constructive dialogue" held with representatives of the Tierra del Fuego community, business leaders, the independent scientific commission, and certain governmental actors led to numerous changes to the design of the project which were "acceptable to Trillium and beneficial to the region and the local community."[277] On the other hand, the intransigence of certain groups whose sole intention was allegedly to obstruct the project was considered a negative aspect. It is

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[273] Greenpeace Chile, Defensores del Bosque Chileno and Fide XII, *Análisis Técnico Comparativo del Segundo Estudio de Impacto Ambiental del Proyecto Río Cóndor* 8 (Oct. 1997). In this report, the three ecological groups categorically reject the second EIA presented by Trillium.

[274] *Message of the President*, *supra* note 45. The president highlighted the six principles of the Ley Marco without which "it is impossible to fully understand the scope and intentions of this law." *Message of the President*, *supra* note 45. The sixth principle is efficiency which entails, according to the President, avoiding "the enormous amount of environmental bureaucracy which exists in other countries." *Message of the President*, *supra* note 45.

[275] *Presidente Frei*, *supra* note 252, at 16.

[276] Manne, *supra* note 193, at 29. In spite of the positive motives announced by the NGOs for their participation, the timber company believes that they simply abused the Chilean legal system "with the objective of delaying the initiation of the project." Manne, *supra* note 193, at 29.

[277] Manne, *supra* note 193, at 26.

claimed that there were certain organizations supposedly representative of the community that were opposed to every type of forestry project, regardless of the amount of damage that the project would generate. Thus, these groups "permanently generated false information and communicational noise which confused the public."[278]

On the basis of these problematic areas highlighted in the Trillium case, various suggestions to improve the Ley Marco have been proposed. First, none of the parties who presented legal actions expressed their opinions through established channels of popular participation, preferring instead to wait until the entire SEIA process had concluded. Therefore, it is suggested that legal actions should be available only to those who participated previously in the SEIA since allowing last-minute complaints severely undermines the effectiveness of the process.[279] Secondly, while aiming to eliminate abuse of the legal system, some investors have advocated limiting appeals in such a manner so that the system remains just and efficacious. They argue this readjustment is necessary since, in its present form, "even when the complaint is superficial or lacking in seriousness, the party is not penalized and there is no way to avoid it going to the Supreme Court."[280] Finally, under the provisions in the Ley Marco related to grievances, public participation can be converted into a web of

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[278] Manne, *supra* note 193, at 27-28. According to the timber company, too much time was lost in the correction of the "distortions" spread by the opposing groups. If all the financial resources used to rectify this campaign of false information could have been employed in a constructive manner, perhaps the project could have been improved in ecological terms. The most troubling aspect, explained Manne, is that "the public tends to believe the distortions when they lack the opportunity to know the truth." Manne, *supra* note 193, at 27.

[279] Manne, *supra* note 193, at 28. *See also* Fernando Agüero, *La Participación Ciudadana en la Protección del Medio Ambiente*, DERECHO DEL MEDIO AMBIENTE: CONGRESO INTERNACIONAL 89, 92 (Fundacion Facultad de Derecho—Universidad de Chile ed., 1998). According to Agüero, it is curious that the NGOs, despite the rights granted to them in the Ley Marco, have tended not to exhibit much interest in intervening during the development of environmental regulations, preferring instead to wait until the end in order to radically oppose the official resolutions and to denounce the alleged insufficiencies in the public participation mechanism. It would be more beneficial, suggests Agüero, if the NGOs would participate in the analysis of the environmental instruments in order to achieve a greater degree of commitment from these groups and to reduce the drama of public participation in the SEIA.

[280] Manne, *supra* note 193, at 31. The company explained that the aggressive tactics of ecological organizations in North American courts that constantly obstruct certain projects are now starting in Chile.

multiple legal complaints. The representatives of Trillium argue, for example, that the concept of the "single window" functions inadequately and that it is necessary to make the system rational.[281] In the case of the Río Cóndor project, environmentalists simultaneously presented a legal complaint in the tribunals of Punta Arenas and an administrative appeal before CONAMA. Therefore, to coordinate the complaint mechanism, it is recommended that one must exhaust the administrative process prior to initiating legal struggle.

CONCLUSION: THE LEY MARCO: IS THIS "FIRST STEP" SUFFICIENT?

A. The Ley Marco: Is This "First Step" Sufficient?

"This law is serious, explicit in its mandates [and] develops broad principles without attempting to confront each and every one of the environmental realities of our country. A simple but feasible scheme was chosen. We consider this to be what is possible and convenient to do during this first stage in order to advance seriously and realistically in a field where others have already suffered failures that we have the responsibility to avoid."[282]

In spite of the numerous controversies related to the application of the SEIA, this statement clearly manifests the opinion of the Chilean government that the Ley Marco is marching in the right direction. As discussed previously, prior to the promulgation of this law, the environmental field found itself in a state of confusion since the incoherence and disorganization of the legislation in effect created "an ignorance of the scope of the laws, uncertainty over the validity of the original texts, and a high grade of noncompliance."[283] The creation of the Ley Marco, therefore, constitutes the first step toward resolving Chile's environmental problems. Chile's President characterized the Ley

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[281] Manne, *supra* note 193, at 32. The foreign investors ask if it is reasonable that those opposed to a project may interpose a complaint against COREMA, and, later, present an identical complaint in another tribunal? According to Trillium, on the basis of common sense, the answer should be "no." However, the company contends that "it is occurring at this moment with a high cost for the government and for the project." Manne, *supra* note 193, at 32.

[282] Ley de Bases del Medio Ambiente, 1994 (Chile), Intervention of Rafael Asenjo Zegers, Executive Secretary of the National Environmental Commission.

[283] *Message of the President*, *supra* note 45.

Marco by its gradual implementation.[284] Some experts suggest that the country must start from somewhere since "a functioning law that requires some perfecting is worth more than a perfect law that is never enacted."[285]

To adjust legislation to the Chilean reality, two primary methods have been proposed. First, on the basis of the lessons learned from the application of the Ley Marco, especially in the Trillium case, greater specificity could be added. For instance, although the Ley Marco contains a relatively limited number of provisions which are focused on the fundamental issues, it could be improved by gathering basic principles in order that they may serve as points of reference for regulations over specific materials.[286] CONAMA, likewise, has announced that the next step consists of developing coherent laws for each sector which will renew the provisions already in effect.[287] Secondly, the State is developing various support programs for environmental management in Chile which include plans to strengthen public participation.[288]

Despite the affirmations about the imminent changes in the Ley Marco, history suggests that legal modifications are not rapidly achieved in the Chilean system. For example, the President has openly criticized the slowness with which laws are passed, asking if it is necessary to wait "an enormous amount of time to provide a solution to each of the most important legal topics."[289] Although the list is abundant, two recent examples of congres-

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[284] *Message of the President*, *supra* note 45. One of the foundations of the Project is gradual implementation. This means that the formation of the environmental institutions in the public sector, the dictation of norms for each sector, and ecological education will all be applied gradually.

[285] Pablo Villarroel, *Un Sello Verde para el Modelo Chileno*, AMBIENTE Y DESARROLLO, Mar. 1993, at 12.

[286] *Message of President*, *supra* note 45.

[287] COMISIÓN NACIONAL, *supra* note 47, at 43.

[288] COMISIÓN NACIONAL, *supra* note 47, at 43. The principal programs include: (1) the project CONAMA/Inter-American Development Bank entitled *Program of Strengthening Compliance with the Environmental Norms*, (2) the establishment of the National Environmental Center, and (3) the cooperation CONAMA/World Bank called *Development of Environmental Institutions*.

[289] *Frei Criticó el Lento Trámite de las Leyes*, EL MERCURIO, July 2, 1998, at A1. Speaking of the new law regarding the rights of detainees, the President criticized the slow enactment in the national congress of the laws considered to be fundamental to the Chilean society. These criticisms from the President, the legislators and the general public have been "repeating themselves with great vehemence." *Id.* As an example of the parliamentary delay, the report cites 222 pieces of pending legislation, only 13 of which have been classified as urgent. *Id.*

sional lethargy are the Law of Filiation and the Native Forest Law Project. The first was approved after a discussion that was prolonged for over five years and the latter, subsequent to nearly eight years of debate, has still not been enacted.[290] In fact, it is said that the current version of the forestry project does not enjoy the support of a considerable portion of the legal sectors and "there exists less consensus about it now than with regard to the original proposal."[291]

On the grounds of the problems already detected with the Ley Marco as well as the sluggishness with which the Chilean legislation is enacted, it is clear that this new environmental framework (i.e., Ley Marco), irrespective of its effectiveness in other areas, is incapable of adequately protecting the native forests and promoting the concept of Sustainable Forest Development in Chile. Thus, in closing, this article proposes the introduction of a forest certification program as a pragmatic option to counteract the destruction of the native forest, a pressing problem in this South American nation.[292]

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[290] *Congreso Aprobó Igualdad de Derechos para los Hijos*, EL MERCURIO, Sept. 9, 1998, at A1. Subsequent to a five year political debate, at the beginning of September 1998 the Congress dispatched the project that establishes equality for all children, eradicating the discrepancy between the concepts of legitimacy and illegitimacy.

[291] Antonio Lara, *Necesidad de una Visión Integral*, CHILE FORESTAL, Apr. 1997, at 13.

[292] This article is the first of a two-part series. For a detailed analysis of the feasibility of timber certification in Chile, see Hale E. Sheppard, *Timber Certification: An Alternative Solution to the Destruction of Chilean Native Forests*, 14 J. ENVTL. L. & LITIG. ___ (forthcoming Fall 1999).